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THE

ENCYCLOPÆDIA

OF

EVIDENCE

EDITED BY
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VOL. VIII

LOS ANGELES, CAL.
L. D. POWELL COMPANY
1906

TIMES-MIRROR PRINTING AND BINDING HOUSE
LOS ANGELES, CAL.

TABLE OF TITLES.

KIDNAPING.

By Glenda Burke Slaymaker, LL. B.

CROSS-REFERENCES:

Abduction;
False Imprisonment;
Seduction.

I. INTENT.

1. Question of Fact for Jury. — The question of defendant's intention, as made material in the various statutes and at common law, is one of fact for the determination of the jury under appropriate instructions from the court.[1]

2. Need Not Be Proved by Direct Evidence. — It need not be proved by direct evidence.[2]

3. Specific Intent. — Positive intent in the defendant himself must be shown.[3]

1. Oliver *v.* State, 17 Ala. 587; Com. *v.* Nickerson, 5 Allen (Mass.) 518.

2. Com. *v.* Nickerson, 5 Allen (Mass.) 518. "It is a maxim of the law, and its correctness is shown by human experience, that acts indicate the intention, and in conformity with this, the law, in some cases, judges of a man's previous intentions by his subsequent actions." People *v.* Fick, 89 Cal. 144, 26 Pac. 759.

3. In Com. *v.* Nickerson, 5 Allen (Mass.) 518, where a defendant was charged with the specific intent of seizing another to carry him away

II. ADMISSIBILITY AND RELEVANCY.

1. Circumstances and Conditions Attending Commission of Alleged Offense. — It is proper to bring before the court or jury all the circumstances attending the alleged kidnaping, the relations of the parties, the condition of the person kidnaped, his age and education, within the limitation that the evidence must be confined to the points in issue;[4] and so, upon a charge of having kidnaped a female, it is competent to show that she was taken by the defendant to, and confined in, a house of ill-fame.[5]

2. Unwillingness of Child's Custodian to Taking. — Evidence is admissible to show that the person lawfully having in his custody a child alleged to have been kidnaped was unwilling that it should be taken from him by the defendant, and evidence of positive acts of precaution upon the part of such custodian to prevent the decoying away of the child is competent.[6]

3. Divorce Proceedings Instituted by Defendant as Corroborative of Intention to Marry Person Kidnaped. — Where the theory of the prosecution is that the defendant kidnaped the prosecuting witness

from his place of residence, this intent was not proven by evidence that the defendant was only the agent or employe of another who intended to kidnap the person seized, the defendant himself in fact having no knowledge of his principal's intent in the matter, but merely delivering such person into the principal's custody. The court said: "In the case of a specific intent of the character here charged, the defendants must have knowledge of such intent to make them criminally liable therefor. It would be open to the jury in such cases, as a matter of fact, to find from all the circumstances that the defendants had such knowledge of the intent and purpose for which they were employed to make the assault and false imprisonment, and that they co-operated in such purpose with their employer. But they are not, as a matter of law, to be charged with such intent upon the proof of intent on the part of the person employing them, they being found to have been wholly ignorant thereof, and such object not being the natural result or consequence of their employment, or of the acts done by them."

4. People *v.* Fick, 89 Cal. 144, 26 Pac. 759. In Moody *v.* People, 20 Ill. 316, the court held properly given an instruction that "in determining the guilt or innocence of the defendants in the indictment the jury should take into consideration the condition of the girl [alleged to have been kidnaped], her age, education and the state of her mind at the time, the representations and conduct of the several defendants toward her, the effect of those representations and that conduct upon her, the object of defendants in effecting her removal from the state, and all the circumstances surrounding the case as detailed in evidence."

5. In People *v.* Fick, 89 Cal. 144, 26 Pac. 759, the defendant, a constable of a justice's court, was shown, on an indictment for the kidnaping of a female, to have arrested the prosecutrix upon a warrant issuing from the justice's court and to have taken her to a private house, where she was detained, instead of bringing her directly before the justice. The trial court admitted evidence to show that the house where the prosecuting witness was taken was one of ill-fame, and the supreme court held such evidence to have been properly received as showing the motive and intent of the accused in making the arrest and in failing to comply with the mandate of the warrant.

6. It was certainly competent to show that the prosecutor was un-

with the intention of marrying her, evidence of the institution of a divorce proceeding by the defendant against his wife is competent as corroborative of evidence of statements by the defendant that he intended to marry the prosecutrix.[7]

4. Parent's Manner Toward His Family. — It is no justification to another who carries away a child without the consent of the parent that the parent treated his family harshly; and evidence of such fact is therefore irrelevant.[8]

5. Defendant's Ignorance of Parent's Right to Custody of His Minor Child. — Upon a prosecution for the kidnaping of a child it is not necessary to prove that the defendant knew that he was violating the parent's right to the custody of such child.[9]

6. Consent. — A. Of Child Too Young to Assent. — Where a child is too young to give valid assent to his own removal evidence that it willingly accompanied the defendant charged with having kidnaped it is irrelevant and immaterial, constituting no defense to the charge.[10]

B. Of Legal Custodian of Child to Avoid Compliance With Process. — The consent of the lawful custodian of a child to its removal from the state by another, with the purpose and intent that it shall not be compelled to obey a subpœna, is not nullified so as to render its removal a kidnaping because of the issuance and service of the process.[11]

willing that his minor child should be taken, carried or decoyed away, and any efforts that he made or precautions that he took to prevent it — as nailing up the window of her room — were admissible in evidence to establish this fact. Gravett *v.* State, 74 Ga. 191.

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

8. "There was no error in excluding evidence of the prosecutor's harsh treatment of his family; whether he treated them kindly or otherwise was no concern of the defendant." Gravett *v.* State, 74 Ga. 191.

9. Gravett *v.* State, 74 Ga. 191. A man must be held to intend that which must be the natural consequences of his acts; and when one has done an act unaccompanied by circumstances which justify its commission, it is a principle of law that he intended to produce the consequences which have ensued. Com. *v.* Nickerson, 5 Allen (Mass.) 518.

10. State *v.* Rhoades, 29 Wash. 61, 69 Pac. 389. This child of nine years of age was incapable of assenting to a forcible removal from the custody of his teacher, and a transfer to other persons forbidden by law to take such custody. He was under illegal restraint when taken away from the lawful custody and against the will of his rightful custodian; and such taking is in law deemed to be forcible and against the will of the child. Com. *v.* Nickerson, 5 Allen (Mass.) 518.

11. John *v.* State, 6 Wyo. 203, 44 Pac. 51. In the case cited, the father, by the consent of the mother, they being divorced, and the mother having been awarded the custody of the child, took the child out of the state of its domicile after the service upon it of a subpoena, so that it might not be compelled to answer the subpoena and appear in the case as a witness. The father was indicted for kidnaping, the state seeking to convict upon the theory that the mother had no power to consent to the child's removal from the state of its domicile so that it might be detained therefrom to avoid being compelled to appear as a witness. The court on appeal denied the soundness of the position of the

7. Actual Physical Force Need Not Be Proved. — It is not necessary, in support of a charge of kidnaping, to show the use of force or violence; but it will be sufficient to prove a coercion of will by falsely exciting fear by the use of threats, or by fraud or undue influence.[12]

8. Good Faith. — Confining in Hospital for Insane. — Where one in good faith procures another to be placed, under due forms of law, in a hospital for the insane, he will not be guilty of kidnaping under a statute defining the crime as causing another "to be secretly confined or imprisoned within the state."[13]

prosecution, and held that while another crime might have been committed by the defendant, the crime of kidnaping was not established, the mother's consent being valid.

12. "While the letter of the statute requires the employment of force to complete this crime, it will undoubtedly be admitted by all that physical force and violence are not necessary to its completion. Such a literal construction would render this statutory provision entirely useless. The crime is more frequently committed by threats and menaces than by the employment of actual physical force and violence." Moody *v.* People, 20 Ill. 316.

13. Where the evidence shows merely that the defendant did not exercise such care and discretion as an ordinarily prudent person should have exercised under the circumstances, evidence of the defendant's good faith in such cases may be received in defense to a prosecution for such crime. People *v.* Camp. 139 N. Y. 87, 34 N. E. 755, *affirming* 66 Hun 536, 21 N. Y. Supp. 741.

KNOWLEDGE.

CROSS-REFERENCES:

Animals;

Fraud; Fraudulent Conveyances;

Homicide;

Intent;

Master and Servant; Municipal Corporations;

Negligence;

Receiving Stolen Goods;

Vendor and Purchaser.

SCOPE OF ARTICLE.

The question of knowledge, so far as it relates to specific subjects treated in this work, will be found under their respective titles, this being a view of the question only in its general aspect.

I. PRESUMPTIONS AND BURDEN OF PROOF.

1. Knowledge of Fact. — A. In General. — Where knowledge of a fact is relied upon as ground of demand or defense, the burden of proving such knowledge is upon the party claiming relief.[1]

1. Relationship of Signers of Note. — When a note, signed by several promisors, does not show on its face that some of the promisors are in fact sureties, knowledge of that fact on the part of the promisee is not to be presumed in favor of the sureties who seek to be discharged on the ground of an extension of time given by the promisee to the principal debtor; but such knowledge must be proved. Wilson *v.* Foot, 11 Metc. (Mass.) 285.

One Who Seeks To Establish Title Under an Unrecorded Deed against an attachment and levy of an execution has the burden of proving that the attaching creditor had actual knowledge, at the time of his attachment, that there was a subsisting deed of the premises. Sibley *v.* Leffingwell, 8 Allen (Mass.) 584.

Contents of City Records. — In Lancey *v.* Bryant, 30 Me. 466, an action for libel against the mayor and clerk of a city, of which the plaintiff was tax collector, the publication consisting of a statement in their annual report charging the plaintiff with owing the city a large balance, the plaintiff requested the court to charge the jury that the defendants as mayor and clerk of the city must be presumed in law to know the contents of the city records relative to the transaction between the city and the plaintiff; but it was held that the charge was properly refused.

No Presumption of Knowledge Arises. — The fact that a recorder of deeds may have entered of record in his office deeds of conveyance of lands subsequently sold and conveyed by himself raises no presump-

Whatever a party ought to know and has an opportunity to know, he is presumed, as against innocent third persons, to know.[2]

B. Matters Within the Intelligence of Ordinary Men. What the law will presume as to knowledge of men in matters within the intelligence of ordinary men may in many cases be a difficult question, and it is not easy to state a general rule which will apply in all cases.[3]

C. Knowledge of Court Records and Orders. — A party to a suit who has been brought into court will be presumed to have knowledge of the records[4] and orders of the court relative to the suit.[5] But while such presumption is conclusive stand-

tion that at the time of conveyance he knew of a defect in his title. Tong *v.* Matthews, 23 Mo. 437.

2. Johnson *v.* Levy, 109 La. 1036, 34 So. 68. See also Moundsville B. & W. R. Co. *v.* Wilson, 52 W. Va. 647, 44 S. E. 169; Martin *v.* Webb, 110 U. S. 7. *holding* that officers and directors of a corporation are presumed to know what they ought by proper diligence to know.

Presumption of Knowledge of Different Names of Articles of Commerce. — Those dealing in articles of commerce will be presumed to be acquainted with the different names by which articles of commerce are known to the commercial world. Moore *v.* Des Arts, 2 Barb. Ch. (N. Y.) 636.

"The Maker of a Deed Is Bound To Know Its Contents, except when obtained by fraud or duress, and once knowing its contents he is bound to remember them at his own peril." Alvarez *v.* Brannan, 7 Cal. 503.

One Dealing With a Person Whom He Knows To Be a Broker may be presumed to know from the nature of a broker's business that he is acting as agent for some third person. Baxter *v.* Duren, 29 Me. 434.

3. McGowan *v.* La Plata Min. & Smelt. Co., 9 Fed. 861, where the court said: "Within limits, the law will assume that every one has knowledge of destructive forces in the world and the powers of the earth and air. Of such is the knowledge that comes to every man of sound mind, in the ordinary course of his life, that fire will burn; that water will drown; that one may fall off a precipice; and the like. Recently in this court it was said of one who mounted a push car on a railroad, and went down a steep grade, to his hurt, that, knowing the grade, it was his own folly not to heed the law of gravitation; because it is known to all men of sound mind and of all degrees of intelligence that wheeled vehicles go down hill with increasing speed if left to themselves." In this case it was held, however, that the explosive power of hot slag when cast into water is not within the intelligence of ordinary men; that "it is doubtful whether many people of education know the force and violence of such an explosion; and, if fully informed, how many of them, when put to service at a smelting furnace, would recall their learning without a suggestion from some source?" See also Lanigan *v.* New York Gaslight Co., 71 N. Y. 29, where it was held that a person of mature years and ordinary intelligence was presumed to know the explosive quality of illuminating gas. For discussion of a similar principle see article "Judicial Notice," Vol. VII.

4. "The presumption of law, in effect the rule of law, is that every man knows the records of the proceedings of our courts after he has been brought into court. In point of fact, he may not have known himself; yet, by his counsel, he did know it." Watrous *v.* Rodgers, 16 Tex. 410.

5. "The law presumes that the defendant to an action knew of the orders that had been made in the case directing the receiver to pay out the money in his hands as such receiver." Meguiar *v.* Fesler, 19 Ky. L. Rep. 1126, 42 S. W. 920.

ing alone, yet it is rebuttable and may be removed by evidence.[6]

D. KNOWLEDGE OF TRUTHFULNESS OR FALSITY OF REPRESENTATIONS. — A vendor who has made representations to his vendee is presumed to have known the truthfulness or falsity of those representations.[7]

E. KNOWLEDGE OF CUSTOM. — a. *In General.* — Where a custom is special or local, and is confined to a particular trade, business or profession, there is no presumption that the party had knowledge of it,[8] proof of knowledge being required in order to bind the party.[9] But if the custom or usage is universal, uniform, of long standing and notorious in the particular trade, business or profession, all persons dealing in that trade, business or profession will be presumed to have contracted with reference to the custom or usage.[10] But such presumption is generally a rebuttable one.[11] There are instances, however, where the parties have been denied

6. Meguiar *v.* Fesler, 19 Ky. L. Rep. 1126, 42 S. W. 920.

7. Miner *v.* Medbury, 6 Wis. 295, in which the representations were concerning timber lands owned by the defendant, and the defendant stated that there was enough timber to last fifty years, when in fact the timber was nearly exhausted. And see articles "FRAUD," Vol. VI, and "VENDOR AND PURCHASER."

8. Hendricks *v.* W. G. Middlebrooks Co., 118 Ga. 131, 44 S. E. 835; John O'Brien Lumb. Co. *v.* Wilkinson (Iowa), 101 N. W. 1050; Bank of Commerce *v.* Miller, 105 Ill. App. 224; Bixby *v.* Bruce (Neb.), 95 N. W. 34.

"If a usage is general, both parties are presumed to know it, and to contract in reference to it. If it is special, and confined to a particular business, or has reference to a particular port only, there is no such presumption." Isaksson *v.* Williams, 26 Fed. 642.

9. Union Stock Yards Co. *v.* Westcott, 47 Neb. 300, 66 N. W. 419; Wadley *v.* Davis, 63 Barb. (N. Y.) 500; McMasters *v.* Pennsylvania R. Co., 69 Pa. St. 374, 8 Am. Rep. 264; Isaksson *v.* Williams, 26 Fed. 642.

Proof of Knowledge of Custom. "The plaintiff was not bound by any custom of defendant as to the ventilation of its barges, unless the jury believe from the evidence that he had personal knowledge thereof, or unless such custom was so well established and universal that his knowledge of the same would be conclusively presumed." Walsh *v.* Mississippi Valley Transp. Co., 52 Mo. 434.

10. West *v.* Ball, 12 Ala. 340; Barker *v.* Borzone, 48 Md. 474; Walsh *v.* Mississippi Valley Transp. Co., 52 Mo. 434; Wood *v.* Hickok, 2 Wend. (N. Y.) 501; Hartford Fire Ins. Co. *v.* Harner, 2 Ohio St. 452, 59 Am. Dec. 684; Davie *v.* Lynch, 1 White & W. Civ. Cas. (Tex.) § 694. See article "CUSTOMS AND USAGES."

11. Pennell *v.* Delta Transp. Co., 94 Mich. 247, 53 N. W. 1049, in which a local custom was sought to be established whereby employes were to have their board in addition to their wages, and the court said: "Where the custom or usage is restricted to a certain locality or business, though it has become general and uniform in that locality or in that particular business, and the custom is relied upon as a ground of recovery, it is settled, we think, that such custom is not conclusive on the party, so that he may not give evidence that it was unknown to him."

"When the defendant proposed, by the question which was rejected, to offer evidence tending to show his ignorance of the existence of the usage, he claimed no more than to exercise the right of attempting, by direct evidence, to repel the pre-

the right to show their ignorance of a custom.[12] Knowledge of a local or special custom may be presumed from previous dealings of the party with the institution where the custom prevailed.[13]

b. *Knowledge of Custom of Particular Trade.* — One engaged in a particular trade is presumed to know the prevalent customs of that trade.[14] Thus underwriters of goods shipped on a vessel are bound to know the usage of the trade in which the vessel is engaged, and proof thereof is not necessary.[15]

c. *Knowledge of Market Custom.* — A person dealing in a par-

sumption of knowledge, which might, without that proof, or perhaps in opposition to it, he made from the facts of the case." Walls *v.* Bailey, 49 N. Y. 464, 10 Am. Rep. 407. See article "CUSTOMS AND USAGES."

12. Walsh *v.* Mississippi Valley Transp. Co., 52 Mo. 434.

Conclusive Presumption. — "It was shown in evidence that it was customary for the bank, and indeed for all other banks, to receive their certificates of deposit in payment of claims in the hands of the bank for collection. But it is not shown by the evidence that the plaintiff had notice of such custom. We do not think it necessary either to prove the custom or bring notice of it home to the plaintiff. Courts take judicial notice of general customs and usages of merchants, and of whatever ought to be generally known within the limits of their jurisdiction, . . . and we think that the system by which nearly all banks in this country transact monetary affairs by the use of checks, drafts and certificates of deposit . . . is so well known and understood that no business man, much less a company whose sole occupation is loaning money, should be allowed to profit by pleading ignorance of it." British & American Mtg. Co. *v.* Tibballs, 63 Iowa 468, 19 N. W. 319.

13. Dabney *v.* Campbell, 9 Humph. (Tenn.) 680.

14. *United States.* — Baxter *v.* Leland, 1 Blatchf. 526, 2 Fed. Cas. No. 1125; Hazard *v.* New England M. Ins. Co., 8 Pet. 557; Tidmarsh *v.* Washington F. & M. Ins. Co., 4 Mason 439, 23 Fed. Cas. No. 14,024.

Illinois. — Deshler *v.* Beers, 32 Ill. 368, 83 Am. Dec. 274.

Massachusetts. — Daniels *v.* Hudson River F. Ins. Co., 12 Cush. 416, 59 Am. Dec. 192.

New York. — Wall *v.* Howard Ins. Co., 14 Barb. 383; Hartshorne *v.* Union Mut. Ins. Co., 36 N. Y. 172.

Pennsylvania. — Norris *v.* Insurance Co. of North America, 3 Yeates 84, 2 Am. Dec. 360; McCarty *v.* New York & E. R. Co., 30 Pa. St. 247; Carter *v.* Philadelphia Coal Co., 77 Pa. St. 286.

In an action for breach of contract to furnish a certain number of reams of paper, a general custom in the trade in which the plaintiff had been engaged for a number of years was sought to be established, and the court said: "The defense was that by general usage in the particular trade a ream 15x20 is accepted as the standard size, and which size serves as the common multiple for calculating the cost of a ream of different size, and that in quoting the cost of paper for the purpose of purchase and sale, reference is invariably had to this common multiple. . . . Evidence of the fact of the usage mentioned was therefore competent and material to the defense, and its exclusion by the trial court under plaintiff's objection was error. The fact that the plaintiff had been engaged in the particular trade for a number of years preceding the execution of this contract presumptively established his knowledge of any well-known and prevalent custom or usage in that particular trade." DeCernea *v.* Cornell, 3 Misc. 241, 22 N. Y. Supp. 941.

15. Toledo, F. & M. Ins. Co. *v.* Speares, 16 Ind. 52.

ticular market is presumed to know the custom of that market bearing on the transaction in question.[16]

d. *Knowledge of Custom of Carriers.* — Where a carrier has an established custom, one who has been in the habit of shipping over the road will be presumed to have knowledge of the custom.[17]

2. Knowledge of Law. — A. In General. — Every person is presumed to know the general laws of the state wherein he resides, both civil and criminal.[18] But this rule, in its application to the

16. Cothran *v.* Ellis, 107 Ill. 413.

17. Indianapolis, B. & W. R. Co. *v.* Murray, 72 Ill. 128.

18. *England.* — Reg. *v.* Coote, L. R. 4 P. C. 599.

United States. — Clark *v.* United States, 95 U. S. 539.

Alabama. — Brent *v.* State, 43 Ala. 297.

Arkansas. — State *v.* Paup, 13 Ark. 129, 56 Am. Dec. 303.

Colorado. — Clayton *v.* Smith, 1 Colo. 95.

Connecticut. — Shalley *v.* Danbury & B. H. R. Co., 64 Conn. 381, 30 Atl. 135.

District of Columbia. — Strong *v.* District of Columbia, 1 Mack. 265.

Georgia. — Butler *v.* Livingston, 15 Ga. 565.

Illinois. — Russell *v.* Rumsey, 35 Ill. 362; Supervisors of Marshall Co. *v.* Cook, 38 Ill. 44, 87 Am. Dec. 282.

Indiana. — Haskett *v.* State, 51 Ind. 176; Winehart *v.* State, 6 Ind. 30.

Maryland. — Grumbine *v.* State, 60 Md. 355.

Michigan. — Woodruff *v.* Phillips, 10 Mich. 500; LeRoy *v.* East Saginaw City R. Co., 18 Mich. 233, 100 Am. Dec. 162; Robert *v.* Morrin, 27 Mich. 306; Hess *v.* Culver, 77 Mich. 598, 43 N. W. 994, 18 Am. St. Rep. 421; Mogg *v.* Hall, 83 Mich. 576, 47 N. W. 553.

Mississippi. — Holman *v.* Murdock, 34 Miss. 275; Whitton *v.* State, 37 Miss. 379.

Rule Stated. — In Horne *v.* Barton, 7 De Gex M. & G. (Eng.) 587, Lord Justice Knight Bruce said: "*Prima facie* and presumptively I apprehend that a person under no disability, who has a full knowledge of facts, from which rights of property arise or accrue to that person, ought to be deemed to be aware also of those rights."

Rule Equally Applicable to Civil and Criminal Law. — In Platt *v.* Scott, 6 Blackf. (Ind.) 389, 39 Am. Dec. 436, a charge that "every person is bound to know the criminal laws of the land, but not the civil law," was, on appeal, held erroneous. The court said: "It is considered that every person is acquainted with the law, both civil and criminal; and no one can therefore complain of the misrepresentations of another respecting it. In the case before us the defendant must be presumed to have known the law regulating the location of the warrant in question, and he cannot therefore be permitted to say that he was misled by the representations which the plaintiff made as to what the law was on the subject."

Executive Proclamations. — The courts will take judicial notice of proclamations by a governor or the president of the United States, setting apart days for fasting and prayer or thanksgiving, and as the same are published in the daily and weekly newspapers it is not to be presumed that any citizen is ignorant of them; nor will liquor dealers, or other business men, be permitted to plead ignorance as an excuse for a non-compliance with, or violation of, the statutes relating to legal holidays. People *v.* Ackerman, 80 Mich. 588, 45 N. W. 367.

Concerning a Law Relating to Foreign Corporations the court, in Keystone Driller Co. *v.* Superior Court, 138 Cal. 738, 72 Pac. 398, said: "The stockholders of the Paraiso oil company must also be presumed to have known the laws of California, particularly as they are residents of this state; and they therefore know what was required

law of crimes, is subject, as it is sometimes in respect to civil rights, to certain important exceptions. Where the act done is *malum in se,* or where the law which has been infringed was plain and settled, the maxim, in its rigor, will be applied; but where the law is not settled, or is obscure, and where the guilty intention, being a necessary constituent of the particular offense, is dependent on a knowledge of the law, this rule, if enforced, would be misapplied.[19] In the case of a ministerial officer, while he is presumed to know the law, such presumption does not extend to matters of fact which cannot be determined from the law.[20]

B. NON-RESIDENTS. — So, too, a person is presumed to know

of a corporation organized outside of the limits of this state as a condition for doing business here."

Trustees. — The rule that every person is presumed to know the law applies to trustees, although they may be exonerated from losses resulting from their ignorance of the law in cases where they exercised proper diligence and precaution, and acted upon advice of counsel. Miller *v.* Proctor, 20 Ohio St. 442.

It Is Not Essential That an Adult Who Promises To Pay an Obligation contracted by him while a minor should have actual knowledge of the invalidity of the contract at the time of making the promise, since he is presumed to know the law. Bestor *v.* Hickey, 71 Conn. 181, 41 Atl. 555.

The Terms of the Supreme Court being fixed by statute, it is presumed that parties, as well as courts, have knowledge thereof. Gauldin *v.* Shehee, 20 Ga. 531. See also New York Cent. Ins. Co. *v.* Kelsey, 13 How. Pr. (N. Y.) 535.

Knowledge of General Postal Regulation. — A postoffice employe will be presumed, as a matter of law, to have knowledge of the general postal regulations. East Tennessee, V. & G. R. Co. *v.* White, 15 Lea (Tenn.) 340, in which the court said: "We hold, therefore, that in view of the relation sustained by the parties to this suit to the postoffice department, the charge of the circuit judge [that the regulations of the postoffice department were matters of fact] was erroneous; that, as applicable to this case, the postal regulations were not facts, but law, and that the judge should so have instructed the jury."

In Bank of De Soto *v.* Hansbrough, 89 Mo. App. 252, it was held that the cashier of a bank and a bank's attorney must be presumed to know the different meanings of the terms "indorsers" and "makers" of promissory notes.

19. Cutter *v.* State, 36 N. J. L. 125, where the court said: "To give it any force in such instances would be to turn it aside from its rational and original purpose, and to convert it into an instrument of injustice. The judgments of the courts have confined it to its proper sphere. Whenever a special mental condition constitutes a part of the offense charged, and such condition depends on the question whether or not the culprit had certain knowledge with respect to matters of law, in every such case it has been declared that the subject of the existence of such knowledge is open to inquiry, as a fact to be found by the jury. This doctrine has often been applied to the offense of larceny. The criminal intent, which is an essential part of that crime, involves a knowledge that the property taken belongs to another; but even when all the facts are known to the accused, and so the right to the property is a mere question of law, still he will make good his defense if he can show in a satisfactory manner that, being under a misapprehension as to his legal rights, he honestly believed the articles in question to be his own." See also the article "LARCENY," Vol. VIII.

20. People *v.* Rix, 6 Mich. 144, in which the court said: "Where the jurisdiction of the subject-matter depends upon matters of fact, the

the laws of the foreign state or country in which he transacts business, although a non-resident.[21]

C. Knowledge of Ordinances and By-Laws of Municipal Corporations. — A city officer[22] or the inhabitants of a municipal corporation[23] are presumed to have knowledge of its ordinances and by-laws.

D. Knowledge of Legal Consequences of Action. — Every one is presumed to know and consent to the necessary legal consequences of his action.[24] So every one is presumed to know the legal effect of his contract,[25] and is usually bound thereby, whether he had such knowledge or not.[26]

E. Private or Foreign Law. — But the rule presuming knowledge of the law does not apply to private laws,[27] and there is

existence or non-existence of which cannot be determined from the law, and which is not of public notoriety, a ministerial officer ought not, we think, be bound to ascertain it at his peril, unless the law has plainly given him the right to demand the information, and to determine the fact."

21. Hill *v.* Spear, 50 N. H. 253. See also Cambioso *v.* Maffet, 2 Wash. C. C. 98, 4 Fed. Cas. No. 2330; Sigua Iron Co. *v.* Brown, 19 App. Div. 143, 45 N. Y. Supp. 989; Cory *v.* Gillespie, 94 Iowa 347, 62 N. W. 837.

22. Galbreath *v.* Moberly, 80 Mo. 484, in which it was held that the plaintiff, as an officer of the city, must be presumed to have knowledge of the ordinances or orders establishing and continuing his salary.

The Members of a City Council are presumed to know the contents of their journals, as they have the means of knowing, and it is their duty to know. "As the organ of the city, in the disposition of city property, the council was bound to know whatever had been done, or not done, by it in reference to that property." Holland *v.* San Francisco, 7 Cal. 361.

23. Palmyra *v.* Morton, 25 Mo. 593, where it was said: "There is nothing in the objection that the defendant was not notified of the ordinance, for, being a member of the corporation, he is presumed to know of its by-laws."

24. Frank *v.* Powell, 11 La. 499, in which the court said: "The emancipation of a slave brought into the state of Ohio is a necessary legal consequence of his removal thither; and his former owner, by whose agency his removal is effected, must be presumed to have consented to the emancipation." United States *v.* Anthony, 11 Blatchf. 200, 24 Fed. Cas. No. 14,459; Reg. *v.* Mailloux, 16 N. B. 493.

25. Mears *v.* Graham, 8 Blackf. (Ind.) 144; State *ex rel.* Board of Com'rs *v.* Van Pelt, 1 Ind. 304; Allin *v.* Shadburne, 1 Dana (Ky.) 68, 25 Am. Dec. 121; Simpson *v.* Hawkins, 1 Dana (Ky.) 303; Triplett *v.* Gill, 7 J. J. Marsh. (Ky.) 432.

"The law requires us to assume that the parties did understand the contract into which they entered and the liability which the defendant below assumed. It would have been improper to authorize the jury to infer from the evidence the existence of such ignorance among the parties, and, if so, to instruct them that if it existed the verdict must be for the defendant." Gist *v.* Drakely, 2 Gill (Md.) 330, 41 Am. Dec. 426.

26. Black *v.* Ward, 27 Mich. 191, 15 Am. Rep. 162.

27. Boyers *v.* Pratt, 1 Humph. (Tenn.) 90.

"The familiar maxim that ignorance of the law is no excuse for the breach or non-performance of any agreement, because any one is presumed to know the law, applies only to general public laws, which prescribe a rule of action for the whole community; and that it has no application whatever to special or private laws, which are only intended to operate upon particular individuals. . . . A special or private law, in this respect, stands upon

no presumption whatever of knowledge of foreign laws.[28]

Knowledge of Rules or By-Laws of Private Corporation. — A stranger is not presumed to know the rules or by-laws of a private corporation.[29]

F. CONSTRUCTION OF LAW. — The rule presuming knowledge of the law extends not only to knowledge that the law exists, but also to knowledge as to how the courts will construe the law.[30]

the same footing with the law of another government. And all the authorities concur that ignorance of foreign law is deemed to be ignorance of *fact*; because no person is presumed to know the foreign law, and it must be proved as a fact." King *v.* Doolittle, 1 Head (Tenn.) 77.

28. Haven *v.* Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353. See also Waterman *v.* Sprague Mfg. Co., 55 Conn. 554, 12 Atl. 240; Merchants' Bank *v.* Spalding, 9 N. Y. 53; Honegger *v.* Wettstein, 94 N. Y. 252; Stedman *v.* Davis, 93 N. Y. 32, wherein it was held that there is no presumption that a creditor in a foreign state knows the law or public acts or records of the state wherein his debtor's assignment is made and executed, and that such knowledge is a fact to be proved.

29. Rules and Regulations of Corporation. — The law does not presume that one about to become, or who has become, a passenger on a railway train knows the rules and regulations of the railway company. Lake Shore & M. S. R. Co. *v.* Rosenzweig, 113 Pa. St. 519, 6 Atl. 545.

A Teacher in an Academy is not presumed to know the by-laws of the academy, and is not bound by them in the absence of proof of knowledge thereof. Boyers *v.* Pratt, 1 Humph. (Tenn.) 90.

30. Detroit *v.* Martin, 34 Mich. 170, 22 Am. Rep. 512. In this case a tax had been assessed under a statute which was subsequently held to be unconstitutional. Prior to this decision the plaintiff had paid the tax under protest, in order, as he claimed, to prevent a threatened sale. The court said: "The plaintiff, at the time he paid this tax, paid it with the full knowledge of all the facts and circumstances. He is conclusively presumed to know the law applicable thereto. He is presumed to have known at the time he paid this tax that the statute under which the assessment was made was void, and that a sale of the premises therefor would constitute no cloud upon his title, and that he could not be injured by such sale."

See also Williams *v.* Corcoran, 46 Cal. 553, a similar action, where the court said: "The plaintiffs are presumed to know the law; to know that the provision of the act in respect to the assessment of the property within the district was void."

In State *v.* Paup, 13 Ark. 129, 56 Am. Dec. 303, the court said: "There appears to have been an effort by the courts to uphold the maxim that ignorance of the law shall not excuse, and at the same time, in cases of peculiar hardship, they have made distinctions between ignorance of the existence and of the legal effect of the law."

Compare Brent *v.* State, 43 Ala. 297, a prosecution for violating the law against lotteries, wherein the prosecution insisted that the defendant was presumed to know that the special statute which he claimed permitted him to carry on the business was, and would be held to be, unconstitutional; but the court said: "We cannot consent to carry this rule of presumption to this extent; it must be confined to presuming that all persons know the law exists, but not that they are presumed to know how the courts will construe it, and whether, if it be a statute, it will, or will not, be held to be constitutional. To extend the rule beyond this limit will be to implicate the legislature who passed, and the governor who approved, the act in a charge of gross immorality and dishonesty. If the appellant is to be presumed to know the act was unconstitutional, the same presumption will fix upon them the same extent of knowledge; that

G. Conclusiveness of Presumption. — While the presumption of a knowledge of the law is generally conclusive,[31] it has been held a rebuttable one.[32] There is no rule which conclusively presumes knowledge of the law as a fact, where that fact is important.[33]

II. MODE OF PROOF.

1. Direct Testimony. — A. In General. — Knowledge[34] or the

is, that they knew the act, when it was passed and approved, was in conflict with the constitution; and if this be so, it will be a hard matter, we think, to clear either from this grave implication. But we are satisfied the rule must have the limit we give it. To hold otherwise will take from the rule all its virtue and make it odious to all right and just-thinking men." See also Morrell *v.* Graham, 27 Tex. 646.

31. Bestor *v.* Hickey, 71 Conn. 181, 41 Atl. 555; Holman *v.* Murdock, 34 Miss. 275; Cunningham *v.* Cunningham, 72 Conn. 157, 44 Atl. 41, which was an action for non-support, in which the court said: "It was argued by the appellee that an act of the legislature was not brought to the attention of the court below, nor in any way relied upon by the plaintiff. It was, however, the law of the land, which the parties and the court were conclusively presumed to know."

32. Hart *v.* Roper, 41 N. C. 349, 51 Am. Dec. 425; Hess *v.* Culver, 77 Mich. 598, 43 N. W. 994, 18 Am. St. Rep. 421, where the court said: "It has been held by this court in repeated instances that while a man is, for public reasons, held responsible for his conduct, although ignorant of law, there is no conclusive presumption that he actually knows the law."

"Until the contrary appears, every one is taken to be cognizant of the law. The doubt and difficulty have been, not whether the burden of proof is not cast upon him who seeks to screen himself from the effects of his acts, by showing that they were done in ignorance of his legal rights; that has never been disputed." Butler *v.* Livingston, 15 Ga. 565.

To hold that a man cannot be defrauded by false representations because he is presumed to know the law, which presumption is a violent one in most cases, is to place the ignorant and foolish, who are generally the victims of fraud, beyond the protection of the law. So held in Averill *v.* Wood, 78 Mich. 342, 44 N. W. 381, where plaintiff claimed to have been defrauded in the purchase of the note of an insolvent corporation by representations that its receiver had arranged to pay the note in lumber, which arrangement it was claimed the receiver had no power to make, and hence that the plaintiff had no right to rely thereon.

33. Black *v.* Ward, 27 Mich. 191, 15 Am. Rep. 162. See also Reg. *v.* Mayor of Tewksbury, L. R. 3 Q. B. 629, where the maxim under discussion was very clearly explained, and it was held that where actual knowledge was in question the legal presumption could not supply it. Hill *v.* Taylor, 50 Mich. 549, where it was held that there is no such conclusive presumption of an actual knowledge of the law as will make a party guilty of malice when he is acting in reliance upon what he had reason to believe and does believe is lawful. If a man actually believes a statute to be constitutional which is unconstitutional, the case must be a very plain one which would make such ignorance of the law culpable. Finch *v.* Mansfield, 97 Mass. 89; Ryan *v.* State, 104 Ga. 78, 30 S. E. 678.

34. Rice *v.* Melott, 32 Tex. Civ. App. 426, 74 S. W. 935; Abbe *v.* Justus, 60 Mo. App. 300; Turner *v.* Keller, 66 N. Y. 66; Park *v.* Wooten, 35 Ala. 242. See also Cork *v.* Bacon, 45 Wis. 192, 30 Am. Rep. 712; Tumlin *v.* Crawford, 61 Ga. 128. *Compare* Boyd *v.* Daily, 85 App. Div. 581, 83 N. Y. Supp. 539, *affirmed* Boyd *v.* New York, S. & T. Co., 176 N. Y. 556, 613, 68 N. E. 1114.

want of knowledge,[35] like any other fact, may be testified to directly.

B. Witness' Opinion or Conclusion. — Ordinarily whether or not another person had knowledge of a particular fact is not capable of proof by the mere opinion or conclusion of a witness,[36] although it has been held proper to permit a witness to state that

In an action to replevin apples levied upon which did not belong to the plaintiff, the defendant having testified that he was present when the apples were levied upon, it was competent for him to testify that his agent pointed out the apples in controversy to the sheriff, as tending to show that the sheriff must have known that the apples did not belong to the plaintiff. Sleight *v.* Henning, 12 Mich. 371.

In Beale *v.* Posey, 72 Ala. 323, it is held proper to permit a witness to testify as a fact that he "knew and recognized the walk" of another person; that so far as the objection that the testimony is mere matter of opinion may be true "it is of opinion formed from observation dependent for its value upon the opportunities of observation, and like the recognition of the human voice, incapable of higher evidence."

In Allen *v.* Rodgers, 70 Hun 48, 23 N. Y. Supp. 1071, an action to recover a commission for selling property for the defendant under an agreement the existence of which the defendant denied, it was held that the rejection of a question to the defendant, "Did you at any time know that Mr. Allen [the plaintiff] was working for you?" was proper, as the question called merely for the conclusion of the witness.

35. Hale *v.* Robertson, 100 Ga. 168, 27 S. E. 937; Frost *v.* Rosecrans, 66 Iowa 405, 23 N. W. 895. See also McCosker *v.* Banks, 84 Md. 292, 35 Atl. 935.

"Where the situation of a witness was such that if a certain fact had existed he would probably have known it, his want of knowledge is some evidence, although slight, that the fact did not exist, and he will be permitted to testify in such case that if the fact did exist he did not know it." Blakey *v.* Blakey, 33 Ala. 611; Killen *v.* Lide, 65 Ala. 505; Nelson *v.* Iverson, 24 Ala. 9; Thomas *v.* Degraffenreid, 17 Ala. 602.

In Frame *v.* William Penn Coal Co., 97 Pa. St. 309, an action to recover for goods sold and delivered by the plaintiff to the defendant, wherein the defendant claimed that he had dealt with the plaintiff's agent, through whom the goods had been sold, as a principal, and desired to set off a claim held by him against such agent, it was held that he should have been permitted to state what knowledge he had that the plaintiff's agent was dealing as principal or agent; that if the defendant "had no knowledge of the agency the absence of such knowledge was of itself a fact which it was competent for him to state. The direct question might well have been asked. Its modification tended merely to draw out his sources of information, which was at most an anticipation of cross-examination."

In Finn *v.* Clark, 12 Allen (Mass.) 522, an action to recover for goods sold and delivered, wherein the defense was a claim by way of set-off for money paid by the defendant for the plaintiff for other goods lost in transit, it appeared that the defendant had received by mail a bill of lading for the lost goods which did not give his residence or full name, and it was held proper to permit the defendant to testify to his ignorance of this omission until after the goods had been destroyed.

36. Bailey *v.* State, 107 Ala. 151, 18 So. 234; Butler *v.* Cornwall Iron Co., 22 Conn. 335; McCosker *v.* Banks, 84 Md. 292, 35 Atl. 935. See also Charles *v.* Amos, 10 Colo. 272, 15 Pac. 417; Durrence *v.* Northern Nat. Bank, 117 Ga. 385, 43 S. E. 726; Bank of Commerce *v.* Selden, 1 Minn. 340.

In Major *v.* Spies, 66 Barb. (N. Y.) 576, it was held that the ques-

another person had knowledge of a fact, where he also states the facts indicating unmistakably that he knows whereof he speaks.[37]

C. Testimony of Informant. — It is proper to show that a party had knowledge of a fact by the testimony of a witness that he had informed such party of the fact.[38]

2. Acts, Declarations, Etc. — Acts of a party sought to be charged with knowledge of a fact, or statements by him in the nature of or constituting an admission of his knowledge, may be received in evidence against him,[39] although collateral and foreign to the main

tion, "Did the plaintiff know you had nothing to do with the labor on the building after October last?" was properly rejected, as the fact of the plaintiff's knowledge should be shown by declarations, acts and circumstances tending to establish such fact, and not by the witness' opinion or inference.

37. Wright *v.* State (Tex. Crim. App.), 44 S. W. 151, a larceny prosecution, where it was held proper under such circumstances to permit the owner of the alleged stolen cattle to testify that defendant knew his cattle. See also Abbett *v.* Page, 92 Ala. 571, 9 So. 332.

In Gulf, C. & S. F. R. Co. *v.* West (Tex. Civ. App.), 36 S. W. 101, an action to recover damages for personal injuries sustained by the plaintiff while attempting to cross the defendant's railroad track, it was held proper to permit a witness to testify that a brakeman of the defendant company was standing nearby and knew that the plaintiff and other children who were with him were crossing, or attempting to cross, the track at the place where the plaintiff was injured; that "the testimony is not of a supposition, inference or conclusion, but of a fact occurring within the presence and observation of the witness."

38. Tumlin *v.* Crawford, 61 Ga. 128. In this case the question was whether or not a sale by defendant in *fi fa* to his son, principally on credit, was *bona fide*, and it was held proper to permit the son to testify that he had informed his grantees, who were the claimants, of the fact that his father had not fully paid for the land, lien notes for which were then outstanding. *Compare* Hazelton *v.* Allen, 3 Allen (Mass.) 114.

In St. Louis, A. & C. R. Co. *v.* Dalby, 19 Ill. 352, an action against a railroad company to recover damages for an assault by the train men upon the plaintiff upon his refusal to pay the fare demanded by the conductor, it appeared that the company had established a rule charging an increased fare in case the passenger failed to procure a ticket; that the plaintiff had applied to the station agent for a ticket and was told that he was out of tickets, and could sell the plaintiff none, and gave the plaintiff a written statement to that effect to show to the conductor, all of which facts the plaintiff was allowed to prove by the testimony of the station agent. The written memorandum of the station agent was not used for the purpose of establishing the fact that the plaintiff had applied for a ticket and could not procure it. It was held that the writing was an independent fact of itself, and proper to be used as such for the purpose of bringing home to the conductor the truth that the plaintiff had done all he could to procure a ticket, and thereby had entitled himself to the right to ride at the ticket fare.

Knowledge of Conditions of Sale. As to whether a purchaser at a sheriff's sale had knowledge of the conditions of sale, the written conditions of the sale are admissible, where the defendant was present both before and during the sale, and the conditions were read aloud at the opening of the sale, and he signed an acknowledgment that he had purchased the property at the sale. Gaskell *v.* Morris, 7 Watts & S. (Pa.) 32.

39. Kidd *v.* American Pill & Med. Co., 91 Iowa 261, 59 N. W.

41; Salmon *v.* Richardson, 30 Conn. 360, 79 Am. Dec. 255; Miller *v.* Cook, 124 Ind. 101, 24 N. E. 577 (knowledge of falsity of slanderous statements); Stanton *v.* Simpson, 48 Vt. 628; Lewis *v.* Gibson, 9 Rob. (La.) 146; Hunt *v.* Strew, 33 Mich. 85; Rodriguez *v.* Espinosa (Tex. Civ. App.), 25 S. W. 669; Druck *v.* Nicolai, 16 Or. 512, 19 Pac. 650. *Compare* Armitage *v.* Snowden, 41 Md. 119.

In White *v.* Reed, 15 Conn. 457, an action upon a letter of guaranty, where the plaintiff, for the purpose of proving notice to the defendant of his acceptance of the guaranty and of the sales made under it, offered the declarations of the defendant that he knew of the existence of the guaranty; that he asked why the claim had not been presented to the commissioners on his estate; and that in the conversation he made no objection that notice had not been given him, but said if the claim was not outlawed, and it was a continuing guaranty, he would pay it; it was held that such declarations were admissible.

In Jones *v.* Hopkins, 32 Iowa 503, it was held that evidence that a vendor of property made statements to a third party, subsequent to the sale, at variance with his representations to the vendee at the time of the sale, is admissible as tending to show that he knew such representations were false at the time of making them.

Knowledge of the Character of Land. — An admission of the plaintiff in an action for damages for fraudulent representations as to land purchased by him, that he had knowledge of its character, is admissible against him without reference to the time when it was made, as are other acts and declarations. High *v.* Kistner, 44 Iowa 79.

Knowledge of Incompetency of Coemploye. — Where the plaintiff's decedent, a railroad employe, was killed by an act of a coemploye, in an action for damages resulting from such death, testimony that the division superintendent of the railroad, in speaking of the coemploye, said that such coemploye must quit drinking is admissible to show knowledge of the incompetency of the coemploye. Chapman *v.* Erie R. Co., 55 N. Y. 579, *reversing* 1 Thomp. & C. 526.

Knowledge of Intention To Commit a Crime. — The defendant in a suit for arson, in response to a statement that another had seen him pass a certain place at a certain time, said that the person was mistaken; "that he did not see him pass there on the evening the house was burned, but he passed there on the evening it was intended to be burned;" and it was held that the defendant's admissions were competent as tending to prove that he had knowledge of the existence of the intention to commit an unlawful act and an accurate knowledge of the time when the act was committed. Williams *v.* Dickenson, 28 Fla. 90, 9 So. 847.

In Robison *v.* Swett, 3 Me. 316, an action of trespass *quare clausum fregit*, the question turned upon the nature and duration of the plaintiff's possession of the land in controversy, and it was held that evidence of allegations in writs in former suits against the plaintiff brought for the benefit of the defendant in that action in which he was charged as a disseisor was admissible in connection with other circumstances to show knowledge on the part of the defendant and his grantors of the nature and extent of the plaintiff's claim.

The Declarations of the Purchaser of Real Estate that he knew that certain buildings were not on the land are admissible against him in an action by him for damages for false representations by the vendor, making it appear that the boundaries of the land included the buildings, although such declarations are a weak and doubtful species of evidence. Hitchcock *v.* Baughan, 36 Mo. App. 216.

In Bennett *v.* Gibbons, 55 Conn. 450, 12 Atl. 99, an action for fraud in the sale of a horse, the defendant introduced a witness who testified that at the time of the sale and while the negotiations were in progress he took the plaintiff aside and told him that if the horse was all right it would be worth a sum stated, and that if the horse was sound he could not expect to get it

subject.[40] But a party cannot be allowed to show his own acts and declarations at a particular time for the purpose of showing that he had then for the first time learned the matters in question.[41]

3. Indirect or Circumstantial Evidence. — A. In General. Knowledge need not necessarily be proved by direct and positive evidence; on the contrary, it may be inferred from facts and circumstances.[42]

at the price asked, whereupon the witness was further asked of the reply the plaintiff had made. The court, in holding the rejection of this question to be error, said that what the witness told the plaintiff, if true, "did tend to show that he had some knowledge of the condition of the horse at the very time he was negotiating for an exchange. It is to be presumed that the reply would have referred to the same matter, and that it would or might have furnished more certain evidence as to the extent of the plaintiff's knowledge."

40. Tobin *v.* Walkinshaw, 1 McAll. 186, 23 Fed. Cas. No. 14,070; Chapman *v.* Erie R. Co., 55 N. Y. 579.

41. Hazelton *v.* Allen, 3 Allen (Mass.) 114.

42. *Alabama.* — Park *v.* Wooten, 35 Ala. 242.

California. — Kneeland *v.* Wilson, 12 Cal. 241.

Georgia. — Knight *v.* State, 88 Ga. 589, 15 S. E. 456.

Massachusetts. — Lynch *v.* Richardson, 163 Mass. 160, 39 S. E. 801.

Michigan. — Robinson *v.* Worden, 33 Mich. 316.

Missouri. — Abbe *v.* Justus, 60 Mo. App. 300; Rine *v.* Chicago & A. R. Co., 100 Mo. 228, 12 S. W. 640; Van Raalte *v.* Harrington, 101 Mo. 602, 14 S. W. 710; Maupin *v.* Emmons, 47 Mo. 304. See also Shumate *v.* Reavis, 49 Mo. 333; Whitman *v.* Taylor, 60 Mo. 127.

New Hampshire. — Pendexter *v.* Carleton, 16 N. H. 482.

New York. — Parker *v.* Conner, 93 N. Y. 118, 45 Am. Rep. 178; Chapman *v.* Erie R. Co., 55 N. Y. 579.

Tennessee. — Stainback *v.* Junk Bros. Lumb. & Mfg. Co., 98 Tenn. 306, 39 S. W. 530.

Texas. — Murry *v.* State (Tex. Crim.), 79 S. W. 568; Davis *v.* Van Wie (Tex. Civ. App.), 30 S. W. 492.

Vermont. — Stanton *v.* Simpson, 48 Vt. 628.

In Sibley *v.* Leffingwell, 8 Allen (Mass.) 584, where there was direct evidence that an attaching creditor, who had levied upon a portion of a messuage, had actual knowledge, prior to his attachment, of an unrecorded deed of "the place," it was held that evidence that the portion levied upon was inclosed with the residue of the premises, and the whole occupied as one entire messuage, was competent for the purpose of showing that the attaching creditor knew that the deed covered the whole of the messuage.

In English *v.* Caldwell, 30 Mich. 362, an action of replevin for a horse which the plaintiff claimed the defendant had taken without permission while he was trying the defendant's horse with a view to trading, the defendant claiming that an absolute trade had been completed before he took possession of the plaintiff's horse, it was held that evidence was admissible on the part of the plaintiff to prove an unsuccessful search and inquiry for the horse after the defendant had taken it away, as tending to show that the defendant had secreted the horse or kept it out of the way, and that he knew that in fact no absolute trade as claimed by him had been made, and that he had obtained no right to the horse.

Knowledge That Certain Funds Were Trust Funds. — To show that the director of a corporation, charged with having wrongfully appropriated certain trust funds, knew that they were trust funds, an extract from a pamphlet issued by the corporation, which stated that the fund was a trust fund and could not be appropriated for any other use, was admissible. Putnam *v.*

Gunning, 162 Mass. 552, 39 N. E. 347.

Knowledge of Liability. — In Banfield *v.* Whipple, 10 Allen (Mass.) 27, 87 Am. Dec. 618, an action to recover damages for injury to a hired horse resulting from driving it in an immoderate and improper manner, it was held competent to show that immediately after the injury alleged the defendants had assigned all of their property without other proof of consideration than the recitals in the assignment, as being some evidence that the defendants were conscious of liability and were endeavoring to escape therefrom.

Knowledge of Existence of Way. In Wissler *v.* Hershey, 23 Pa. St. 333, where the question was whether or not a purchaser of real estate had knowledge of the existence of a private way over the land at the time of the purchase, it was held that evidence that the way had been used for many years and that the purchaser lived all the time in the immediate neighborhood was proper to go to the jury.

Solvency of Maker of Note. — In Walker *v.* Thompson, 61 Me. 347, an action upon an alleged guaranty for the payment of certain promissory notes, defendant contended that the plaintiff had obtained the guaranty by fraudulent misrepresentations as to the solvency of the maker; and it was held proper to permit the maker to testify to certain transactions between himself and the plaintiff tending to show his insolvency and the plaintiff's probable knowledge thereof.

Knowledge of Agency. — In Ely *v.* Tweedy, 18 Conn. 458, an action for goods sold and delivered, wherein the question was whether or not the person who had received the goods from the plaintiff was the authorized agent for the defendants, and the plaintiff, to establish the agency, introduced evidence showing that such person had acted as general agent for the defendants in the purchase and sale of property of all kinds. Plaintiff then proved that such person had purchased of a third person certain real estate as agent for the defendants, taking deeds thereto to himself as their agent, and to show that the defendants had knowledge of his acts as their agent the plaintiff introduced in evidence a release deed from the agent to the defendants of the property so conveyed to him referring to the original deeds to him, and it was held that such release deed, in connection with the other deeds, was competent evidence for the purpose for which it was introduced.

It Will Be Presumed That an Attorney Read and Had Knowledge of the Declaration to which pleas were filed in the name of the firm of which he is a member, and the records of such proceedings are admissible in evidence in a subsequent action of detinue against such attorney to prove knowledge on his part of the plaintiff's title to the slave in question, as disclosed in such declaration. Parsons *v.* Boyd, 20 Ala. 112.

Knowledge of Character of Place. In an action for personal injuries caused by falling through a trap door, maintained by the proprietor of a restaurant in dangerous proximity to the place provided for customers' hats and coats, evidence that on a previous occasion defendant had warned another customer about approaching the hole is admissible as descriptive of the place and to show defendant's actual knowledge of the danger. Franklin *v.* Engel, 34 Wash. 480, 76 Pac. 84.

In Simmons *v.* New Bedford, V. & N. Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99, a personal injury action, where the injury complained of had been sustained by the falling upon the plaintiff of a small boat suspended over the main deck on the larboard side of the defendand's steamboat, which fell at a time when several persons were in the boat and another was getting into it, it was held that evidence that passengers had been in the habit of sitting in the larboard boat so frequently and during such a period of time before the accident that the officers of the steamboat must have known of it was admissible as tending to show their knowledge of that fact; but that evidence of the disregard by pas-

Particular Instances of Viciousness of an Animal are admissible to show the owner's probable knowledge of the character or disposition of the animal.[43]

Possession of Document. — Knowledge of the contents of a document may be shown by proof of its possession.[44]

B. NOTORIETY OF FACT. — a. *In General.* — It is competent to prove the notoriety of a fact in the neighborhood of a party sought to be charged with knowledge of it, as a basis for an inference that he knew the fact.[45] But it would seem that the party must have

sengers of the rules of the steamboat company in going outside the rails in other parts of the vessel or into the starboard boat had no tendency to show a use of the larboard boat with the knowledge of the officers in a manner dangerous to other passengers.

In Adams *v.* Way, 33 Conn. 419, an action on a bond guaranteeing the payment of a mortgage debt, it appeared that the bond described the mortgage as being for three years, while in fact the mortgage provided for foreclosure at any time upon failure of the mortgagor to pay the interest. The plaintiff claimed that the mortgagor applied to the defendant to guarantee the loan, and exhibited to the defendant the note and mortgage, which he read and knew the contents and provisions thereof. This the defendant denied, and testified that until about a week before the trial he had never seen the note and mortgage, and knew nothing of their contents except what he had learned from the guaranty itself, which he signed; that he knew nothing of the provisions whereby the principal might become due upon failure to pay the interest; and that had he supposed the mortgage could be foreclosed so soon he would not have signed the guaranty. To confirm his testimony in this respect, and to show that his attention was specifically drawn to the time the loan was to run, the defendant's counsel asked him in substance whether the property would not be likely to rise in value. The court held the rejection of this question proper.

In Fenno *v.* Chapin, 27 Minn. 519, 8 N. W. 762, an action to recover a farm implement claimed by the plaintiff under a contract of sale reserving title to him until the purchase price was paid, but which the defendant claimed by purchase from the vendee without knowledge of plaintiff's claim, it was held that evidence that defendant knew that plaintiff had the exclusive right to sell such implements, and that plaintiff's name was on the implement in question, was properly excluded as immaterial; that there was nothing in either of these facts, if proved, tending to charge defendant with knowledge of plaintiff's claim.

43. Worth *v.* Gilling, L. R. 2 C. P. 3; Arnold *v.* Norton, 25 Conn. 93; Kittredge *v.* Elliott, 16 N. H. 77; Cockerham *v.* Nixon, 33 N. C. 269; McCaskill *v.* Elliott, 5 Strob. (S. C.) 196; Keenan *v.* Hayden, 39 Wis. 558. See article "ANIMALS," Vol. I, p. 897.

44. Wright *v.* Tatham, 7 Ad. & El. 313, 34 E. C. L. 95. See also Street *v.* Johnson, 80 Wis. 455, 50 N. W. 395, 14 L. R. A. 203, *holding* that the presumption is that one who sells and delivers a newspaper containing a libel knew that the libel was in the paper at the time of the sale and delivery. As to *assent* to the contents of a document, see article "ASSENT," Vol. I.

45. *Alabama.* — Jones *v.* Hatchett, 14 Ala. 743; Ward *v.* Herndon, 5 Port. 382.

Georgia. — Kuglar *v.* Garner, 74 Ga. 765.

Maryland. — Brooks *v.* Thomas, 8 Md. 367.

Minnesota. — Hahn *v.* Penney, 62 Minn. 116, 63 N. W. 843.

Missouri. — Crane *v.* Missouri Pac. R. Co., 87 Mo. 588.

Texas. — Pressler *v.* State, 13 Tex. App. 95; Continental Ins. Co. *v.* Cummings (Tex.), 81 S. W. 705;

been a resident in the immediate neighborhood.[46] It has been held that there must be proof that the fact was discussed in his presence.[47]

A Mere Rumor or Vague Report brought to the knowledge of a purchaser for a valuable consideration at or before the purchase that there was an outstanding claim or conveyance, without defining the character of the claim or conveyance, or to whom or by whom it was made, will not charge the purchaser with such knowledge as will vitiate his title in favor of one claiming by gift.[48]

b. *Knowledge of Insolvency.* — So upon an issue whether one knew of the insolvency of another person, or had reasonable grounds to believe such person to be insolvent, common report of the insolvency of such person is admissible.[49]

Missouri Pac. R. Co. *v.* Owens, 1 White & W. Civ. Cas. § 383.

Vermont. — State *v.* Flint, 60 Vt. 304, 14 Atl. 178.

Contra. — Tucker *v.* Constable, 16 Or. 407, 19 Pac. 13.

If a party is sought to be charged with knowledge of a fact, evidence of its general report and belief of its verity, in the neighborhood, is competent to go to a jury as tending to show that the party also knew of it; for in many cases it is almost impossible to fix positive knowledge of a fact upon a party, although he may be interested in knowing it and doubtless is informed thereof; and in reason there can be no injustice in raising a presumption of knowledge on his part by showing that the community in which he resided was informed of the matter, and that the party himself must have known of it. Benoist *v.* Darby, 12 Mo. 196; Brander *v.* Ferriday, 16 La. 296.

Notoriety of Adverse Possession. Tennessee Coal, I. & R. Co. *v.* Linn, 123 Ala. 112, 26 So. 245; Knight *v.* Knight, 178 Ill. 553, 53 N. E. 306; Sparrow *v.* Hovey, 44 Mich. 63, 6 N. W. 93. And see article "Adverse Possession," Vol. I.

Notoriety of Adverse Claim or Litigation. — Stephenson *v.* Kilpatrick, 166 Mo. 262, 65 S. W. 773.

46. Dunbar *v.* Mulry, 8 Gray (Mass.) 163, an action to recover the price of spirituous liquors, the defense being that they were sold to be resold by the defendant without license, the defendant cannot, even after proving that no licenses were granted at that time in that county by the county commissioners, and that the plaintiff (who lived in an adjacent city in another county) was frequently, about that time, in the defendant's shop, and had dealings with other persons in the same city and business as the defendant, introduce evidence that it was then generally notorious in that city that no licenses were granted in the county, for the purpose of showing the plaintiff's knowledge of that fact. The court said: "The fact, with the knowledge of which the plaintiff was to be charged by reason of its general notoriety, was what course had been pursued under this statute by a local tribunal. It may well be doubted whether this is of the class of facts of such general public interest that a mere knowledge of the fact may be shown by its general notoriety. As matter of public interest it affected the inhabitants of the county of Norfolk chiefly, if not only."

47. Clark *v.* Ricker, 14 N. H. 44, where it was held that evidence that the matter was the subject of conversation in the neighborhood of the party sought to be charged with knowledge thereof was not admissible for the purpose of establishing knowledge of it by him, where it is not shown that it was talked about in his presence.

48. Black *v.* Thornton, 31 Ga. 641.

49. Gordon *v.* Ritenour, 87 Mo. 54; Benoist *v.* Darby, 12 Mo. 196; Conover *v.* Berdine, 69 Mo. 125; Hahn *v.* Penney, 62 Minn. 116, 63

c. *Knowledge of Fraudulent Intent.* — Common report of a party's fraudulent intent in purchasing goods or incumbering his property is not competent for the purpose of charging another with knowledge of such intent.[50]

d. *As to Competency of Employe.* — Evidence of the reputation of an employe is admissible to show that the employer had knowledge of the character of the employe as to competency.[51]

e. *Dangerous Character of Place or Machinery.* — Reputation of the dangerous character of a place is admissible as showing probable knowledge thereof on the part of the person or persons charged with its care.[52] And the same rule applies to reputation of the dangerous character of machinery.[53]

f. *Vicious Character of Animal.* — So, too, the reputation for viciousness of an animal is relevant for the purpose of showing the owner's knowledge of that characteristic.[54]

C. PUBLICATION OF FACT IN NEWSPAPER. — It has been held

N. W. 843. And see article "FRAUDULENT CONVEYANCES," Vol. VI.

Evidence that a mortgagor was generally considered insolvent in the neighborhood of his mortgagee is a fact proper to be shown to credit the inference that the mortgagee knew of the mortgagor's insolvency. Brander *v.* Ferriday, 16 La. 296.

50. Gordon *v.* Ritenour, 87 Mo. 54. See also Hedges *v.* Wallace, 2 Bush (Ky.) 442.

51. *Illinois.* — Metropolitan, W. S. E. R. Co. *v.* Fortin, 203 Ill. 454, 67 N. E. 977; Chicago & A. R. Co. *v.* Sullivan, 63 Ill. 293.

Indiana. — Pittsburg, F. W. & C. R. Co. *v.* Ruby, 38 Ind. 294.

Kansas. — Cherokee & P. Coal & Min. Co. *v.* Dickson, 55 Kan. 62, 39 Pac. 691.

Maryland. — Norfolk & W. R. Co. *v.* Hoover, 79 Md. 253, 29 Atl. 994.

Massachusetts. — Monahan *v.* Worcester, 150 Mass. 439, 23 N. E. 228; Carson *v.* Canning, 180 Mass. 461, 62 N. E. 964.

New York. — Park *v.* New York C. & H. R. Co., 155 N. Y. 215, 49 N. E. 674.

Utah. — Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295.

And see articles "MASTER AND SERVANT;" "NEGLIGENCE."

52. Chase *v.* Lowell, 151 Mass. 422, 24 N. E. 212, where the court said: "While the authorities are not to be held responsible for the neglect of citizens to inform them of the existence of a defect, the fact that it was generally talked about in the community is a circumstance which may properly be considered. In such a case notoriety derives its force as evidence not merely from its suggestion that the defect was of such a kind that the authorities would have been likely to discover it in the first instance with their own eyes, but quite as much from the probability that their attention would have been brought by others to a matter which was generally talked about, and in which they were interested." See also Carter *v.* Steyer, 93 Iowa 533, 61 N. W. 956.

53. Chicago & A. R. Co. *v.* Shannon, 43 Ill. 338.

Dangerous Character of Car. Evidence that a particular make of car used by a railroad company had, because of its dangerous character, been abandoned not only by the company in question, but by railroad companies generally, is competent to show knowledge of the dangerous character of the car on the part of the company sought to be charged. Crane *v.* Missouri Pac. R. Co., 87 Mo. 588.

54. Wormsdorf *v.* Detroit City R. Co., 75 Mich. 472, 42 N. W. 1000. And see article "ANIMALS," Vol. I, p. 897.

that knowledge of a fact may be established by proof of its publication in a newspaper shown to have been usually read by the party sought to be charged.[55]

D. Similar Transactions. — It is competent to show the commission of a series of similar acts for the purpose of showing guilty knowledge.[56] Such evidence is competent to establish knowledge of fraud.[57] And subsequent false representations to others concerning the same matter may be shown for the purpose of showing knowledge of fraud.[58]

55. Com. *v.* Robinson, 1 Gray (Mass.) 555, *holding* that a copy of a newspaper containing an advertisement of the usual time of arrival of a certain stage coach is admissible as evidence of the knowledge of such time by one who usually read the paper. *Compare* Lewis *v.* Andrews, 53 Hun 638, 6 N. Y. Supp. 247, *affirmed* 127 N. Y. 673, 27 N. E. 1044; Milbank *v.* Dennistoun, 10 Bosw. (N. Y.) 382, where it was held that proof that the defendants took a newspaper which, immediately before the sale in question, contained an article calculated to put its readers on inquiry as to the existence of causes likely to produce a rise in prices, is not admissible, unless it be proved that they saw the particular article in question. Watkinson *v.* Bank of Pennsylvania, 4 Whart. (Pa.) 482, 34 Am. Dec. 521.

Statements in Newspaper as to Dissolution of Copartnership. — In Roberts *v.* Spencer, 123 Mass. 397, an action against the defendant as a member of a copartnership to recover on a copartnership debt, wherein the defendant claimed that prior to the time the debt was contracted he had withdrawn from the firm, the question being whether or not the plaintiff knew of such withdrawal at the time of making the contract with the firm, it was held proper to permit the defendant to put in evidence the advertisement of the dissolution of the firm and the withdrawal of the defendant published by the firm in certain newspapers, and an editorial on the withdrawal published in one of the newspapers, the plaintiff having already testified that he advertised in both newspapers and that they were sent regularly to him.

56. Similar Transactions to Show Guilty Knowledge. — DuBois *v.* People, 200 Ill. 157, 65 N. E. 658; Goldsberry *v.* State, 66 Neb. 312, 92 N. W. 906; Decker *v.* McSorley, 111 Wis. 91, 86 N. W. 554; State *v.* Allen, 56 S. C. 495, 35 S. E. 204.

Receiving Stolen Goods. — Upon the trial of a prosecution for receiving stolen goods, knowing that they had been stolen, evidence of another purchase of stolen property by the defendant from the same persons alleged to have stolen the property in question is admissible to show the defendant's guilty knowledge. People *v.* Doty, 175 N. Y. 164, 67 N. E. 303. See also Goldsberry *v.* State, 66 Neb. 312, 92 N. W. 906. And see article "Receiving Stolen Property."

57. Allen *v.* Millison, 72 Ill. 201. Dwyer *v.* Bassett, 1 Tex. Civ. App. 513, 21 S. W. 621, in which the court said: "We think the rule is well established that when *scienter* and motive are involved it is competent to show the commission of a series of similar acts by the defendant, who is charged with guilty knowledge or fraudulent intent."

58. United States L. Ins. Co. *v.* Wright, 33 Ohio St. 533; Duval *v.* Mowry, 6 R. I. 479.

Where it becomes necessary to show the defendant's knowledge of the falsity of representations made by him to the purchaser of property, such knowledge may be shown by evidence that after the sale he made contrary representations to others concerning the same property. Jones *v.* Hopkins, 32 Iowa 503.

LACHES.— See Limitation of Actions.

LANGUAGE.— See Interpreters; Judicial Notice; Private Writings; Wills.

LANDLORD AND TENANT.

By Clark Ross Mahan.

CROSS-REFERENCES:

Ambiguity;

Forcible Entry and Detainer;

Parol Evidence.

I. THE RELATION OF LANDLORD AND TENANT.

1. Presumptions and Burden of Proof. — A. The Agreement. a. *In General.* — Whenever the existence of the relation of landlord and tenant is in issue the burden of proving that fact is upon him who asserts it.[1] Thus one who would invoke the rule estopping a tenant from disputing the title of his landlord must in the first instance establish the existence of the relation of landlord and tenant.[2]

b. *Action for Use and Occupation.* — **(1.) Generally.** — In order to sustain an action for the use and occupation of real estate it is incumbent upon the plaintiff to show the existence of the conventional relation of landlord and tenant between himself and the

1. Pheland *v.* Candee, 105 Ala. 235, 16 So. 696, where the plaintiff expressly claimed upon a lease and as for rent, the lease being denied by special plea, and issue being taken upon this plea, and it was held essential to his right of recovery that he should prove the tenancy, though it might be that it was unnecessary for him to so claim.

To Enable a Party To Recover on a Verbal Lease his evidence should make his claim certain; to make it probable is not enough. Jackson *v.* Beling, 22 La. Ann. 377.

2. Crim *v.* Nelms, 78 Ala. 604; Steele *v.* Bond, 28 Minn. 267, 9 N. W. 772; Sands *v.* Hughes, 53 N. Y. 287.

defendant.[3] Mere occupancy is not of itself sufficient to warrant

3. *England.* — Sullivan *v.* Jones, 3 Car. & P. 579.

United States. — Watkins *v.* Holman, 16 Pet. 25; Carpenter *v.* United States, 17 Wall. 489.

Arkansas. — Byrd *v.* Chase, 10 Ark. 602.

California. — Hathaway *v.* Ryan, 35 Cal. 187.

Connecticut. — Vandenheuvel *v.* Storrs, 3 Conn. 203; Gun *v.* Scovil, 4 Day 228.

Delaware. — Redden *v.* Barker, 4 Har. 179.

Florida. — Ward *v.* Bull, 1 Fla. 311.

Georgia. — Barnes *v.* Shinholster, 14 Ga. 131; Clark *v.* Green, 35 Ga. 92; Mercer *v.* Mercer, 12 Ga. 421; Lathrop *v.* Standard Oil Co., 83 Ga. 307, 9 S. E. 1041.

Illinois. — McNair *v.* Schwartz, 16 Ill. 24; Oakes *v.* Oakes, 16 Ill. 106.

Indiana. — Avery *v.* Smith, 8 Blackf. 222; Newby *v.* Vestal, 6 Ind. 412; Cressler *v.* Williams, 80 Ind. 366.

Kentucky. — Richmond & L. Tpke. R. Co. *v.* Rogers, 7 Bush 532; Crouch *v.* Briles, 7 J. J. Marsh. 255, 23 Am. Dec. 405.

Maine. — Curtis *v.* Treat, 21 Me. 525; Porter *v.* Hooper, 11 Me. 170; Rogers *v.* Libbey, 35 Me. 200; Emery *v.* Emery, 87 Me. 281, 32 Atl. 900; Howe *v.* Russell, 41 Me. 446; Dennett *v.* Penobscot Fair Co., 57 Me. 425, 2 Am. Rep. 58.

Maryland. — De Young *v.* Buchanan, 10 Gill & J. 149, 32 Am. Dec. 156; Stoddert *v.* Newman, 7 Har. & J. 251.

Massachusetts. — Central Mills *v.* Hart, 124 Mass. 123; Boston *v.* Binney, 11 Pick. 1, 22 Am. Dec. 353; Theological Institute *v.* Barbour, 4 Gray 329.

Michigan. — Hogsitt *v.* Ellis, 17 Mich. 351; Dalton *v.* Laudahn, 30 Mich. 349; Marquette H. & O. R. Co. *v.* Harlow, 37 Mich. 554, 26 Am. Dec. 538.

Minnesota. — Hurley *v.* Lamorcaux, 29 Minn. 138, 12 N. W. 447; Crosby *v.* Horne, 45 Minn. 249, 47 N. W. 717; Folsom *v.* Carli, 6 Minn. 284.

Mississippi. — Scales *v.* Anderson, 4 Cushm. 94.

Missouri. — Edmonson *v.* Kite, 43 Mo. 176; Cohen *v.* Kyler, 27 Mo. 122.

Nebraska. — Skinner *v.* Skinner, 38 Neb. 756, 57 N. W. 534; Janouch *v.* Pence, 93 N. W. 207.

New Hampshire. — Swift *v.* New Durham Lumb. Co., 64 N. H. 53, 5 Atl. 903; Durrell *v.* Emery, 64 N. H. 223, 5 Atl. 97; Barron *v.* Marsh, 63 N. H. 107.

New Jersey. — Conover *v.* Conover, 1 N. J. Eq. 403; Stewart *v.* Fitch, 31 N. J. L. 17.

New York. — Thompson *v.* Bower, 60 Barb. 463; Preston *v.* Hawley, 101 N. Y. 586, 5 N. E. 770; Collyer *v.* Collyer, 113 N. Y. 442, 21 N. E. 114.

North Carolina. — Watson *v.* Eachin, 47 N. C. 207.

Ohio. — Richey *v.* Hinde, 6 Ohio 371; Peters *v.* Elkins, 14 Ohio 344.

Oregon. — Espy *v.* Fenton, 5 Or. 423.

Pennsylvania. — Lockard *v.* Robbins, 10 Atl. 120; Stockton's Appeal, 64 Pa. St. 58; Henwood *v.* Cheeseman, 3 Serg. & R. 500.

Vermont. — Watson *v.* Brainard, 33 Vt. 88; Chamberlin *v.* Donahue, 44 Vt. 57; Keyes *v.* Hill, 30 Vt. 759.

Wisconsin. — Ackerman *v.* Lyman, 20 Wis. 454; De Pere Co. *v.* Reynen, 65 Wis. 271, 22 N. W. 761, 27 N. W. 155.

Assumpsit for the use and occupation of land lies only in case the defendant can be considered as having held the land with the permission of the plaintiff. This permission may be either express or implied. In cases where the defendant has held the land adversely to the plaintiff no permission can be inferred and assumpsit does not lie. But where the defendant has entered without any color of right and held the land, the law, in cases where there is nothing to rebut the presumption, may perhaps presume a promise on the part of the defendant to pay for the use and a permission on the part of the plaintiff. Wiggin *v.* Wiggin, 6 N. H. 298, where, however, the defendant held the land in defiance of the plaintiff.

Where a person has taken possession of land and occupied it with the

an inference of a tenancy.[4] Proof of a mere offer to hire is insufficient to support the action.[5]

(2.) Rebuttal of Implied Agreement. — (A.) GENERALLY. — While proof of the possession and beneficial enjoyment of real estate with the permission of the owner is ordinarily sufficient to sustain an action upon an implied agreement for use and occupation, yet the implication may be rebutted by proof that the use and occupation was under such circumstances as to show that there was no expectation of rent by either party,[6] or by proof of a contract or other fact inconsistent with the relationship of landlord and tenant.[7]

permission of the owner the law will presume a promise to pay a reasonable rent though none has been expressly fixed. In such a case the contract is deduced from the assent of the owner and the action of the occupant under it. But there is no basis for any such presumption when an occupant enters without any understanding with the owner or without his knowledge. Still less, if possible, is there ground for any such presumption when an entry was made and occupation was commenced before the alleged landlord had any title. An occupation commenced without authority of course is not in privity with the ownership of the title, and there can be no privity of contract between the occupant and the owner of the land until there has been at least an acknowledgment of the owner's title and of tenure under him. Brolosky *v.* Ferguson, 48 Pa. St. 434.

In Gillespie *v.* Hendren, 98 Mo. App. 622, 73 S. W. 361, where an occupant of land was notified by the owner that he would be required to pay rent, although he refused to agree to pay any particular amount or pay any sum whatever, it was held that his occupation with the owner's permission and with the understanding that rent would be demanded created an implied promise, at least, to pay a reasonable compensation for the use of the land.

4. *Kentucky.* — Richmond & L. Tpke. R. Co. *v.* Rogers, 7 Bush 531.

Louisiana. — Jordan *v.* Mead, 19 La. Ann. 101.

Missouri. — Edmonson *v.* Kite, 43 Mo. 176.

Nebraska. — Janouch *v.* Pence, 93 N. W. 207.

New York. — McFarland *v.* Watson, 3 N. Y. 286; Wood *v.* Wilcox, 1 Denio 37.

Ohio. — Butler *v.* Cowles, 4 Ohio 205.

Vermont. — Chamberlin *v.* Donahue, 44 Vt. 57.

Mere occupancy of the premises in question, with the knowledge, but not with the consent, of the owner, is not enough to raise the implication of a tenancy at will. Center Creek Min. Co. *v.* Frankenstein, 179 Mo. 564, 78 S. W. 785.

Where land is occupied by a person not the owner in such manner and under such circumstances that a contract to pay rent cannot be inferred, in the absence of proof of an express contract, rent for the occupancy of the premises cannot be recovered. Mitchell *v.* Pendleton, 21 Ohio St. 664.

5. Ballentine *v.* McDowell, 3 Ill. 28, where the plaintiff proved that the defendant had a conversation with the plaintiff's agent in which the latter wished the defendant to agree to a specified rent, to which the defendant made no other objection than the amount of rent required, and offered a smaller sum, which was not agreed to, it was held that the evidence was insufficient to establish the relation of landlord and tenant.

6. Collyer *v.* Collyer, 113 N. Y. 442, 21 N. E. 114.

7. Chamberlin *v.* Donahue, 44 Vt. 57.

As, for example, where the occupant expressly refuses to hold

(B.) Occupancy Wrongful in Inception. — Where the occupancy of land was wrongful in its inception the presumption is that it continues to be so; and where the owner of the land asserts that the occupant subsequently became his tenant he has the burden of proving that fact.[8]

(C.) Occupant Claiming Adversely. — Where the entry of the defendant is shown not to have been under the plaintiff, and his right to occupy was and is claimed adversely to the plaintiff, then the implication of tenancy or of contract will not arise, and the action must fail.[9] But in the case of possession taken under a lease with right of renewal, the continued possession cannot be presumed to be wrongful or adverse.[10]

(D.) Possession Under Contract of Purchase. — In an action for use and occupation, proof that the defendant was in possession of the premises as the plaintiff's vendee rebuts every implication of a promise by the defendant to pay rent.[11] And an entry under such an agreement may be proved by parol for the purpose, not of

such a relation. Keyes *v.* Hill, 30 Vt. 759.

8. Walker *v.* Engler, 30 Mo. 130.

9. Boston *v.* Binney, 11 Pick. (Mass.) 1, 22 Am. Dec. 353; Littleton *v.* Wynn, 31 Ga. 583; Pico *v.* Phelan, 77 Cal. 86, 19 Pac. 186. See also Williams *v.* Hollis, 19 Ga. 313; Jackson *v.* Mowry, 30 Ga. 143; Lankford *v.* Green, 52 Ala. 103; Scales *v.* Anderson, 4 Cushm. (Miss.) 94.

Lathrop *v.* Standard Oil Co., 83 Ga. 307, 9 S. E. 1041, where the negotiations between the parties looking to the recognition of the plaintiff as landlord, and to the payment both of past and future rent, had no result. No terms were agreed upon, and there was nothing to indicate that the defendant or its agent intended to treat the plaintiff as landlord, or as entitled to claim any rent except as a result of negotiations.

10. There must be proof of an open, notorious disclaimer of all holding under the landlord's title and an adverse claim set up that would amount to a disseisin in order to rebut the presumption that the continued possession was under the lease. Myers *v.* Silljacks, 58 Md. 319.

11. *Alabama.* — Tucker *v.* Adams, 52 Ala. 254.

Arkansas. — Mason *v.* Delancy, 44 Ark. 444.

Connecticut. — Vandenheuvel *v.* Storrs, 3 Conn. 203.

Georgia. — Brown *v.* Persons, 48 Ga. 60.

Illinois. — McNair *v.* Schwartz, 16 Ill. 24; Greenup *v.* Vernor, 16 Ill. 25.

Indiana. — Newby *v.* Vestal, 6 Ind. 412; Fall *v.* Hazelrigg, 45 Ind. 576, 15 Am. Rep. 278.

Kentucky. — Jones *v.* Tipton, 2 Dana 295.

Massachusetts. — Little *v.* Pearson, 7 Pick. 301, 19 Am. Dec. 289.

Michigan. — Dwight *v.* Cutler, 3 Mich. 566, 64 Am. Dec. 105.

New York. — Bancroft *v.* Wardwell, 13 Johns. 189.

Texas. — Brown *v.* Randolph (Tex. Civ. App.), 62 S. W. 981.

Vermont. — Chamberlin *v.* Donahue, 44 Vt. 57; Stacy *v.* Vermont C. R. Co., 32 Vt. 551. See also Hough *v.* Birge, 11 Vt. 190.

In Bemis *v.* Allen, 119 Iowa 160, 93 N. W. 50, where the controversy was whether or not the defendant held the premises in question under a contract of purchase, or as mere tenant as claimed by plaintiff, it was held proper to receive in evidence the lease under which the defendant occupied the premises for the prior year, as tending to show that at the date when defendant claimed the contract to purchase was made, his possession was referable to the lease, and thus to cast

showing title, but of showing that the relation of landlord and tenant did not exist.[12]

c. *Distress for Rent.* — In order to justify a distress for rent, it is incumbent upon the claimant to show the existence of the relation of landlord and tenant;[13] and he must make the same showing to entitle himself to the statutory lien.[14]

d. *Proceedings to Recover Possession of Premises.* — Again, on proceedings to recover possession of premises alleged to be held by the defendant as tenant of the plaintiff,[15] such as summary proceedings under the statute,[16] or unlawful detainer,[17] there must be

upon him the burden of establishing a valid subsequent agreement by which the relation of landlord and tenant had ceased and that of vendor and vendee had been created.

12. Barnes *v.* Shinholster, 14 Ga. 131.

Where the issue is whether or not an occupant of land is in possession as tenant or under a contract of purchase, testimony of a witness that he had heard the landlord say that the occupant was to redeem the land which he bid off for such occupant is sufficient to prove a contract of bargain and sale. Clark *v.* Green, 35 Ga. 92.

13. Murr *v.* Glover, 34 Ill. App. 373; Hancock *v.* Boggus, 111 Ga. 884, 36 S. E. 970; Cohen *v.* Broughton, 54 Ga. 296, where it was held that the fact that the owner of land rented it to another, without proof that such other ever took possession of or cultivated the land, did not justify the levy of a distress warrant upon crops made on the land by a third person, between whom and the plaintiff or the plaintiff's tenant there was no express or implied contract to re-rent.

In Carter *v.* Grant, 32 Gratt. (Va.) 769, it was held that on proceedings on a forthcoming bond given on a distress for rent, whether by motion or by action on the bond, it is incumbent upon the plaintiff to prove the contract of rent for which the distress was sued out.

14. Saterfield *v.* Moore, 110 Ga. 514, 35 S. E. 638.

15. In Edmondson *v.* White, 19 Ga. 534, a proceeding under the Georgia Rent Laws of 1827, wherein the tenant made affidavit that he was not a tenant or lessee of the plaintiff, it was held incumbent on the plaintiff to show a lease before he was entitled to recover possession of the premises.

In an action by a landlord to recover possession of the demised premises the plaintiff cannot, after producing a written lease, the formal execution of which he fails to prove, maintain his action on parol proof of possession and payment of rent. The law implies no contract where the parties have made an express one, and a landlord, after such offer of an express contract and failure to prove it, is estopped from denying the existence of such written contract. Barry *v.* Ryan, 4 Gray (Mass.) 523.

In an action to recover land wherein the answer of the defendant does not admit facts sufficient to raise a presumption of a lease entitling the landlord to the rent demanded, the burden of proof is upon him to establish such a lease. Montgomery *v.* Willis, 45 Neb. 434, 63 N. W. 794.

16. Hughes *v.* Mason, 84 N. C. 472; Bergman *v.* Roberts, 61 Pa. St. 497; People *ex rel.* Ainslee *v.* Howlett, 76 N. Y. 574; Dodin *v.* Dodin, 32 Misc. 208, 65 N. Y. Supp. 851; Smith *v.* Caputo, 14 Misc. 9, 35 N. Y. Supp. 127; Evertson *v.* Sutton, 5 Wend. (N. Y.) 281, 21 Am. Dec. 217.

To authorize the institution of summary proceedings to recover possession of land, the conventional relation of landlord and tenant must be shown to have existed between the parties; it is not enough to show a tenancy by operation of law. People *ex rel.* Mitchell *v.* Simpson, 28 N. Y. 55; Benjamin *v.* Benjamin, 5 N. Y. 383.

17. Mason *v.* Delancy, 44 Ark. 444; Wheelock *v.* Warschauer, 21

proof of the conventional relation of landlord and tenant between the parties.

e. *Entry After Rental Notice.* — The relation of landlord and tenant may be implied from the fact of a person's entering or holding over after a notice from the owner that he should expect rent.[18]

f. *Grantor Remaining in Possession.* — When a grantor remains in possession of the premises conveyed after the conveyance, the presumption is that he is there rightfully and as tenant of the grantee; but this presumption, like other presumptions, may be controlled or disproved by counter-proof.[19]

g. *Presumption of Assignment of Lease.* — **(1.) Generally.** Where a person who is not the lessee is in possession of demised premises, the presumption is that he is in possession as assignee of the term;[20] and if such is not the fact the burden is upon him to explain the real character of his possession.[21]

Cal. 309. And see article "FORCIBLE ENTRY AND DETAINER." Vol. V.

In Knowles *v.* Murphy, 107 Cal. 107, 40 Pac. 111, an action of unlawful detainer, it was held that upon proof of the execution of the lease, and the default in the payment of the rent provided therein, with the admission that the defendants held possession of the demised premises, the plaintiffs were entitled to judgment.

18. Coit *v.* Planer, 7 Robt. (N. Y.) 413, 4 Abb. Pr. (N. S.) 140; Despard *v.* Walbridge, 15 N. Y. 374. See also Bishop *v.* Howard, 2 B. & C. (Eng.) 100.

19. As, for example, the grantor may show that the conveyance, although absolute in form, was given only for the purpose of securing a debt owing by him to the grantee. Larrabee *v.* Lumbert, 34 Me. 79. The court said if the evidence was offered for the purpose of altering or varying the terms of the grant it could not on legal principles have been received, but that this was not the object. The grantor "did not enter into possession as he might have done, but permitted the defendant to remain in the undisputed enjoyment of the premises, and this evidence is offered to show what were the relations between the parties to the deed after its delivery. The action of assumpsit for use and occupation may be maintained upon parol evidence, and the same evidence is receivable to defeat it. The claim of the plaintiff rests only on a legal presumption. Proof is properly admissible to show why and wherefore the demandant continued in possession, and thus to rebut a presumption of law or establish its inapplicability as affecting the legal rights of the parties."

20. Weide *v.* St. Paul Boom Co. (Minn.), 99 N. W. 421; Frank *v.* New York, L. E. and W. R. Co., 122 N. Y. 197, 25 N. E. 332; Washington R. E. Co. *v.* Roger Williams Sil. Co., 25 R. I., 56 Atl. 686; Cross *v.* Upson, 17 Wis. 638.

Possession Soon After the Departure of the Original Lessees, and the exercise of such acts in sub-leasing, etc., as would be natural in an assignee, furnish presumptive evidence of an actual assignment. Adams *v.* French, 2 N. H. 387.

21. Ecker *v.* Chicago, B. & Q. R. Co., 8 Mo. App. 223, where the court said that the assignment of a lease is a fact of which the lessor may not be cognizant, but the party in possession necessarily knows whether he is in as assignee or not, and it is therefore incumbent upon him to disclose the true character of his possession. See also Bedford *v.* Terhune, 30 N. Y. 453, where the court, quoting from Quackenboss *v.* Clarke, 12 Wend. (N. Y.) 555, said: "The fact of possession is sufficient evidence of an as-

(2.) Validity of Assignment. — The law further presumes that the assignment was sufficient to transfer the term and satisfy the statute of frauds.[22]

(3.) Possession of Entire Premises. — An assignment of the lease will not be presumed when it is not shown that the occupant is in possession of the entire premises.[23]

(4.) Express Covenant to Pay Rent. — The law does not presume that the assignee entered into an express covenant to pay rent, so as to make himself liable otherwise than through privity of estate.[24]

(5.) Conclusiveness of Presumption. — This presumption of an assignment of the lease is but a *prima facie* presumption, and may be rebutted by proof that the person charged as assignee never in fact took an assignment of the lease;[25] that he is a sub-tenant, or merely a licensee,[26] or that the lease had expired before he took possession.[27]

h. *Presumption From Tenant Holding Over.* — When a tenant in possession under a lease from year to year, or for a term of years, holds over after the expiration of his term with the consent of the landlord, a renewal of the contract is presumed.[28] And where the tenant in such case asserts that he holds, not as tenant, but

signment in the first instance. The fact of an assignment is a transaction between the defendant and the lessee of which the plaintiff is not cognizant, but the defendant is. There is no hardship, therefore, in concluding him by his possession unless he discloses the true state of his title."

A Conveyance of Leased Premises by the Lessee to one having notice of the lease operates merely as an assignment of the term, and if the assignee goes into possession he will be liable to the lessor for the rent reserved in the lease. And although the term had expired before the grantee took the conveyance and went into possession, yet if he had notice that the premises were held by his grantor as tenant of another, and there had never been any surrender of possession to the landlord, there will be deemed to have been a holding over with the consent of the landlord, and the grantee will become a tenant from year to year or at will, and liable for the stipulated rent. De Pere Co. *v.* Reynen, 65 Wis. 271, 22 N. W. 761, 27 N. W. 155.

22. Frank *v.* New York, L. E. & W. R. Co., 122 N. Y. 197, 25 N. E. 332.

23. Ely *v.* Winans, 88 N. Y. Supp. 929.

24. Frank *v.* New York, L. E. & W. R. Co., 122 N. Y. 197, 25 N. E. 332. See also Dey *v.* Greenebaum, 82 Hun 533, 31 N. Y. Supp. 610; Quackenboss *v.* Clarke, 12 Wend. (N. Y.) 555. *Compare* De Pere Co. *v.* Reynen, 65 Wis. 271, 22 N. W. 761, 27 N. W. 155, *supra* note 12.

25. Cross *v.* Upson, 17 Wis. 638. See also Mariner *v.* Crocker, 18 Wis. 251, where the testimony showed clearly and conclusively that the occupant was not in possession of the premises as assignee of the lease, but solely by virtue of his appointment as receiver of the railroad claimed to have occupied the premises in question as a depot. Frank *v.* New York, L. E. & W. R. Co., 122 N. Y. 197, 25 N. E. 332, where it was said that this rule was open to question, if the rebutting evidence offered involved proof of entry without right or as a trespasser.

26. Washington R. E. Co. *v.* Roger Williams Sil. Co., 25 R. I., 56 Atl. 686.

27. Williams *v.* Woodard, 2 Wend. (N. Y.) 487.

28. *Alabama.* — Crommelin *v.* Thiess, 31 Ala. 412, 70 Am. Dec. 499.

as purchaser, the burden of proving that fact is upon him.[29] This presumption in the case of a tenant holding over, however, will not arise where the original lease embraces collateral matters to be performed on each side which can only be performed during the life of the lease itself.[30]

B. Possession of the Tenant. — a. *In General.* — The production of a lease does not of itself show the relation of landlord and tenant existing between the parties; it must be further shown that the lessee entered under the lease[31] or held such possession of the premises as was referable to the lease.[32]

Connecticut. — Bacon *v.* Brown, 9 Conn. 334.

Illinois. — Webster *v.* Nicholls, 104 Ill. 160; Clinton Wire Cloth Co. *v.* Gardner, 99 Ill. 151.

Indiana. — Burbank *v.* Dyer, 54 Ind. 392.

Kansas. — Intfen *v.* Foster, 8 Kan. App. 336, 56 Pac. 1125.

Maine. — Longfellow *v.* Longfellow, 54 Me. 240.

Maryland. — DeYoung *v.* Buchanan, 10 Gill & J. 149, 32 Am. Dec. 156.

Michigan. — Scott *v.* Beecher, 92 Mich. 590, 52 N. W. 20.

Mississippi. — Usher *v.* Moss, 50 Miss. 208.

Missouri. — Quinette *v.* Carpenter, 35 Mo. 502.

Nebraska. — Montgomery *v.* Willis, 45 Neb. 434, 63 N. W. 794.

New York. — Schuyler *v.* Smith, 51 N. Y. 309.

Pennsylvania. — Harvey *v.* Gunzberg, 148 Pa. St. 294, 23 Atl. 1005.

Tennessee. — Noel *v.* McCrory, 7 Cold. 623.

29. Hill *v.* Goolsby, 41 Ga. 289.

30. As, for example, where the lessee was to finish a certain room in the house, then in an unfinished state, for which purpose he was to advance money to be repaid by the lessor at the end of the year, and other matters indicating a bargain for the duration of the term fixed by the lease itself, which in this case was a year. Diller *v.* Roberts, 13 Serg. & R. (Pa.) 60, 15 Am. Dec. 578.

So where the rent reserved is merely ground rent or for the land, exclusive of the buildings, and the landlord at the expiration of the term becomes entitled to the buildings erected by the tenant, a different rule prevails. Abeel *v.* Radcliff, 15 Johns. (N. Y.) 505.

31. If necessary to show possession it is sufficiently established by testimony of the tenant himself that he had had the property for a number of years, and that his refusal to surrender was due to the fact that the landlord had told him he might hold the premises as long as he wanted them, if he would pay as much rent for them as any one else, and the landlord himself did not want them. Goodbub *v.* Scheller, 3 Ind. App. 318, 29 N. E. 610.

32. Cadwell *v.* Center, 30 Cal. 539, 89 Am. Dec. 131.

In the absence of any evidence to the contrary, where a written lease is to take effect *in praesenti* and possession under the lease is given, the *prima facie* presumption is that both the instrument and possession of the premises were delivered on the date of the lease. Rhone *v.* Gale, 12 Minn. 25.

Where one occupies and improves real estate, which is manifestly beneficial, and a lease to him for a nominal rental from the owner is found duly recorded, it will be presumed in the absence of testimony that he holds under the lease. Libby *v.* Staples, 39 Me. 166.

Compare Gilhooley *v.* Washington, 4 N. Y. 217, *holding* that an action of covenant upon a sealed lease for the non-payment of rent does not depend upon proof of the occupation or enjoyment of the demised premises.

As against a tenant for a term under an agreement, who has once entered and become vested with the term, a recovery of rent for the entire term may be had, without any

Slight Facts Tending to Show a Dealing With the Premises on the part of the lessee are sufficient to prove the taking possession by him.[33]

b. *Implied Agreement.* — So, too, where a person is sought to be charged as tenant under an implied agreement, beneficial enjoyment or constructive possession is a fact necessary to be shown.[34]

It Is Not Necessary to Show Actual Occupation; it is enough to show that the power to occupy and enjoy was given by the landlord to the tenant.[35]

C. Possession of Landlord. — Proof of the execution of the lease and that the rent due thereunder is unpaid makes a *prima facie* case for the recovery of the rent.[36]

D. Title of Landlord. — When the relation of landlord and tenant is shown to exist, the former is not required to prove title.[37] But the reception in evidence of deeds and other muniments of title is not error of which the tenant, sued for unlawfully detaining the premises, can complain.[38]

Action by Purchaser of Demised Premises. — In an action by a purchaser of the demised premises to recover for rent, it is incumbent upon the plaintiff to show that he has succeeded to the original landlord's rights.[39]

other proof of use and occupation than such entry by him, although it may appear that he afterward quitted the premises long before his term expired. Crommelin *v.* Thiess, 31 Ala. 412, 70 Am. Dec. 499.

33. As, for example, entry on the land, putting up notice to rent, making repairs, etc. Smith *v.* Barber, 96 App. Div. 236, 89 N. Y. Supp. 317, recognizing the existence of this rule.

34. Wood *v.* Wilcox, 1 Denio (N. Y.) 37. In McFarlan *v.* Watson, 3 N. Y. 236, where a lease was executed for a year at a quarterly rent, and the defendant, who entered under the lessee for the commencement of the term and occupied for the whole year, paid the first three quarters' rent, the lessor's agent taking receipts from him as such agent, it was held that an agreement to pay rent to the lessor might be inferred from such facts so as to sustain an action in the name of the lessor for use and occupation during the last quarter of the term.

Occupancy by a Third Person who was put in possession by the defendant is evidence from which the occupancy by the defendant may be inferred. Dimock *v.* Van Bergen, 12 Allen (Mass.) 551.

35. Hall *v.* Western Transp. Co., 34 N. Y. 284.

Evidence of the Delivery and Acceptance of the Key is sufficient, although there is no evidence of continued actual possession. Hall *v.* Western Transp. Co., 34 N. Y. 284; Little *v.* Martin, 3 Wend. (N. Y.) 220.

36. Collins *v.* Hall, 5 Wash. 366, 31 Pac. 972, *holding* that it is not necessary to show possession by the lessor, for if the want of possession in the lessor at the time of the execution of the lease is a defense the burden of proving it is on the lessee.

37. Crim *v.* Nelms, 78 Ala. 604; Cressler *v.* Williams, 80 Ind. 366; Kiernan *v.* Terry, 26 Or. 494, 38 Pac. 671; Tryon *v.* Davis, 8 Wash. 106, 35 Pac. 598.

On the Hearing of an Application for an Injunction by a landlord against his tenant for cutting and carrying away timber it is not necessary that the landlord show his title to the property. Parker *v.* Raymond, 14 Mo. 535.

38. Williams *v.* Wait, 2 S. D. 210, 49 N. W. 209, 39 Am. St. Rep. 768.

39. And for this purpose it is competent to receive in evidence the

2. Nature and Sufficiency of Proof. — A. DIRECT TESTIMONY. A verbal contract of letting may be proved by the direct testimony of a witness,[40] provided, of course, the facts to which he is testifying are within his personal knowledge.[41] An occupant of land alleged to be in possession as tenant cannot testify that he considers the property as his, in the absence of any attempt to bring home to the other party a knowledge of his claim.[42]

B. BEST AND SECONDARY EVIDENCE. — The fact of tenancy or occupancy of real estate is one which may exist independently of any written lease which the tenant may hold, and as such may be shown by oral testimony;[43] it is not necessary to produce the lease in order to establish the fact of occupancy or identify the parties to the letting; provided, of course, the inquiry does not extend to the contents of the written lease.[44] There is authority, however, that where the occupation of land is founded on a writ-

judgment against the original landlord, execution thereon, and sale thereunder and the sheriff's deed to the plaintiff. Johnson *v.* Doss, 1 W. & W. Civ. Cas. (Tex.) § 1075.

40. McDonald *v.* Stewart, 18 La. Ann. 90. In Gilman *v.* Riopelle, 18 Mich. 145, where the issue was whether or not an occupant was in possession as owner or as tenant, it was held that evidence of a conversation between him and the claimant of the property before he went into possession, tending to show negotiations for a lease by him, was proper. The court said: "It would be clearly competent to prove such a contract by either party to it, or it would be equally competent to prove it by any other person who was present at the time and heard it."

41. Testimony of a witness that the premises in question "were not altogether taken" should, on proper objection, be excluded where it is not pretended that he was present at the conversation between the parties in relation to the renting of the rooms, and hence had no personal knowledge on the subject. Lewis *v.* Havens, 40 Conn. 363.

42. To permit him to so testify is merely permitting him to testify to the state of his own mind. Hogsitt *v.* Ellis, 17 Mich. 351. The court said that after remaining quietly in possession for a long period, without any overt act or any declaration to the other claimant indicating a hostile holding, until possession is demanded of him by the owner, he cannot then, for the first time, by mere words, without any facts to sustain them, or by a mere silent opinion or determination of his own mind, make his holding adverse to the owner, so as to prevent the latter from treating him, at his option at least, as tenant at sufferance.

43. Hammon *v.* Sexton, 69 Ind. 37.

In Grubbs *v.* Stephenson, 117 N. C. 66, 23 S. E. 97, an action by a landlord to recover crops grown by the defendant, to satisfy advances made to him, wherein a third person intervened claiming also as landlord, it was held that as there was evidence tending to show that the plaintiff's name was not in the lease when signed by the defendant it was competent for the defendant to testify that he had rented no land from the plaintiff, and that the defendant having testified that he had rented the land in question from the intervenor, it was competent to corroborate him by producing the lease from the latter.

Evidence of Declarations by One in Possession of land that he let it as tenant of a certain person is admissible, even though it be shown that the tenancy was created by a written instrument and that instrument is not produced. Thompson *v.* Matthews, 61 N. C. 15.

44. Rayner *v.* Lee, 20 Mich. 384.

ten contract, even though it be defective, the writing must be produced as the best evidence.[45]

C. Documentary Evidence. — Lease. — When necessary to show the conventional relation of landlord and tenant, the written lease between the parties may be received in evidence,[46] although not under seal,[47] or not so executed as to transfer an interest in the land.[48]

45. Brewer *v.* Palmer, 3 Esp. (Eng.) 213, *holding*, however, that, if the plaintiff has made out a *prima facie* case without proof of the existence of a writing, defendant, if he seeks to show a holding under a written lease, must produce the instrument. See also Mensing *v.* Cardwell (Tex. Civ. App.), 75 S. W. 347, *holding* that a party cannot complain on appeal that oral testimony of the lessee as to the existence of the rental contract was received in the absence of an objection by him on the trial that the written lease should have been produced.

In Cowie *v.* Ahrenstedt, 1 Wash. 416, 25 Pac. 458, it was held error to permit extrinsic evidence as to the defendants' interest in the premises as lessees because it affirmatively appeared that the lease was in writing and within the convenient reach of the parties.

In Buell *v.* Cook, 5 Conn. 206, the plaintiff, in support of a count for use and occupation of land, offered to prove the acknowledgment of the defendant that he had hired and occupied the premises, during the period in question, agreeing to pay therefor a certain sum, and it appeared that there was an outstanding written agreement for a lease of the premises for the period in question in the hands of the plaintiff, which, through failure of the event on the happening of which the lease was to become effective, never did so become; and it was held that, in the absence of evidence showing that the acknowledgment in question was referable to the written agreement, the evidence was admissible, but that if the acknowledgment had relation to the written lease the offered testimony was not admissible because where the occupation of land is founded on a written contract, even though it be defective, the writing must be produced as being the best evidence.

46. **A Written Lease, Although Signed Only by the Lessee,** is admissible against him on behalf of the lessor where it appears that the lessee took possession of the premises thereunder; under such circumstances the lessee is estopped to question the validity of the agreement. Equitable Life Assur. Soc. *v.* Schum, 40 Misc. 657, 83 N. Y. Supp. 161.

In Finnigan *v.* Biehl, 30 Misc. 735, 63 N. Y. Supp. 147, an action by a third person against the landlord for damages for personal injuries suffered through lack of repairs to a certain portion of the premises, it was held that a written lease by the defendant of the premises was admissible for the purpose of showing that at the time of the injury the portion of the premises where the injury was received was in possession of the tenant who was responsible for the repairs.

A Lease Signed Only by One as the Lessee's Agent is not competent evidence to prove the relation of landlord and tenant so as to invoke the rule of estoppel against the tenant, where there is no evidence or offer of such that the agent was empowered to make the lease, or of possession and enjoyment under and by virtue of the lease. Chicago & A. R. Co. *v.* Keegan (Ill.), 31 N. E. 505.

47. In an action of assumpsit for use and occupation, occupation by permission of the plaintiff may be proved directly by the production and proof of a written lease not under seal. Goshorn *v.* Steward, 15 W. Va. 657.

48. Cornwall *v.* Hoyt, 7 Conn. 420, where it was held that writings given as leases of land, although not executed so as to transfer an interest or title in the land, might be received in evidence to show that the

Rent Note. — The relation of landlord and tenant may be shown by the production of a note given for the rent.[49]

Judgment in Former Action Between Parties. — The relation may be shown by the production of a judgment in summary proceedings for the possession,[50] or a judgment for rent,[51] of the premises rendered in a former action between the parties.

A Judgment in Ejectment is conclusive evidence that the relation of landlord and tenant did not exist between the parties during the time mesne profits could be recovered in the ejectment suit.[52]

D. Admissions and Declarations. — The relation of landlord and tenant may be established by the admissions or declarations of the parties on the subject.[53] But, of course, the act relied on as an admission must come within the rule defining that term.[54]

defendant and others under him had occupied the premises in question by permission of the plaintiff.

49. Kelly *v.* Eyster, 102 Ala. 325, 14 So. 657.

50. A judgment roll in summary proceedings by a landlord against his tenant is conclusive evidence of the existence and validity of the lease, the occupation by the tenant and that rent is due; but not as to the amount due. Goetschius *v.* Shapiro, 88 N. Y. Supp. 171. See also Reich *v.* Cochran, 151 N. Y. 122, 45 N. E. 367, 56 Am. St. Rep. 607; Jarvis *v.* Driggs, 69 N. Y. 143; Brown *v.* Mayor, 66 N. Y. 385.

51. The record of a judgment for rent confessed by a tenant to his landlord is competent evidence to establish the fact that the relation of landlord and tenant was recognized by both parties. Weidner *v.* Foster, 2 Penn. & W. (Pa.) 23.

In an action for rent a judgment in favor of the plaintiff in a former action against defendant for rent of the same premises for a previous quarter is conclusive upon all the questions determined therein. Kelsey *v.* Ward, 38 N. Y. 83.

52. Chamberlin *v.* Donahue, 44 Vt. 57.

53. Hearn *v.* Gray, 2 Houst. (Del.) 135.

An Agreement Made on Sunday for the Rent of Land, although void under the statute, yet may be considered and looked to in connection with other circumstances to explain the character of the alleged tenant's possession and to account for the subsequent conduct of both parties in relation to the land; it may be proved as a declaration or admission on the part of the landlord forming part of the *res gestae,* and the fact that these declarations or admissions were made on Sunday does not impair or affect their character as evidence. Rainey *v.* Capps, 22 Ala. 288.

In Murray *v.* Mattison, 67 Vt. 553, 32 Atl. 479, where the issue was whether or not the defendant or her husband was in fact the tenant of the plaintiff, it appeared that she personally had paid none of the rent, but that her husband had paid it up to the time of the alleged unlawful dispossession by remittances direct to the landlord, and that she was fully cognizant of all the correspondence which passed between her husband and the landlord concerning it; and it was held that a letter from her husband to the landlord remitting money in payment for rent was admissible against her as tending to show in connection with the other testimony in the case that she understood that her husband and not she was the tenant.

In an action to recover agreed rent for the use of a right of way over land belonging to the lessor, evidence of statements by the lessee to his tenants when he leased to them as to his right to use the right of way is admissible as tending to show not only the use of the premises by the defendant, but that the right to their use was obtained from the plaintiff. Ledyard *v.* Morey, 54 Mich. 77, 19 N. W. 754.

54. The acknowledgment by an

Thus declarations of a person in possession of goods as to the ownership, made in the absence of the alleged owner, are not admissible against the latter to charge him as tenant of the premises.[55]

E. HEARSAY. — But the relation of landlord and tenant cannot be shown by hearsay evidence.[56]

F. PAROL EVIDENCE. — a. *In General.* — Although the occupation was under an oral agreement void under the statute, the agreement may be proved in order to show the intended relation of landlord and tenant.[57]

b. *Conditional Delivery.* — Where a lease is absolute and unconditional on its face, parol evidence cannot be received to prove that the parties agreed that it should be conditional.[58]

occupant of real estate of an obligation to pay rent in case a tenancy shall be found to exist is not an admission that a tenancy does in fact exist. Robinson *v.* Morgan, 58 N. H. 412.

55. In Gates *v.* Max, 125 N. C. 139, 34 S. E. 266, an action for rent wherein the plaintiff claimed that the parties in possession were agents for the defendant, it was held that evidence of such persons as to the ownership of the goods on the premises was not admissible as against the defendant. The court said: "The general rule is that declarations of a party in possession of property are admissible for the purpose of qualifying such possession; but we do not think that the authorities go to the extent of allowing such evidence for the sole purpose of fixing a pecuniary responsibility upon a third party not then present."

56. The recital in a bill of sale of goods seized and sold by an officer, that the seizure and sale were made in pursuance of a distress for rent, is no proof whatever of the existence of a lease or of any agreement by which the sum recited was reserved so as to support the distress. Smith *v.* Sheriff, 1 Bay (S. C.) 443.

57. Ecclesiastical Com'rs *v.* Merral, L. R. 4 Ex. 162.

Although a verbal contract of letting may, under the statute of frauds, be ineffectual to pass to the lessee a leasehold estate for the term sought to be created thereby, yet where a statute expressly provides that a landlord, in case the agreement is not by deed, may recover from the tenant a reasonable satisfaction for the use and occupation of his land, it is error in an action under such a contract of letting to reject parol evidence to show the duration of the use and occupation and the value thereof. Hellams *v.* Patton, 44 S. C. 454, 22 S. E. 608.

In Thomas *v.* Nelson, 69 N. Y. 118, an action to recover rent, the plaintiff offered in evidence a memorandum signed by himself stating in substance that he was to give a lease to the defendant for seven years, no rent being specified. It was held that this did not preclude him from proving the agreement by parol evidence, since the memorandum was not itself the contract.

A verbal agreement to pay rent, if not within the statute of frauds, or its actual payment, may be sufficient to raise a presumption of the existence of the relation of landlord and tenant and make it incumbent on the tenant to show the invalidity of the agreement or its insufficiency to originate the relation. Crim *v.* Nelms, 78 Ala. 604.

Where a tenant under an oral agreement has enjoyed the use of land according to the stipulated terms of such agreement, parol evidence of the agreement between the parties under which the tenant entered and occupied the premises is not in violation of the provision of the statute of frauds. In King *v.* Woodruff, 23 Conn. 56, where the premises had been occupied by the tenant and nothing remained necessary for the fulfillment of the contract except the payment of the stipulated rent, evidence was held proper to show the amount of that rent.

58. Browning *v.* Haskell, 22 Pick. (Mass.) 310, where the lessor was

c. *Commencement of Term.* — Where the lease, complete in other respects, does not state when the term was to commence, that fact may be shown by parol evidence.[59]

d. *Non-Existence of Tenancy.* — A person sought to be charged as tenant may show that the relation of landlord and tenant never in fact existed.[60] Thus it is proper to permit him to show that the lease was one of a series of transactions by which the premises were designed to be made security for the payment to the alleged lessor of a sum of money.[61]

not allowed to prove that when the lease was presented to her by the lessee for her signature she refused to sign it because it was not according to agreement; that the lessee then stated that he would not take possession of the premises unless she signed it, but that if she would sign it he would have the lease made out according to agreement within a few days, and that it should make no difference with her, whereupon she signed it, and that she afterward demanded of him to make the lease according to the agreement, which he refused to do.

59. In Legget *v.* Harding, 10 Ind. 414, the lease was dated on the 2d of October, 1854. The defendant proved that it was not actually signed till February, 1855. It was held proper to permit the plaintiff to prove that the contract was made and reduced to writing on the 2d of October, 1854; that the year was to commence at that date; that possession was then given and received; and that by accident or carelessness the agreement was not actually signed till February, though it was then signed with reference to its having taken effect on the day of its date.

60. Crim *v.* Nelms, 78 Ala. 604. See also Russell *v.* Turner, 7 Johns. (N. Y.) 186. As, for example, that the alleged lease was executed in pursuance of an usurious agreement and is void, so that such relation did not exist. People *v.* Howlett, 76 N. Y. 574. See also Reich *v.* Cochran, 151 N. Y. 122, 45 N. E. 367, 56 Am. St. Rep. 607, 37 L. R. A. 805.

It is permissible for a tenant sued for rent under a written lease to show that the premises had been occupied by another person under a lease from the same landlord, covering the same period of time. Murphy *v.* Farley, 124 Ala. 279, 27 So. 442.

In Buell *v.* Cook, 4 Conn. 238, an action for use and occupation where the plaintiff had failed in his attempt to prove a demise from himself to the defendant, it was held that the defendant was properly permitted to prove that he held and occupied not under the plaintiff, but under a third person.

Where it is charged that the occupant of the premises was in possession as the agent of the owner and that a lease between them was but a device designed and intended to conceal the true relation of principal and agent between the alleged lessor and lessee, the rule that the servant of a tenant is in privity with the tenant and bound by the terms of the contract between the landlord and tenant does not operate to estop such servant from showing the true relation existing between the parties. Oriental Inv. Co. *v.* Barclay (Tex. Civ. App.), 64 S. W. 80.

Where the estoppel is set up by one claiming as assignee of the lessor, the tenant may show that such assignment was ineffectual to pass the lessor's title. Hilbourn *v.* Fogg, 99 Mass. 11.

In a landlord and tenant process, evidence that the plaintiff's lessor never had any title to the premises in controversy has no tendency to show that the defendant never occupied the premises as the tenant of such lessor. If he did so occupy he was estopped to deny his landlord's original title. Gage *v.* Campbell, 131 Mass. 566.

61. Steele *v.* Bond, 28 Minn. 267, 9 N. W. 772.

c. *Acceptance of Tenancy Induced by Fraud or Mistake.* — **(1.) Generally.** — Although the general rule is that a tenant is estopped to deny his landlord's title, he may show that he was induced to accept the lease by force,[62] fraud or misrepresentation, or under a mistake, or in ignorance of his rights.[63] And the lessor may be permitted to

62. The rule that a lessee cannot controvert the title of his lessor exists only where the lease has been taken without fraud, force or illegal acts on the part of the lessor, and not where the lessor has threatened to evict the lessee from the premises by force of arms unless he did take the lease. Hamilton *v.* Marsden, 6 Binn. (Pa.) 45.

In Foust *v.* Trice, 53 N. C. 290, where the issue was whether or not an occupant of land was in possession as the plaintiff's tenant or as the defendant's tenant, the occupant having testified that he was carried upon the premises and left there through fraud and violence, for the purpose of getting him off of other lands, and that he had never occupied as the plaintiff's tenant, it was held competent for him to state also in corroboration that he occupied as the defendant's tenant. The court said: "To become the tenant or licensee of the person who had perpetrated the fraud or violence upon him, he must afterward have willingly consented to do so. If it could be proved that he consented to remain on the land, not with the consent or permission of the person who had so improperly carried him there, but with the permission, and as the tenant, of some other person who claimed to be the owner of the land, we think the idea of his having become the tenant or licensee of the first would be completely repudiated. Why not allow such proof? It certainly could not be rejected upon the ground upon which a lessee is barred from disputing his lessor's title. That is founded upon the principle of good faith and privity between the parties. Certainly no such principle can apply between persons whose apparent connection has been brought about by violence and treachery. And it would be particularly inapplicable to a case where the person who committed the wrong told his victim that the land upon which he had placed him had no owner, and he might probably remain upon it five, six or ten years, or perhaps his lifetime."

63. *Alabama.* — Farris *v.* Houston, 74 Ala. 162; *s. c.*, 71 Ala. 570; Blankenship *v.* Blackwell, 124 Ala. 355, 27 So. 551, 82 Am. St. Rep. 175.

California. — Johnson *v.* Chely, 43 Cal. 299; McDevitt *v.* Sullivan, 8 Cal. 592.

Illinois. — Carter *v.* Marshall, 72 Ill. 609; Mackin *v.* Haven, 187 Ill. 480, 58 N. E. 448.

Massachusetts. — Beatty *v.* Fishel, 100 Mass. 448.

Missouri. — Suddarth *v.* Robertson, 118 Mo. 286, 24 S. W. 151; Higgins *v.* Turner, 61 Mo. 249.

New York. — Ingraham *v.* Baldwin, 9 N. Y. 45.

Pennsylvania. — Thayer *v.* Society of United Brethren, 20 Pa. St. 60; Gleim *v.* Rise, 6 Watts 44; Ward *v.* Philadelphia, 6 Atl. 263.

Rhode Island. — Jenckes *v.* Cook, 9 R. I. 520.

South Dakota. — Williams *v.* Wait, 2 S. D. 209, 49 N. W. 309, 39 Am. St. Rep. 768.

Texas. — Franklin *v.* Hurlbert, 1 W. & W. Civ. Cas., § 816.

Vermont. — Swift *v.* Dean, 11 Vt. 323, 34 Am. Dec. 693.

Virginia. — Locke *v.* Frasher, 79 Va. 409. See also Alderson *v.* Miller, 15 Gratt. 279.

In Ware *v.* Chew, 43 N. J. Eq. 493, 11 Atl. 746, the court said: "Whenever parol testimony becomes essential to prevent fraud or wrongdoing no writing is so sacred as to render such testimony inadmissible. Courts are willing that parties who bind themselves by written instruments shall have the full benefit of all they contracted for; but if it is made to appear that a party makes a claim under such instrument of fraud or claims that which it is made to appear by parol was expressly excluded he will not be sustained in a court of equity."

show that the execution of the lease was obtained by the lessee through fraud.[64]

(2.) Mere Expressions of Opinion. — Representations which are mere expressions of opinion and judgment on the part of the lessor are not sufficient to show fraud.[65]

(3.) Tenant's Title Irrelevant. — Where the issue is whether or not a lessee was induced to accept the lease by fraud and duress, evidence of the tenant's title to the property in controversy is irrelevant in the absence of proof of anything said or done by the lessor or any one acting for him which would constitute fraud or duress.[66]

(4.) Burden of Proof. — A lessee seeking to avoid a lease for fraud has the burden of proving the fraud.[67]

G. CIRCUMSTANTIAL EVIDENCE. — a. *In General.* — While the relation of landlord and tenant is one of fact to be established by legal evidence, it does not of necessity mean that in all cases the proof must show that the relation was created by written instrument or by express agreement.[68] Necessarily, at least in the absence of

Even in a Action of Unlawful Detainer the tenant may show that he was induced to accept the lease by reason of the fraud of the lessor. Knowles *v.* Murphy, 107 Cal. 107, 40 Pac. 111.

64. Christie *v.* Blakely (Pa.), 15 Atl. 874, where the lessor was permitted to show that the lease was drawn by the lessee, who read it over to him; that he could not read writing, and that the lease as read to him did not correspond to the agreement made between them.

In Rober Iron Co. *v.* Trout, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285, a lease was annulled because its execution was induced by false representations on the part of the lessees, by means of which an unconscionable advantage was taken of the lessors, the false representations being of matters peculiarly within the knowledge of the lessees and on which the lessors relied and acted as they had a right to do, being injured and deceived by them because of their falsity.

65. Wilkinson *v.* Clauson, 29 Minn. 91, 12 N. W. 147. See also the article "FRAUD," Vol. VI.

66. People's Loan & Bldg. Ass'n *v.* Whitmore, 75 Me. 117, where the court in so ruling said: "The jury are to infer fraud or duress from proof that the defendant had the better title and no real occasion to take a lease and create an estoppel. No legitimate inference of fraud or duress which should void the effect of the lease can be drawn from such proof. . . . To admit the evidence of the defendant's title under the pretext that it is competent upon the question of fraud or duress would be in effect to relieve the defendant from the duty which the law imposes upon him of performing his own solemn agreement." See also Thayer *v.* Society of United Brethren, 20 Pa. St. 60; Ward *v.* Philadelphia (Pa.), 6 Atl. 263; Williams *v.* Wait, 2 S. D. 210, 49 N. W. 309, 39 Am. St. Rep. 768.

67. It is error to impose upon the lessor the burden of proving that there were no fraudulent representations. Beatty *v.* Fishel, 100 Mass. 448.

68. Osgood *v.* Dewey, 13 Johns. (N. Y.) 240.

"To maintain this action for use and occupation it was not necessary for the plaintiffs to prove an express contract with the defendant at the time when he first took possession, nor an express reservation of a certain rent, nor that the defendant has paid rent to the plaintiffs or their intestate. Such an action may be maintained on the implied undertaking where the permissive holding is established; and if it appears in the evidence that a certain rent was reserved the reservation may be used to regulate the *quantum* of dam-

an express agreement, resort must be had to circumstantial evidence,[69] which must be sufficient to warrant the inference that the parties intended to assume such a relation toward each other.[70]

Likelihood of Promise. — Where the only issue is whether or not the defendant had promised to pay rent, he cannot prove that he made no such promise by merely showing that, under the circumstances, it was not reasonable or likely he would have done so.[71]

b. *Conduct of Parties.* — The relation of landlord and tenant may sometimes be inferred from the conduct of the parties toward each other; but what particular conduct will raise such an inference depends upon the circumstances of the particular case.[72]

ages." Stockett *v.* Watkins, 2 Gill & J. (Md.) 326, 20 Am. Dec. 438.

69. Welcome *v.* Labonte, 63 N. H. 124.

Failure To Demand Rent. — Necessarily in determining whether or not the relation of landlord and tenant existed, in support of an action for use and occupation, circumstantial evidence is resorted to, such as silence and acquiescence of the alleged landlord; his failure to charge, demand or receive rent during the whole term of the occupancy, etc. Aull Sav. Bank *v.* Aull, 80 Mo. 199. See also Barron *v.* Marsh, 63 N. H. 107, where it was held that on an issue as to whether or not an occupant of land had promised to pay rent, evidence that the buildings occupied by him were built by him upon the land with the understanding that no rent was to be paid, and that no rent had been paid to or demanded by the owner, is competent.

Claim of Hostile Holding. Where the issue is whether or not an alleged tenant is holding as tenant or under an adverse claim of ownership, the issue is to be determined by the jury from the facts produced in evidence, such as showing that he went in under some colorable claim of right at least, hostile to that of the owner, or that the landlord's title had become extinct, or that he had subsequently obtained it, or at least some colorable claim to it, upon which, though unsound, he still might in good faith have relied, as against the owner, and that the owner had been informed that he was holding, or claiming to hold, in hostility to him. Hogsitt *v.* Ellis, 17 Mich. 351.

70. Preston *v.* Hawley, 101 N. Y. 586, 5 N. E. 770, where the defendant had sold the premises in question to the plaintiff, the evidence showed affirmatively that he did not remain in possession by virtue of any express agreement to rent the premises, and it was held that none could be inferred from the fact that some of the defendant's property remained on the premises after the sale, the defendant expressing a willingness merely to pay storage, but disaffirming any willingness to pay rent for the premises because he thought the rent asked was excessive.

While in an action for rent for use and occupation of premises it is necessary to prove the conventional relation of landlord and tenant, it is not essential, however, that the proof show that the relation was created by written instrument or express agreement. Proof of an implied agreement is sufficient, but there must also, in order to support the action, be proof of some circumstances authorizing an inference that the parties intended to assume the relation toward each other. Van Arsdale *v.* Buck, 82 App. Div. 383, 81 N. Y. Supp. 1017.

71. Swann *v.* Kidd, 78 Ala. 173.

72. Steen *v.* Scheel, 46 Neb. 25, 64 N. W. 957.

The relation of landlord and tenant may be presumed from the conduct of the parties in reference to each other and in respect to the lands which are the subject of the rent; and if the facts of the case are such in the estimation of the jury as to exclude every other reasonable hypothesis, then the law will imply that

c. *Previous Existence of Relation.* — Evidence of the existence of the relation of landlord and tenant for a period of time immediately preceding that in question is competent in connection with evidence of continued occupancy,[73] but that it existed at one time is no evidence that it existed at a previous time.[74]

d. *Kinship of the Parties.* — On an issue as to whether or not an occupant of land was to pay for its use and occupation, the kinship of the parties, although proper to be considered in determining whether there was an express agreement that no rent was to be paid, is not of itself sufficient to raise an inference of such a contract.[75] Slight evidence, however, may justify such an inference.[76]

e. *Payment of Rent.* — Payment of rent affords some evidence of the relation of landlord and tenant between the parties.[77]

the relationship of landlord and tenant does in fact exist. Rainey *v.* Capps, 22 Ala. 288.

73. Withington *v.* Warren, 12 Metc. (Mass.) 114. See also Longfellow *v.* Longfellow, 54 Me. 240, where it was held proper to show the existence of the relation at a previous period by the introduction of a lease between the parties, although that lease had expired at the time in question and the rent under it had already been paid; the court invoking the rule that once a tenancy is proved to have existed it will be presumed to continue in the absence of evidence to the contrary, so long as the lessee remains in possession.

74. McKay *v.* Glover, 52 N. C. 41.

75. Sterrett *v.* Wright, 27 Pa. St. 259 (where the occupant was the son-in-law of the owner); Oakes *v.* Oakes, 16 Ill. 106. See also Clark *v.* Clark, 58 Vt. 527, 3 Atl. 508, where although the question whether a child could recover for the use of his real estate occupied by a parent without an express contract, or circumstances which in law amount to a contract, was raised but not decided, the court said: "We only say that the existence of that relation tends rather to rebut than to raise the implication of a contract for rent."

In Harlan *v.* Emery, 46 Iowa 538, it was held that from the fact that a mother occupies premises belonging to her son, she not being a member of his family, it was to be presumed that she was to pay what they were reasonably worth, unless it were expressly understood by the parties that she was to have the premises rent free; but that in rebuttal of this presumption it was proper to permit testimony of a statement by the son that the mother was a great care and trouble to himself and family; that he was furnishing her a house and getting nothing for it; that "whilst this statement does not necessarily mean that plaintiff was not to have anything for the house it is fairly susceptible of that meaning."

76. Oakes *v.* Oakes, 16 Ill. 106.

77. Bishop *v.* Howard, 2 B. & C. (Eng.) 100; Hearn *v.* Gray, 2 Houst. (Del.) 135; Voight *v.* Resor, 80 Ill. 331; McFarlan *v.* Watson, 3 N. Y. 286; Peters *v.* Elkins, 14 Ohio 344; Kiernan *v.* Terry, 26 Or. 494, 38 Pac. 671. See also Virginia Min. & Imp. Co. *v.* Hoover, 82 Va. 449, 4 S. E. 689. *Compare* Newlin *v.* Palmer, 11 Serg. & R. (Pa.) 98.

"The relation of landlord and tenant between the person who owns and the person who occupies the premises in question may be proved and established to the satisfaction of a jury in a trial like this by acts or facts which clearly show it, as well as by direct evidence, and the payment of rent for the premises occupied by one person to another, and so received by the other, has always been considered the strongest kind of evidence of that character to prove that the relation of landlord and tenant by the recognition of both parties then existed between them as to the premises, for which it was paid by the one and received by the other." Barrett *v.* Jefferson, 5 Houst. (Del.) 477.

II. NATURE AND TERMS OF TENANCY.

1. Presumptions and Burden of Proof. — A. In General. — The inference of a tenancy arising from the fact of use and occupancy does not tend to establish one kind of a tenancy more than another, but simply the fact of tenancy.[78] And in the absence of express agreement or statute determining the question, the nature of the tenancy is one of fact either to be established by direct evidence, or inferred from the circumstances of the particular case.[79] Where the terms of a verbal contract of letting are in dispute, in an action to recover rent thereunder the burden of proof is upon the plaintiff to show by a preponderance of the evidence that the terms are what he claims them to be.[80]

B. Presumption From Tenant Holding Over. — a. *In General.* The general rule is that where a tenant under a lease for a year, or for a term of years, holds over after the expiration of his term, the presumption is, in the absence of proof of any different arrangement, that he holds for a like term and upon the conditions fixed by the original lease;[81] although in some jurisdictions this rule does not

Payment of Rent During the Occupancy of a Third Person is presumptive evidence that the occupant held under the defendant, in an action for use and occupation, which is the same as actual occupancy by the defendant. Moffatt *v.* Smith, 4 N. Y. 126.

78. Hogsitt *v.* Ellis, 17 Mich. 351.

79. An Intention of the Parties To Create an Estate at Will, terminating by its own limitation upon the contingency of a failure by the tenant to pay rent in advance, cannot be inferred from a mere agreement by the tenant to pay the rent in advance; the agreement should, in order to support such an inference, also be on condition that on failure to pay as stipulated the tenant should leave the premises. Sprague *v.* Quinn, 108 Mass. 553. See also Elliott *v.* Stone, 1 Gray (Mass.) 571.

Declarations of Owner. — In Cunningham *v.* Roush, 157 Mo. 336, 57 S. W. 769, it was held that declarations by the owner before and after an occupant had taken possession that he had let the occupant have the farm for five years, and stating the terms on which he had let him have it, were sufficient to show a tenancy from year to year.

Computation of Rent. — Although a verbal contract of letting may, because of the statute of frauds, be ineffectual to create an estate in the premises for the term agreed upon, but merely creates an estate at will, it does not necessarily follow that such an estate may not be converted into a tenancy from year to year by other circumstances; such, for example, as the payment and receipt of rent computed by the year, parol evidence of which should be received. Hellams *v.* Patton, 44 S. C. 454, 22 S. E. 608.

80. East *v.* Crow, 70 Ill. 91.

81. *Alabama.* — Harkins *v.* Pope, 10 Ala. 493.

Connecticut. — Bacon *v.* Brown, 9 Conn. 334.

Georgia. — Hill *v.* Goolsby, 41 Ga. 289.

Illinois. — Prickett *v.* Ritter, 16 Ill. 96; Goldsborough *v.* Gable, 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294, *reversing* 36 Ill. App. 363; Webster *v.* Nicholls, 104 Ill. 160; Clinton Wire Cloth Co. *v.* Gardner, 99 Ill. 151.

Indiana. — Duffy *v.* Carman, 3 Ind. App. 207, 29 N. E. 454.

Kansas. — Intfen *v.* Foster, 8 Kan. App. 336, 56 Pac. 1125.

Maryland. — Hall *v.* Myers, 43 Md. 446; De Young *v.* Buchanan, 10 Gill & J. 149, 32 Am. Dec. 156.

Mississippi. — Usher *v.* Moss, 50 Miss. 208.

Missouri. — Quinette *v.* Carpenter, 35 Mo. 502.

prevail, the occupant being deemed merely a tenant by sufferance,[82]

Nebraska. — Montgomery *v.* Willis, 45 Neb. 434, 63 N. W. 794.

New York. — Hays *v.* Moody, 2 N. Y. Supp. 385; Schuyler *v.* Smith, 51 N. Y. 309, 10 Am. Dec. 609; Abul *v.* Radcliff, 15 Johns. 505.

Pennsylvania. — Diller *v.* Roberts, 13 Serg. & R. 60, 15 Am. Dec. 578; Harvey *v.* Gunzberg, 148 Pa. St. 294, 23 Atl. 1005; Laguerenne *v.* Dougherty, 35 Pa. St. 45; Bedford *v.* McElherron, 2 Serg. & R. 49.

South Carolina. — Dorrill *v.* Stephens, 4 McCord L. 59; Godard *v.* South Carolina R. Co., 2 Rich. L. 346.

Tennessee. — Noel *v.* McCrory, 7 Cold. 623.

Texas. — Franklin *v.* Hurlbert, 1 W. & W. Civ. Cas. § 816.

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

Where a landlord permits a tenant who has been in possession under a written lease to remain in possession after the expiration of the original tenancy, and receives rent quarterly for more than a year, it will be presumed in the absence of proof of any agreement to the contrary that the tenancy is from year to year upon the terms of the original demise, subject to all the conditions and covenants of the original lease. Gardner *v.* Dakota Co., 21 Minn. 33.

In the case of a tenant from year to year holding over, the law presumes an intention by the tenant to continue the yearly tenancy from the holding over. An agreement that such holding over should not be so regarded might be shown to rebut this presumption, or there might be such clear indications of an intention to vacate that a holding over for a day would not support the presumption. But in the absence of proof of any such agreement or such indications the holding over is the legal expression of the tenant's intention, and all that is necessary to complete the contract is the consent or acquiescence of the landlord. Scott *v.* Beecher, 92 Mich. 590, 52 N. W. 20.

82. As, for example, in some of the New England states. Wheeler *v.* Cowan, 25 Me. 283; Kendall *v.* Moore, 30 Me. 327; Theological Institute *v.* Barbour, 4 Gray (Mass.) 329; Edwards *v.* Hale, 9 Allen (Mass.) 462; Emmons *v.* Scudder, 115 Mass. 367; Walker Ice Co. *v.* American Steel & Wire Co., 185 Mass. 463, 70 N. E. 937; Russell *v.* Fabyan, 34 N. H. 218.

In Whitney *v.* Swett, 22 N. H. 10, 53 Am. Dec. 228, the court said: "No estate or interest in lands can be created or conveyed without writing, but an estate at will: N. H. R. S., c. 130, sec. 12. It is therefore immaterial how the existence of a tenancy is shown, whether by parol evidence, or by written instruments, as receipts for rent, or the like; the right of the tenant, whatever might seem to be the actual contract of the parties, is nothing but a tenancy at will unless it can be shown that some other or higher interest or estate, as a tenancy for life or years, was created or conveyed by writing. The ruling of the court was therefore correct, that, in the absence of any writing to create or convey another estate, the plaintiff's interest in the property in question was only that of tenant at will."

When a party remains in possession of premises at the expiration of his term, and no new agreement is made, he becomes a tenant at sufferance. By the common law he was not liable for rent as such, although liable for the fair value of the premises in an action for use and occupation, and the landlord was entitled to resume possession, or the tenant to quit the premises, at any time. Merrill *v.* Bullock, 105 Mass. 486. By statute he is made liable for rent, and the provisions of the lease under which he entered may be used in evidence to prove the amount of rent due from him. Gen. Stat., ch. 90, § 26. When, however, there is a new contract, either express or which may be fairly implied from the acts of the parties, and the tenant occupies under it, his tenancy becomes a tenancy at will, and can only be determined by the landlord or tenant in the mode prescribed for that class of estates. Emmons *v.* Scudder, 115 Mass. 367.

and the burden is on him to show acquiescence of the landlord in his continued possession.[83]

b. *Conclusiveness of Presumption.* — The presumption under discussion may be rebutted by evidence showing a holding over, although by permission of the lessor, under a new contract,[84] or by other facts inconsistent with the presumption;[85] but it cannot be rebutted by proof of a contrary intention on the part of the tenant alone.[86] The burden of proving a new agreement is upon the tenant.[87]

C. The Condition of the Premises, Repairs, Etc. — The general rule is that, in the absence of a statute requiring it, or an express agreement therefor, it is not incumbent on the landlord to make repairs on the premises; and where the tenant asserts that the

83. Chesley *v.* Welsh, 37 Me. 106.

84. Williamson *v.* Paxton, 18 Gratt. (Va.) 475; Montgomery *v.* Willis, 45 Neb. 434, 63 N. W. 794; Walker *v.* Githens, 156 Pa. St. 178, 27 Atl. 36.

A yearly tenant holding over after the expiration of his term is presumed, in the absence of evidence to the contrary, to hold under the terms of the original lease; but this presumption may be rebutted by proof of a new agreement differing materially from the original lease, although the new agreement may be void under the statute of frauds because not reduced to writing. Crommelin *v.* Thiess, 31 Ala. 412, 70 Am. Dec. 499.

In Maynard *v.* Lockett, 1 Posey Unrep. Cas. (Tex.) 527, where the issue was whether or not a tenant holding over did so upon the terms of the original letting or under a new contract, it was held error to refuse to permit the lessee to be asked whether or not on the expiration of the written lease he had stated to the lessor that he would not continue to occupy the premises on the same terms, and the lessor's reply thereto.

In Hoff *v.* Baum, 21 Cal. 120, an action for the use and occupation of certain premises which it appeared the defendant had been occupying at a monthly rental, the plaintiff had served upon him a notice to quit. Previous to the time at which this tenancy expired the defendant proposed to the plaintiff, through a third person, to continue his occupancy at an increased rental, and the plaintiff expressed himself as satisfied with it, although there was no positive evidence that he notified the defendant of his acceptance. The defendant remained in possession and it was held that the inference must be that he did so with the consent of the plaintiff and that the proposal was accepted.

85. Montgomery *v.* Willis, 45 Neb. 434, 63 N. W. 794.

Where the issue is whether or not a tenant holding over after the expiration of his term holds under and subject to the terms of the original lease, it is proper to show that the landlord had, for a period after the expiration of the term, claimed rent in an amount less than that fixed by the lease as tending to show a modification of the terms prescribed by the lease. Quinette *v.* Carpenter, 35 Mo. 502.

86. Clinton Wire Cloth Co. *v.* Gardner, 99 Ill. 151; Goldsborough *v.* Gable, 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294, *reversing* 36 Ill. App. 363.

The mere notice by the tenant to the landlord to the effect that he does not intend to hold on the terms of the original lease is not sufficient to overcome the implication. Schuyler *v.* Smith, 51 N. Y. 309; Conway *v.* Starkweather, 1 Denio (N. Y.) 113.

87. Lutz *v.* Wainwright, 193 Pa. St. 541, 44 Atl. 565.

landlord did in fact make such an agreement, it is incumbent on him to establish it.[88]

D. As to Subletting, Etc. — Where a lessee sets up a contemporaneous agreement giving him the right to sublet, the lease itself giving him no such right, the burden is upon him to establish the agreement.[89] So, too, where the lease requires the lessor's written consent on the lease to a sublease by the lessee, the lease, showing no such consent, is *prima facie* evidence that none was given.[90]

2. Substance and Mode of Proof. — A. Direct Evidence. Where the agreement of tenancy is not in writing, a witness may be asked to "state the terms;" he need not necessarily be asked to state what was said.[91]

B. Best and Secondary Evidence. — The written lease is the best evidence of the terms of the tenancy as fixed therein,[92] and secondary evidence should not be received except upon proper foundation being laid therefor.[93]

C. Documentary Evidence. — In the case of a letting under a verbal agreement on the same terms as a former written lease, the written lease, on being properly proved, may be received in evidence for the purpose of determining the terms of the oral contract.[94]

D. Parol Evidence. — a. *Contemporaneous Parol Agreements.* **(1.) Generally.** — In the absence of fraud or mistake parol evidence

88. Burks *v.* Bragg, 89 Ala. 204, 7 So. 156. As to the admissibility of parol evidence in respect of the condition of the premises, repairs, etc., see *infra* this article.

See also Moore *v.* Weber, 71 Pa. St. 429, 10 Am. Dec. 708, where the court said: "It must certainly appear distinctly that the repairs were done under an agreement of some kind. The landlord may erroneously suppose himself bound, or he may do the repairs for the benefit of the property and that it may not fall into dilapidation. In the absence of an express agreement there is no implied obligation on the landlord to repair demised premises, nor does he impliedly undertake that they are fit for the purposes for which they are rented — that they are tenantable or shall continue so."

89. Zeigler *v.* Lichten, 205 Pa. St. 104, 54 Atl. 489.

90. And it then becomes incumbent on the lessee to show that consent had been given in some other manner. Berryhill *v.* Healey, 89 Minn. 444, 95 N. W. 314.

91. Frost *v.* Benedict, 21 Barb. (N. Y.) 247, where the plaintiff was permitted to state that he leased the premises to the defendant at a certain rent, reserving the right to sell at any time, and that the defendant accepted on such terms. See also, for discussion of the same principle, the article "Contracts," Vol. III.

92. Dikes *v.* Miller, 24 Tex. 417; Grayson *v.* Peyton (Tex. Civ. App.), 67 S. W. 1074. And see article "Best and Secondary Evidence," Vol. II.

93. Refusal to permit a tenant to give oral testimony as to the contents of the alleged written lease is proper where, although he asserted that the writing had been "misplaced," and that he had made "diligent search" for it without finding it, and "thought it was lost or destroyed;" yet he showed the contrary to be true, by the contradictory admission that "he was not prepared to say it was lost or destroyed," and that it was probably among certain private papers in his possession which he had carefully packed away for safe keeping, and which, he confessed, he had neglected to examine. Burks *v.* Bragg, 89 Ala. 204, 7 So. 156.

94. Pancoast *v.* Coon (Pa.), 9 Atl. 156.

is not admissible to vary or contradict the terms of a written lease.[95] And where a lease is explicit and unambiguous it is not competent to show by parol that other rights and privileges than those named in the lease were given.[96] The rule forbidding parol evidence to vary or contradict the terms of a written lease does not apply, however, when the written instrument was executed in pursuance, but only in partial execution, of a preceding verbal agreement.[97]

95. *Arkansas.* — Colonial & U. S. Mtge. Co. *v.* Jeter, 71 Ark. 185, 71 S. W. 945.

California. — Swift *v.* Occidental Min. & Pet. Co., 141 Cal. 161, 74 Pac. 700, 70 Pac. 470.

Colorado. — Equator Min. & Smelt. Co. *v.* Guanella, 8 Colo. 548, 33 Pac. 613; Randolph *v.* Helps, 9 Colo. 29, 10. Pac. 245.

Georgia. — Werner *v.* Footman, 54 Ga. 128.

Illinois. — Heisen *v.* Heisen, 145 Ill. 658, 34 N. E. 597, 21 L. R. A. 434; Lauber *v.* Collins, 40 Ill. App. 426; Hoag *v.* Carpenter, 18 Ill. App. 555; Rector *v.* Hartford Dep. Co., 190 Ill. 380, 60 N. E. 528, *affirming* 92 Ill. App. 175; Keigan *v.* Kinnaire, 12 Ill. App. 484.

Indiana. — Welshbillig *v.* Dienhart, 65 Ind. 94.

Louisiana. — D'Aquire *v.* Barbour, 4 La. Ann. 441; Frigerio *v.* Stillman, 17 La. Ann. 23.

Maine. — Stevens *v.* Haskell, 70 Me. 202.

Massachusetts. — Gardner *v.* Hazelton, 121 Mass. 494.

Michigan. — Walsh *v.* Martin, 69 Mich. 29, 37 N. W. 40.

Minnesota. — Wilkinson *v.* Clauson, 29 Minn. 91, 12 N. W. 147; St. Paul, M. & M. R. Co. *v.* St. Paul U. Dept. Co., 44 Minn. 325, 46 N. W. 566; Stewart *v.* Murray, 13 Minn. 393.

New Jersey. — Society Etc. *v.* Haight, 1 N. J. Eq. 393.

New York. — Hartford & N. Y. S. B. Co. *v.* Mayor, 78 N. Y. 1.

North Carolina. — Taylor *v.* Hunt, 118 N. C. 168, 24 S. E. 359.

Oregon. — Stoddard *v.* Nelson, 17 Or. 417, 21 Pac. 456.

Pennsylvania. — Lyon *v.* Miller, 89 Pa. St. 392; Burton *v.* Forest Oil Co., 204 Pa. St. 349, 54 Atl. 266.

Texas. — Greenhill *v.* Hunton (Tex. Civ. App.), 69 S. W. 440.

Virginia. — Tait *v.* Central Lunatic Asylum, 84 Va. 271, 4 S. E. 697.

West Virginia. — Hukill *v.* Guffey, 37 W. Va. 425, 16 S. E. 544.

Wisconsin. — Hunter *v.* Hathaway, 108 Wis. 620, 84 N. W. 996; Ninman *v.* Suhr, 91 Wis. 392, 64 N. W. 1035.

96. Kelly *v.* Chicago, M. & St. P. R. Co., 93 Iowa 436, 61 N. W. 957. The lease in this case was from the defendant railroad company to the plaintiff for premises on which the plaintiff had erected a hotel and eating house, reciting that it was made for a term of twenty years, and at the rental of one dollar per annum, and "in consideration of the stipulations and agreements herein contained, upon the part of the second party to be performed." The court said: "No doubt defendant was to be much benefited by the erection of an eating house on its line of road which should be conducted in the manner provided for by the lease. But the benefit thus conferred was, by the parties, evidently and expressly measured by the reduction of the rent to the mere nominal sum of one dollar per annum. The consideration for the benefit derived is expressed in the lease, and is no more subject to parol modification than any other condition therein contained."

97. Morgan *v.* Griffith, L. R. 6 Ex. 70; Graffam *v.* Pierce, 143 Mass. 386, 9 N. E. 819, where a verbal agreement was made to give a lease of a hall, and as part of the consideration the lessor promised to put in a certain kind of floor in the hall. The lease was executed. The lessor refused to put in the floor and in a subsequent action by the lessee against the lessor the court held parol evidence of the verbal agreement admissible, saying that the writing was but a part perform-

Third Persons. — The rule prohibiting parol evidence to control the terms of a written lease does not apply to one who is not a party thereto.[98]

(2.) Concerning the Premises. — Parol evidence is not admissible to control the language of the lease concerning the premises demised.[99] Thus, where the demised premises are described by known and certain bounds, it cannot be shown by parol evidence that the parties intended, designated or recognized other and different boundaries.[1] Nor is parol evidence admissible to show an agreement of the parties to reserve part of the premises not reserved by the lease.[2]

Supplying Omitted Description. — The description of the demised

ance of an oral contract, and contained nothing inconsistent with the alleged promise. *Compare* Averill *v.* Sawyer, 62 Conn. 560, 27 Atl. 73, an action upon the covenants of a lease where it appeared that the plaintiffs and defendant had entered into a written agreement by which the plaintiffs were to give the defendant a lease of a store in the building then in the course of construction, the agreement stating sundry particulars in which the store was to be fitted up. The lease was afterward executed in accordance with the agreement and signed by the parties. The defendant set up in defense, and by way of counter-claim, that certain things not specified in the written agreement, as to the fitting up of the store, had been previously promised by the plaintiffs and had not been done, in consequence of which he refused to sign the lease, and the plaintiffs had thereupon promised to do the things within a year, upon which the defendant had signed the lease, but that they had neglected to do them as promised. It was held that the evidence of those promises was not admissible, and that the inadmissibility of the evidence was not removed by the fact that the prior promise merged in the written agreement to make the lease was renewed by the plaintiffs at the time of the execution of the lease itself.

98. Walker Ice Co. *v.* American Steel & Wire Co., 185 Mass. 463, 70 N. E. 937; British & A. Mtge. Co. *v.* Cody, 135 Ala. 622, 33 So. 832.

99. Watkins *v.* Green, 22 R. I. 34, 46 Atl. 38, where it was held that a lessee could not show the existence of a custom in support of his claim that the furnishing of steam heat and forced air passed under the lease as "appurtenances."

1. Knapp *v.* Marlboro, 29 Vt. 282.

In Haycock *v.* Johnston, 81 Minn. 49, 83 N. W. 494, a lease of real property contained the following description of the rented property: "The real property situate in the city of St. Paul, . . . described as follows: Premises known as 'No. 771 Fairmount Avenue,' together with appurtenances. . . . This lease to cover the property that the house and barn stand on, only," and it was held that such description was not ambiguous, and that parol evidence tending to enlarge and extend it was properly excluded as incompetent.

In Morris *v.* Kettle, 57 N. J. L. 218, 30 Atl. 879, the lease demised the premises as "the house and premises . . . known and designated as No. 264 Johnston Ave., and all the buildings, outhouses and premises of such place with the appurtenances." It appeared that the lessor owned a strip of land on each side of the lot and that the outhouses were on the premises on one strip, but no buildings whatever were on the other strip; it was held that in order to extend the premises of the lease to the latter strip parol evidence was not admissible for the lessee to show that when the bargain was made for the lease the agreement was that he should have all the property owned by the lessor at that place.

2. Meredith Mechanic Ass'n *v.* American Twist Drill Co., 66 N. H. 267, 20 Atl. 330.

premises, in a lease required to be in writing under the statute of frauds, cannot be supplied by parol evidence.[3]

(3.) Concerning the Possession and Use of the Premises. — The general rule is that parol evidence is not admissible to vary or contradict the terms of the written lease concerning the use of the premises by the lessee.[4]

(4.) Concerning the Condition of the Premises, Repairs, Etc. — Evidence tending to show a contemporaneous oral warranty of the condition of the premises is not admissible.[5]

3. Guy *v.* Barnes, 29 Ind. 103.

4. A written contract to lease, complete in its terms, cannot be varied by evidence of a contemporaneous oral agreement that the contract was made with the understanding that the lessee and his partner should occupy the room for a particular purpose; that such occupancy was one of the main and essential conditions of the lease guaranteed; that, long before the day fixed for the commencement of the proposed lease, the lessee and his partner dissolved their partnership, and none of the members of the firm desired the room in question for the purpose contemplated; that, at the time lessee demanded the lease in pursuance of the agreement, he did so for himself alone, and for another purpose. Snead *v.* Tietjen (Ariz.), 24 Pac. 324.

Where the written lease specifies the purpose for which the premises were to be used, parol evidence cannot be received to show an agreement that the lessee had the privilege of using them for other purposes. Sientes *v.* Odier, 17 La. Ann. 153.

In the case of a written lease, evidence of a contemporaneous conversation between the parties in relation to the purpose for which the lease was given and received, and also as to the character of the land, for the purpose of showing the intention of the parties to the lease as to the use to be made of the land, is not admissible in aid of the construction of the lease where there is no ambiguity in its terms. Burr *v.* Spencer, 26 Conn. 159, 68 Am. Dec. 379.

In Haycock *v.* Johnston, 81 Minn. 49, 83 N. W. 494, it appeared that plaintiff leased to defendant the premises for the term of five years. This action was brought to recover rent due under the terms of the lease. Defendant interposed the defense that at the time the lease was executed, and as a part of that transaction, plaintiff specially agreed, by parol, not to erect a new dwelling within twenty-four feet of the rented building; that plaintiff violated such special agreement, erected a new building within fourteen feet, and thereby evicted defendant from a portion of the leased premises. It was held that evidence tending to prove the alleged parol special agreement was incompetent, as tending to vary and contradict the terms of the written lease.

In ejectment against an assignee of the lessee, parol evidence that it was verbally agreed between the parties to the lease that the premises should be used only for a certain purpose, or that the lessor would rent to no one but the lessee, is not admissible. Rickard *v.* Dana, 74 Vt. 74, 52 Atl. 113.

It is not competent for a lessee to show by parol evidence a contemporaneous promise on the part of the lessor that the adjoining premises should not be used in a manner inconsistent with the business of the lessee or so as to annoy him. Gray *v.* Gaff, 8 Mo. App. 329.

5. York *v.* Steward, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125; Stevens *v.* Pierce, 151 Mass. 207, 23 N. E. 1006.

Where the lease contains no warranty, express or implied, that the premises are fit for the purposes for which they are hired, evidence of declarations of the lessor to that effect made at the time of the execution of the lease is not admissible. Dutton *v.* Gerrish, 9 Cush. (Mass.) 89, 55 Am. Dec. 45.

Supply of Water. — In Cooney *v.*

Repairs. — And where the lease contains no covenant to repair, parol evidence of a promise by the lessor to repair, made prior to the execution of the lease, is not admissible.[6] Nor, where the lease contains covenants in relation to repairs, is it proper to receive evidence of an agreement by the lessor to make other repairs,[7] or to vary the agreement as made.[8] Where the lessee takes upon himself,

Murray, 45 Ill. App. 463, where the lease contains no provision with reference to the landlord furnishing a sufficient supply of water on the premises for the use of the lessee, it was held that evidence of a contemporaneous agreement by him to that effect is not admissible. See also Brigham *v.* Rogers, 17 Mass. 571.

Condition of Fixtures and Machinery. — In the case of a lease of a factory and the fixtures and machinery in it, which is silent as to the condition of the fixtures and machinery, parol evidence of a warranty by the lessor that the machinery is in good repair and of sufficient capacity to do the work for which the premises were let is not admissible. Naumberg *v.* Young, 44 N. J. L. 331, 43 Am. Rep. 380.

In Easterby *v.* Heilbron, 1 McMull. (S. C.) 462, the demised premises consisted of a certain lot, "together with the three brick tenement dwelling houses thereon, and also the brick buildings now in progress of being erected thereon;" the lessee covenanting to pay rent at a certain rate for the lot with the buildings already erected thereon until the brick buildings in process of construction were completed, and as soon as those were completed, to pay rent at an increased rate; the lessor covenanting to finish and complete the brick buildings in question according to his own plans and directions, and that whenever he declared the buildings completed and finished, of which he was to be the sole and exclusive judge, and tendered the use and occupation thereof to the lessee, the latter was bound to receive and accept them without any objection whatever. Subsequently the lessor tendered the lessee the buildings, the lessee taking possession and occupying them. Afterward the lessor distrained for the advance rent and the lessee replevied; it was held that the lessee could not prove that at the time of the notice and tender by the lessor the new buildings were not finished and completed; that to allow the tenant under such covenant to offer proof that the houses were unfinished would be to repeal the agreement altogether."

6. Roehrs *v.* Timmins, 28 Ind. App. 578, 63 N. E. 481; Eberle *v.* Girard L. Ins. A. & T. Co. (Pa.), 4 Atl. 808; Van Derhoef *v.* Hartman, 63 App. Div. 419, 71 N. Y. Supp. 552.

In Howard *v.* Thomas, 12 Ohio St. 201, an action by a lessee to recover damages from his lessor for not repairing the premises, it was held that the plaintiff could not show by parol evidence that at the time of the execution of the written lease he refused to sign it unless the lessor would promise to repair the premises, and that thereupon the defendant promised so to do, in consideration of which the lessee signed the lease. In this case it was insisted that the rule against parol evidence did not apply because the verbal promise was the consideration of signing the lease, but the court said: "It is obvious that the same might be claimed as being implied in every case when it is shown by parol that some stipulation ought to have been but was not expressed in the writing. There may be cases where an instrument executed is not intended to express the entire agreement of the parties, but is in execution of some distinct and separable part." *Holding* that case not to fall within the exception.

7. Smith *v.* Smull, 69 App. Div. 452, 74 N. Y. Supp. 1061.

8. Colhoun *v.* Wilson, 27 Gratt. (Va.) 639, where the lease stipulated for certain repairs to be made by the lessor upon the premises, but fixed no time within which the repairs were to be made, it was held that the time within which the lessor was to perform the covenant was limited only by the duration of the term;

by the express terms of the lease, the duty of making repairs, he cannot, in the absence of fraud, accident or mistake, prove a parol agreement by the lessor to make repairs.[9]

(5.) Concerning the Rent. — When the parties have reduced to writing their agreement in regard to the rent to be paid by the tenant, parol evidence is not admissible to vary or contradict the agreement so written,[10] either for the purpose of increasing or diminishing the sum so agreed upon. The written contract must speak for

that he had until the end of the term to make the repairs, and that parol evidence was inadmissible to prove a verbal agreement by the lessor to make repairs by a certain time. See also Cronin *v.* Epstein, 19 N. Y. St. 806, 2 N. Y. Supp. 709.

9. Wodock *v.* Robinson, 148 Pa. St. 503, 24 Atl. 73; Martin *v.* Berens, 67 Pa. St. 459. In Kline *v.* McLain, 33 W. Va. 32, 10 S. E. 11, 5 L. R. A. 400, where the lease provided that the lessee was to keep the premises in repair except as to unavoidable accidents and natural wear and tear, it was held that he could not, in support of an action by him against the lessor for failure to repair damages to the premises caused by unavoidable accidents, show a contemporaneous agreement by the lessor to make repairs.

In Nicoll *v.* Burke, 78 N. Y. 580, where a lease, by the terms of which the tenant was to keep the premises in repair, was renewed from year to year by indorsements thereon, it was held that evidence of a verbal agreement between the parties prior to the last renewal, by which the landlord was to make the repairs, and of the bad condition of the premises caused by failure so to do, was properly excluded.

10. Smith *v.* McEvoy, 98 Ill. App. 330, where the lease provided that the lessee was to pay the lessor as rent for the premises a certain portion of all the grain raised on the premises, to be delivered as stipulated; and it was held that the lessee could not show by parol evidence that it was agreed at the time of the lease that the lessor should furnish seed grain and pay for thrashing.

Where the lease provides that failure of the lessee to make any one of the payments when due will render the lease null and void, it is not permissible to show that it was agreed between the parties that the lessee could at any time relieve himself of all liability and terminate the lease by declining to pay any one of the payments when due. Hall *v.* Phillips, 164 Pa. St. 494, 30 Atl. 353.

In construing a stipulation in a lease for years that the lessee shall pay the rent reserved except in cases of unavoidable casualty, the declarations of the lessor as to his understanding of the terms of the lease are not admissible. Bigelow *v.* Collamore, 5 Cush. (Mass.) 226.

In Powell *v.* Thompson, 80 Ala. 51, an action by a landlord against his tenant and others for removing crops grown on the rented premises, with notice of the existence of the plaintiff's lien for rent for which the tenant had executed his rent note stipulating for the delivery of certain bales of cotton, it was held that the plaintiff should not have been allowed to prove that it was a rule or custom he had made on his plantation that he should have all the cotton seed raised on his land by his tenants, for the reason (1) that one man alone cannot establish a custom or usage, and (2) such evidence contradicted the express terms of the rent note.

A landlord cannot show by parol evidence that a lessee for years agreed to give notes *in praesenti* for the rents of succeeding years where the lease is reduced to writing and contains no such agreement, and there is no averment that owing to fraud, accident or mistake the writing does not fully express the concurrent intention of the parties. Pickett *v.* Ferguson, 45 Ark. 177, 55 Am. Rep. 545.

Medium of Payment of Rent. Where rent reserved in the lease is payable in money, parol evidence to

itself.[11] There is authority, however, to the effect that it is permissible to show a consideration additional to that expressed in the lease, where it is of the same character.[12]

(6.) Concerning Alterations, Etc. — Parol evidence is not admissible to vary the terms of the lease concerning alterations;[13] neither can

show that at least a portion of the rent was to be taken out in boarding is not admissible. Stull *v.* Thompson, 154 Pa. St. 43, 25 Atl. 890.

11. Williams *v.* Kent, 67 Md. 350, 10 Atl. 228, where it was accordingly held that it could not be shown by the lessee that, during the negotiations for proposed improvements and additions to the demised premises, the lessor had verbally agreed to pay the water assessments necessary for their maintenance. See also Preston *v.* Merceau, 2 Wm. Bl. (Eng.) 1249. Powell *v.* Thompson, 80 Ala. 51, where it was held error to permit the landlord to show that in addition to the twenty bales of cotton agreed in writing to be delivered as rent, it was orally agreed to deliver as part of the same consideration twenty-eight hundred bushels of cotton seed.

Where a lease under seal for a term fixes the amount of rent to be paid monthly, evidence of a parol agreement changing the amount of rent to be paid for the unexpired term, which leaves the lease unchanged in other respects, is not admissible. Barnett *v.* Barnes, 73 Ill. 216. See also Loach *v.* Farnum, 90 Ill. 368.

A lessee in possession under a lease on its face complete in every respect cannot show that prior to the execution of the lease it was agreed and understood that when the premises were sold by the lessor the proceeds of sale should be credited upon the note given by the lessee for rent. Boone *v.* Mierow (Tex. Civ. App.), 76 S. W. 772, so holding under the rule that parol evidence of a consideration different from or additional to that stated in the writing is not admissible where the consideration is contractual in its nature.

12. Raub *v.* Barbour, 6 Mack. (D. C.) 245. In this case the lease contained a covenant that the landlord would sell and convey to the tenant the premises at a designated price at any time during the life of the lease, and it was held error to refuse to permit the landlord to show that the tenant had verbally promised him that if he would execute the lease with the covenant in question inserted, he, the tenant, would in consideration of its insertion pay to the landlord, in addition to the consideration to be paid for the lease of the premises, one-half of whatever profit he might make and receive by reason of any sale or assignment he might subsequently make of his right, title and interest under and by virtue of the covenant.

In an action to enforce a lien for rent under a written lease the recitals therein as to the rental stated are not conclusive as between the landlord and tenant, and it is proper to permit parol evidence to show that the rent agreed to be paid by the terms of the lease was not the real rental for the use of the premises, but included additional indebtedness. First Nat. Bank *v.* Flynn, 117 Iowa 493, 91 N. W. 784.

13. Covenant Against Alterations. Where the lease contains a covenant against alterations, parol evidence is not admissible to show that when the lease was made it was expressly agreed that any such alterations as would not injure the tenement, and which might be again so changed as to return the tenement to the condition it was in when leased, should not be deemed a violation of such covenant. Walker *v.* Engler, 30 Mo. 130.

Where the parties have entered into a written lease of premises "in the present condition," evidence of a prior verbal agreement, by which the lessor after the lease began was to make a substantial addition to the property, is not admissible. Tracy *v.* Union Iron Wks. Co., 104 Mo. 193, 16 So. 203, where it was proposed to show by such evidence that the lessor had agreed to add a switch to con-

evidence of a contemporaneous oral agreement concerning improvements be introduced for that purpose.[14]

b. *Collateral and Independent Facts.* — **(1.) Generally.** — Parol evidence may be given of collateral and independent facts which tend to support the lease,[15] provided it is not offered to vary the agreement and is consistent with the instrument.[16]

(2.) Concerning the Premises. — The rule prohibiting parol evidence does not apply to a previous distinct collateral agreement upon a collateral and independent consideration concerning the premises demised, which did not merge in the subsequent written contract of hiring.[17]

(3.) Concerning Repairs. — Where the agreement by the lessor to repair was collateral it may be shown by parol evidence,[18] provided

nect the premises with a railroad line.

In McLean *v.* Nicol, 43 Minn. 169, 45 N. W. 15, where the written lease provided that the defendant should pay rent at a certain rate until gas and water service should be introduced into the premises, and an increased rental after that time, and contained no express covenant by the lessor to introduce gas and water, it was held that the tenant could not introduce evidence of such a contemporaneous oral agreement.

Parol evidence is not admissible to show that the words "the said house is to be furnished with gas," as used in a written lease, meant that the landlord should supply gas fixtures, and not that he should pay for the gas consumed in the house. Thorpe *v.* Sughi, 33 Ala. 330.

14. Evidence of a contemporaneous representation by the lessor that he would put certain improvements in the building, and that the lessee, relying on the representations, signed the lease, is not admissible in the absence of fraud. Lerch *v.* Sioux City Times Co., 91 Iowa 750, 60 N. W. 611. See also Lynch *v.* Lauer, 14 Misc. 252, 35 N. Y. Supp. 715.

In Louisiana, the Civil Code recognizes the right of the tenant to put improvements on the leased premises, and also recognizes his right of ownership in them, and accordingly improvements so made are the personal property of the tenant, and any agreement relative to them may be proved by parol evidence. McDonald *v.* Stewart, 18 La. Ann. 90.

15. Stearns *v.* Lichtenstein, 48 App. Div. 498, 62 N. Y. Supp. 949; Raub *v.* Barbour, 6 Mack. (D. C.) 245.

16. In Hamilton *v.* Emerson, 31 Misc. 257, 64 N. Y. Supp. 48, where the lease provided that the lessor was not responsible for any latent defect or change of condition in the premises, or for damages to the same; that the rent was not to be withheld or diminished on account thereof, and required the lessee to keep the premises in repair at his own expense, it was held that evidence of an agreement on the part of the lessor that the premises were in a tenantable condition and fit for occupancy was not admissible.

17. As, for example, a promise by the lessor that certain fixtures consisting of shelving, etc., then on the premises should be retained and remain there, so that the lessee might enjoy the benefit of them if he took the lease. Lewis *v.* Seabery, 74 N. Y. 409.

18. Van Derhoef *v.* Hartman, 63 App. Div. 419, 71 N. Y. Supp. 552.

In Caulk *v.* Everly, 6 Whart. (Pa.) 303, an action by a lessee against his lessor to recover for moneys expended in repairs, it was held that parol evidence was admissible to prove that after the lease had been executed and taken away the lessor returned to have it attested; that the lessee then mentioned that certain necessary repairs had been omitted and that the lessor agreed that they should be made at his expense by the lessee. The court said: "Letting and repairing

it be not inconsistent with, though it may be wholly independent of, the terms of the written contract.[19]

c. *Writing Not Embodying Whole of Agreement.* — **(1.) Generally.** When a tenant promised in writing to pay a stipulated rent, but so much of the contract as was intended to state the duties of the landlord was not reduced to writing, but was left to rest in parol, oral evidence of that portion of the contract is admissible.[20]

Omission. — But parol evidence to supply an omission as to the intended use of the premises is not admissible where its effect is to permit the court to make a contract for the parties which they have failed to make for themselves.[21]

are so far different that they may be subjects of distinct contracts; and as the execution of the lease was complete in this instance by the seal and delivery — the attestation of it by witnesses being unessential — the agreement to repair was made at a time subsequent to it. . . . It was evidently an afterthought; but even had the written contract not been closed the parol promise might nevertheless be set up to frustrate the lessor's meditated fraud."

In Heath *v.* West, 68 Ind. 548, where the controversy was as to whether or not the tenant had been injured by a breach of a covenant on the part of his landlord to build certain fences, it was held that inasmuch as the written lease was silent as to what particular fences or as to how much fencing was necessary to inclose the lands in the matter contemplated by the parties, oral testimony covering those questions did not relate to a matter covered by or included in the lease, and hence was properly received.

19. Williams *v.* Kent, 67 Md. 350, 10 Atl. 228.

20. As, for example, that he agreed with the tenant, although contemporaneously with the execution of the rent note, to make repairs on the rented premises, or incurred other like liability. Powell *v.* Thompson, 80 Ala. 51; Vandegrift *v.* Abbott, 75 Ala. 487; Murphy *v.* Farley, 124 Ala. 279, 27 So. 442.

Parol evidence that the lessor agreed to put the demised premises in a safe condition or represented that he had made them safe, which induced the lessee to accept the lease, or which was to be a part of the contract, is admissible where the lease relates only to the obligations and undertakings imposed upon the tenant, making not the remotest reference to any act to be done or obligation assumed, or representation made by the lessor. Such evidence shows an independent collateral agreement to the contract of renting and an inducement to make it not embraced in the written lease. Hines *v.* Willcox, 96 Tenn. 148, 33 S. W. 914, 54 Am. St. Rep. 823, 34 L. R. A. 824.

21. Nostrand *v.* Hughes, 54 App. Div. 602, 67 N. Y. Supp. 72, where the lease provided that the premises were "to be occupied . . . and not otherwise;" and it was held error to permit the introduction of parol evidence of an alleged verbal agreement on the part of the lessor to sign a consent required by law for the use of the premises for the sale of liquors. The court said that the effect of the parol evidence was to ask the court to read into the contract a covenant on the part of the lessor to sign a consent required by law which would make him liable to an action for civil damages for the abuse of the provisions of the law by the lessee thereunder; that the contract was complete and effective as it stood; that the lessee might use the building for any lawful purpose within the provisions of the law, but that he could not compel the lessor "to sign a consent entailing new liabilities and which were not within the contemplation of the parties at the time of entering into the written agreement, which must be deemed to have merged all previous conversations in reference to matters involved in the contract."

(2.) Concerning Improvements. — Where the lease does not recite fully the agreement in reference to improvements erected by the lessee the whole of the agreement may be shown.[22]

d. *Ambiguity.* — **(1.) Generally.** — Ambiguity in a lease may be explained by extrinsic evidence.[23]

Custom or Usage. — Parol evidence may be admitted to show a custom or usage of a place where the lease was entered into for the purpose of annexing incidents to and explaining the meaning of terms used in it. The custom, however, is admissible in proof, not for the purpose of establishing the lease itself, but to add an incident not expressly embraced in it, and in reference to which the parties are presumed to have contracted.[24]

The Situation of the Parties and the subject-matter of the transactions to which the lease relates may be taken into consideration in determining the meaning of any particular sentence or provision therein.[25]

Practical Construction. — Under the rule allowing evidence of the surrounding circumstances to aid or explain an ambiguity, it is proper to permit proof of the practical construction put upon the written lease by the parties and by their acts under it.[26]

(2.) Identification of Premises. — Parol evidence is admissible to

22. In Gray *v.* Oyler, 2 Bush (Ky.) 256, the lease gave the tenant the privilege of erecting buildings on the leased premises, but did not recite fully the agreement in reference thereto as to whether the buildings were to remain and be paid for by the landlord or be removed at the end of the term; and it was held proper to permit parol evidence showing that the tenant was to have the privilege of removing the buildings, or that the landlord should pay for them.

23. Midlothian Coal & Min. Co. *v.* Finney, 18 Gratt. (Va.) 304.

Where it is indisputable that, by the terms of the lease, if the lessee should elect to replace the property in case of its destruction by fire he was to have the insurance money, and the lease itself is silent as to whether he was to have it for the purpose of using it in replacing the property or after it should be replaced, parol evidence as to the real agreement of the parties in this connection is admissible. Cumming *v.* Barber, 99 N. C. 332, 5 S. E. 903. See article "AMBIGUITY," Vol. I, p. 825.

24. Moore *v.* Eason, 33 N. C. 568. See also Hutton *v.* Warren, 1 M. & W. (Eng.) 466.

25. Norris *v.* Showerman, 2 Doug. (Mich.) 16.

Construction of Written Lease. All the facts and circumstances surrounding the making of the lease are admissible so far as they tend to throw light on its meaning. Among these is the rental value of the premises. McConnell *v.* Bettman (Neb.), 90 N. W. 648, where the controversy between the landlord and tenant was whether or not the tenant was liable to the landlord for heat furnished, the lease itself being silent on that question, and the tenant not claiming that any express agreement to furnish it was made.

26. Swift *v.* Occidental Min. & P. Co., 141 Cal. 161, 74 Pac. 700, 70 Pac. 470; Siegel Cooper Co. *v.* Colby, 61 Ill. App. 315.

Where the language of an agreement to lease is so ambiguous as to leave in doubt the intent of the parties, and different interpretations are permissible, recourse may be had to the circumstances surrounding the parties when the agreement was made and the construction they have placed upon it as shown by their own acts. But evidence of such acts is not receivable to justify an interpretation which would be contrary to

identify the demised premises and to determine the limits thereof in the case of an ambiguous description.[27]

(3.) Intended Use of Premises. — In ascertaining the intention of the parties as to the use of the premises, resort may be had to surrounding circumstances, such as the condition of the premises,[28] their

the intent of the parties as clearly expressed in the language they have used. Hall *v.* Horton, 79 Iowa 352, 44 N. W. 569.

Evidence of conduct, not of the parties to the lease, but of lessees claiming adversely to each other, and of which it does not appear the lessor is cognizant, is not admissible in evidence to affect the construction of one of the leases. Walker Ice Co. *v.* American Steel & Wire Co., 185 Mass. 463, 70 N. E. 937. In this case the lease of the plaintiff was of the right to cut and take ice from a pond. The lease to the defendant, a manufacturing company, was of the pond itself, leasing the right of flowage for water power, the plaintiff claiming damages from the loss of the right to take ice occasioned by the defendant company's turning hot water from its condensers into the pond, and it was held that evidence on the part of the defendant as bearing on the construction of his lease, showing that hot water had been discharged into the pond in years past was properly excluded.

27. Parrish *v.* Vance, 110 Ill. App. 57; Corbett *v.* Costello, 8 La. Ann. 427; D'Aquire *v.* Barbour, 4 La. Ann. 441; Eastman *v.* Perkins, 111 Mass. 30; Meredith Mechanic Ass'n *v.* American Twist Drill Co., 66 N. H. 267, 20 Atl. 330; Sirey *v.* Braems, 65 App. Div. 472, 72 N. Y. Supp. 1044; Youmans *v.* Caldwell, 4 Ohio St. 71; Crawford *v.* Morris, 5 Gratt. (Va.) 90; Bell *v.* Golding, 27 Ind. 173.

In Sargent *v.* Adams, 3 Gray (Mass.) 72, 63 Am. Dec. 718, where the lessee in question simply described the premises as the "Adams house," so called, situated on Washington street, in Boston, it was held that the brief description the "Adams house" created no ambiguity on the face of the lease; it was to be presumed that there was a house or estate well known to which it would apply, and there was no ambiguity in the language of the contract, but when this designation came to be applied to the subject there were two subjects to which, without any forced construction, it might apply, and that the case accordingly fell under that class of cases where the very general description adopted will apply to two distinct subjects, and accordingly there is a latent ambiguity.

In Mittler *v.* Herter, 39 Misc. 843, 81 N. Y. Supp. 484, the premises were described as the "northerly half store" at a certain number of a street named, and it was held that the lessee was properly permitted to show that the premises demised were to be of certain dimensions, and that the dimensions of the store offered by the lessor to the lessee were smaller. See also Freund *v.* Kearney, 23 Misc. 685, 52 N. Y. Supp. 149, where the description contained in the lease was that "the westerly half" of the store in question was leased, and it was held that oral testimony to explain the ambiguous description was admissible.

In Alger *v.* Kennedy, 49 Vt. 109, 24 Am. Dec. 117, where the lease described the premises as "recently occupied by ——— as a French hotel," it was held proper to permit the introduction of parol testimony to show what such person occupied as a French hotel. "When doubts arise in applying the language to the thing granted, extrinsic or parol evidence is admissible to resolve the doubts."

28. Thomas *v.* Wiggers, 41 Ill. 470. Where there is nothing in the description of the premises contained in the lease by which it can be determined from the lease itself, whether they were intended for occupation by human beings or not, and an issue is raised in respect thereto, parol evidence is admissible to explain the purposes for which the premises were leased, and incidental thereto their condition and description. Landt *v.* Schneider (Mont.), 77 Pac. 307.

nature and situation, the use to which they previously had been put, and the occupation and character of the lessee.[29]

(4.) Concerning the Rent. — Where in regard to the rent the language of the lease is ambiguous, parol evidence of the real agreement of the parties is admissible.[30]

e. *Mistake.* — Parol evidence is admissible to show a mistake in the writing concerning the rent;[31] the party asserting the mistake having the burden of proof.[32] And to justify the re-formation of a lease on the ground of mistake, the mistake must be clearly and satisfactorily shown.[33]

f. *Fraud.* — Evidence of false representations knowingly made by the lessor as to the condition of the premises, let for a particular purpose, thereby preventing the lessee from more carefully examining the premises, is admissible.[34]

Interpretation of Reasonable Use. For the purpose of showing the intent of the parties in using the words "reasonable use" in the lease, evidence as to the condition, situation and suitableness of the premises for a particular purpose, and that the land had no rental value for any other purpose, and of a verbal agreement that it should be used for that purpose, is admissible. Bartels *v.* Brain, 13 Utah 162, 44 Pac. 715.

29. In aid of such circumstances parol evidence may also be received to show that during the negotiations the lessor had expressly notified the lessee that a particular use foreign to the intended use of the premises would not be permitted. Such evidence does not violate the general rule prohibiting parol evidence to vary or contradict a written instrument, but falls under the exceptions admitting parol evidence in order to ascertain the nature and qualities of the subject-matter of the contract. New Orleans & C. R. Co. *v.* Darms, 39 La. Ann. 766, 2 So. 230.

30. In American Sav. Bank *v.* Shaver Carriage Co., 111 Iowa 137, 82 N. W. 484, where the lease provided for rent in the following language: "Six hundred dollars for the first year, six hundred and sixty dollars for the next two years, and seven hundred and twenty dollars for the next and last two years," it was held proper for the court to ask the defendant tenant the amount of rent agreed upon per year for the second and third years. The court said: "The lease was ambiguous, and parol evidence as to the real agreement of the parties was admissible."

Where the date of payment of the rent is not expressed in the written instrument of leasing it is competent to show the situation and surroundings of the parties with a view to fixing such date. Hartsell *v.* Myers, 57 Miss. 135.

31. Parol evidence is admissible to show that in writing a lease under seal, a mistake was committed by the lessor in stating that "a semi-annual rent of $300" was to be paid instead of $300 per year payable in half-quarterly installments as had been agreed upon. Snyder *v.* May, 19 Pa. St. 235.

Parol evidence is admissible to show that it was the understanding and agreement of all the parties to a lease that for the last few months of the term no rent was to be paid, but that by mistake the lease did not so stipulate. Hultz *v.* Wright, 16 Serg. & R. (Pa.) 345, 16 Am. Dec. 575.

32. Hall *v.* Horton, 79 Iowa 352, 44 N. W. 569; Berens *v.* Maristam, 23 La. Ann. 724.

33. Brown *v.* Ward, 119 Iowa 604, 93 N. W. 587, where the court said: "It is difficult to conceive how it can ever be more clearly established than by the concurrent testimony of every witness having any knowledge of the facts, supported, as we have seen, by the practical construction given the contract by all the parties thereto over a long period of years."

34. Wolfe *v.* Arrott, 109 Pa. St. 473, 1 Atl. 333.

g. *Unlawful Use of Premises.* — **(1.) Generally.** — Parol evidence showing an unlawful use of the demised premises with the knowledge of the lessor is admissible.[35]

(2.) Burden of Proof. — In such case the burden of proving that the lessor knew of such unlawful use is upon the lessee.[36]

(3.) Proof of Knowledge. — Knowledge on the part of the lessor that the premises might, and his intent that they should, be used for unlawful purposes may be shown by circumstantial evidence.[37] To show such knowledge on the part of the lessor, evidence of his conduct and declarations, both before and after, as well as at the time in question, if significant, may be received.[38]

h. *Subsequent Parol Agreement.* — Evidence of an executory parol agreement changing the terms of a written executory lease under seal is not admissible.[39] But if the lease has terminated, proof of an

35. Sherman *v.* Wilder, 106 Mass. 537.

In Pettis *v.* Jennings, 10 R. I. 70, an action of ejectment to recover possession of a tenement hired by the defendant from the plaintiff, it was held that parol evidence was admissible to show that the defendant had been using the tenement as a house of ill-fame, and that record proof of conviction of the defendant for the offense was not necessary. But such record proof may be received to corroborate the landlord's testimony. Stearns *v.* Hemmens, 16 N. Y. St. 701, 1 N. Y. Supp. 52.

36. Commagere *v.* Brown, 27 La. Ann. 314.

37. Ernst *v.* Crosby, 140 N. Y. 364, 35 N. E. 603, where the court said that if the rule were otherwise it might be impossible to prove the immoral purpose which underlay an apparently innocent lease.

Evidence of the character of the place, and of the inmates before and down to the time of the execution of the lease, may be received on the question of knowledge. Demartine *v.* Anderson, 127 Cal. 33, 59 Pac. 207; Egan *v.* Gordon, 65 Minn. 505, 68 N. W. 103.

38. Sherman *v.* Wilder, 106 Mass. 537.

39. Breher *v.* Reese, 17 Ill. App. 545.

In an action at law to recover rent under a written lease, it is not competent for the defendant to show part performance of an oral agreement for a new lease to take the place of the old, which would in equity, but not at law, take the case out of the statute of frauds. Leavitt *v.* Stern, 159 Ill. 526, 42 N. E. 869.

Under the California Statute parol evidence of an agreement modifying the terms of a written lease, which is not acted upon by the lessee until after a conveyance by the lessor of the leased premises to another person, is not admissible as against the latter. Taylor *v.* Soldati, 68 Cal. 27, 8 Pac. 518. See also Harloe *v.* Lambie, 132 Cal. 133, 64 Pac. 88; Erenberg *v.* Peters, 66 Cal. 114, 4 Pac. 1091, where the buildings on the leased premises had been burned during the time of the written lease, it was held that an oral agreement between the parties that the lessor would erect another building which the lessee would rent at an increased rent for the unexpired term was an unexecuted oral agreement having the effect to alter the written lease and was hence invalid.

A Montana Statute provides that a contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise; and in Armington *v.* Stelle, 27 Mont. 13, 69 Pac. 115, 94 Am. St. Rep. 811, it was held that in the case of a sub-lease of a mining claim evidence was not admissible to show a subsequent oral agreement for an extension of the term of the lease in case of the purchase of the title to the property by the sub-lessor because such an agreement was void, being a mere executory agreement, and also without consideration.

independent oral agreement for the use of premises may be given, provided, of course, the agreement does not violate the statute of frauds.[40] There is authority, however, in support of the proposition that evidence of a subsequent parol agreement modifying a written lease is admissible, provided the agreement be supported by a consideration proved.[41] And where the tenant claims such a modification reducing the amount of the rent to be paid, the burden of proving it is upon him.[42]

III. RIGHTS AND LIABILITIES INCIDENT TO THE RELATION.

1. Possession, Use and Enjoyment. — A. PRESUMPTIONS AND BURDEN OF PROOF. — a. *In General.* — The general rule is that where a lessee enters under a lease the presumption is that he acquired possession of the whole of the premises, and if he fails to obtain possession of any portion of them it is incumbent upon him to show it.[43]

b. *Wrongful Eviction.* — Where wrongful eviction is set up by the tenant, either as a basis for the recovery of damages,[44] or in defense of an action for rent,[45] it is incumbent on him to show not only the abandonment by him of the premises, but that the abandonment was occasioned by the acts of the landlord claimed to operate as an eviction.[46]

In the Case of an Eviction by a Stranger to the Covenant, it is incumbent upon the tenant to show that such third person had lawful title

40. Florsheim *v.* Dullagham, 58 Ill. App. 626.

41. Wheeler *v.* Baker, 59 Iowa 86, 12 N. W. 767.

42. Wheeler *v.* Baker, 59 Iowa 86, 12 N. W. 767.

43. Alwood *v.* Mansfield, 33 Ill. 452; Hinton *v.* Fox, 3 Litt. (Ky.) 380.

44. Warren *v.* Wagner, 75 Ala. 188, 51 Am. Dec. 446; Eisenhart *v.* Ordean, 3 Colo. App. 162, 32 Pac. 495.

45. Anderson *v.* Winton, 136 Ala. 422, 34 So. 962.

46. To show an eviction which will operate as a suspension of rent, it is not necessary that the tenant prove an actual physical expulsion from any part of the premises. Proof of any act of a permanent character done by the landlord or by his procurement with the intention and effect of depriving the tenant of the enjoyment of the premises demised, or a part thereof, to which he yields and abandons possession, is sufficient. Royce *v.* Guggenheim, 106 Mass. 201, 8 Am. Rep. 322.

Although the law is more strict against the lessor than a stranger, still a mere entry, though wrongful and unlawful, will not constitute a breach of covenant. It is necessary that something more than an entry and injury be shown, for these are the elements of a trespass. It must also be shown that the entry was an assertion of right or title; in other words, was in the nature of a total or partial eviction. Avery *v.* Dougherty, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680.

In Haller *v.* Squire, 91 Iowa 10, 58 N. W. 921, an action against a landlord for wrongfully taking possession of the leased premises, it was held that the plaintiffs did not show themselves entitled to recover, because the evidence showed that after the termination of a prior suit between the parties for rent the plaintiffs had entirely abandoned the premises and made no efforts thereafter to repossess themselves of the premises by virtue of the lease.

Proof that after the lessee left the premises the lessor took possession and exercised acts of ownership, and

superior to that held of the covenantor at the time of the demise by him to the tenant.[47]

To Entitle a Tenant to Recover Exemplary Damages for His Unlawful Eviction, it is incumbent upon him to show that the act complained of was unlawful and that it was a wanton or malicious act.[48]

c. *Breach of Agreement as to Repairs, Etc.* — Where a tenant asserts a breach of agreement by his landlord in respect to the condition of the premises,[49] or as to repairs,[50] the burden of proving the breach, and that injury resulted therefrom, is upon the tenant.

B. Substance and Mode of Proof. — a. *The Fact of the Breach.* **(1.) Generally.** — In an action for rent the tenant may in defense show that he was deprived of the beneficial use and enjoyment of the premises by the neglect of the landlord to repair according to contract.[51] So, too, where a statute exonerates the tenant from rent in case the premises are destroyed by fire or other accident, he may show in defense of an action for rent such destruction, either partial or entire.[52] The tenant should be permitted to introduce such evidence

advertised them for rent or sale, does not show eviction. Smith *v.* Billany, 4 Houst. (Del.) 113.

47. Chestnut *v.* Tyson, 105 Ala. 149, 16 So. 723, 53 Am. St. Rep. 101.

In Sigmund *v.* Howard Bank, 29 Md. 324, an action by a lessee to recover damages for failure to deliver possession of the leased premises, where the lessee had shown possession of the premises to be in a third person at the commencement of the lease, it was held that evidence tending to show that such third person was a trespasser and in possession of the premises without the authority or consent of the owner was competent; and that accordingly it was error to reject a lease between him and the defendant which by its terms expired the day before the commencement of the plaintiff's lease.

48. Wamsganz *v.* Wolff, 86 Mo. App. 205.

49. In Littlehale *v.* Osgood, 161 Mass. 340, 37 N. E. 375, where a tenant claimed that the landlord had falsely represented the premises in question to be in good sanitary condition, and sought damages for the sickness of his infant child alleged to have resulted from the unsanitary condition of the premises, there was evidence that the child up to the time of her sickness attended school in another part of the city, and it was held incumbent on the plaintiff to show that the sickness was the result of the unsanitary condition of the premises.

50. Clark *v.* Ford, 41 Ill. App. 199.

In an action for damages for failure to repair against a landlord by a tenant who had been in possession of the premises under a former landlord, the burden is on the tenant to show that he sustained damage after the contract with the second landlord was entered into, and the extent of his injury. Aikin *v.* Perry, 119 Ga. 263, 46 S. E. 93.

In an action by a tenant against his landlord for damage to his property caused by a failure to repair the roof, which had been destroyed by fire, it is incumbent on the plaintiff to show that the damage was done after the time when the landlord by proper diligence could have covered the building. Gavan *v.* Norcross, 117 Ga. 356, 43 S. E. 771.

51. Wade *v.* Halligan, 16 Ill. 507; Potter *v.* Truitt, 3 Har. (Del.) 331.

Where the law makes it the duty of a landlord to keep rented premises in repair, as is the case in Georgia, evidence that he did or did not enter into a contract with a third person to make repairs can throw no light on the question of liability, and is properly excluded. Aikin *v.* Perry, 119 Ga. 263, 46 S. E. 93.

52. Richmond Ice Co. *v.* Crystal Ice Co., 99 Va. 239, 37 S. E. 851.

as tends to establish a constructive eviction caused by the omission of the landlord to abate a nuisance originating in and continuing to exist upon property owned and controlled by him.[53]

(2.) Res Gestae of the Act. — The *res gestae* of the act complained of is usually significant and tends to enlighten the jury.[54]

(3.) Intention of the Landlord. — Where the issue is whether or not there was an eviction of a tenant the intention of the landlord is material,[55] and the landlord, being a competent witness in other respects, may testify what his motive and purpose was in doing the acts complained of.[56]

(4.) Circumstantial Evidence. — (A.) EVICTION. — Direct or positive evidence that the act, whether of eviction or of trespass, was done under the authority or by the consent of the landlord is not necessary. Such evidence is frequently not attainable, and the fact, like any other controverted fact, is capable of proof by circumstantial evidence.[57]

53. Thus in York *v.* Steward, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125, where the lease was for the lower story of a business block, the landlord retaining possession of the upper floors, it was held error to refuse to permit the tenant to introduce evidence showing that the building was so defectively constructed as regards the plumbing on the upper floors as to cause the water continually to overflow and run down through the ceiling into the tenant's store room, the effect of which was to render it untenantable, and that the landlord refused and neglected to remedy the defect, although his attention was frequently called thereto. The court said: "The usual words of demise import a covenant for quiet enjoyment, which signifies that the tenant shall not be evicted by title paramount, and also that his possession shall not be disturbed by the acts or wrongful omissions of the lessor. Any sort of annoyance, unless, perhaps, a mere trespass, affecting the occupation of the property let, which prevents the tenant from enjoying it in as ample a manner as he is entitled to by the terms of the lease, amounts to a breach."

54. Baumier *v.* Antiau, 79 Mich. 509, 44 N. W. 939, an action to recover damages for unlawful eviction, where it is held that the mere fact that the lessor offered to admit that the lessee was kept out of possession of the premises by him was no reason for not permitting the lessee to give evidence of that fact and of the circumstances attending it.

55. Eisenhart *v.* Ordean, 3 Colo. App. 162, 32 Pac. 495. "Acts of a landlord in interference with the tenant's possession to constitute an eviction must clearly indicate an intention on the part of the landlord that the tenant shall no longer continue to hold the premises." Morris *v.* Tillson, 81 Ill. 607.

56. Norris *v.* Morrill, 40 N. H. 395. The court said: "In suits where the intention of the defendant is of the gist of the action, and must be shown to be malicious, not to affect the amount of damages, but to entitle the plaintiff to recover any damages whatever, there would seem to be no reason why the defendant, being a competent witness as to all other material facts, should not testify to his intention — the fact which is most material, and which he alone of all men is presumed certainly to know. And there can be no occasion for a different rule where exemplary damages may be given for malicious mischief and for aggravating circumstances of intended indignity, insult and outrage, and where the purpose and intent of the wrongdoer, apparently manifested in his acts, may be the principal and even the only ground of such damages." See also the article "INTENT."

57. The nature and character of the act taken in connection with the

(B.) Breach of Agreement to Surrender in Good Repair. — So, too, where the issue is whether or not the tenant surrendered the premises in good repair, circumstantial evidence is admissible.[58]

b. *Damages.* — (1.) **Generally.** — Where a tenant claims damages for breach of covenant for quiet enjoyment, the true inquiry is as to the value of the unexpired term, less the rent reserved.[59] In estimating the damages to which a tenant is entitled for an unlawful eviction evidence of the efforts of the tenant to carry out the lease is competent.[60] On an issue as to what damages a lessee has suffered

relation of the landlord to the actor; his employment or agency in the business of the landlord; the acquiescence of the latter in the former's acts, accompanied by circumstances indicative of his knowledge that the act was done, and the absence of objection upon his part, are facts which may be considered by the jury in determining whether he authorized or assented to the act complained of." Warren *v.* Wagner, 75 Ala. 188, 51 Am. Dec. 446.

58. Where the issue is whether or not the lessee surrendered the premises in good repair as agreed, evidence that when the rent was paid the lessor expressed himself as being "gratified" with the condition of the premises is admissible. Grayson *v.* Buie, 26 La. Ann. 637.

59. Denison *v.* Ford, 7 Daly (N. Y.) 384; Mack *v.* Patchin, 42 N. Y. 167, 1 Am. Dec. 506; Avery *v.* New York C. & H. R. R. Co., 16 N. Y. St. 417, 2 N. Y. Supp. 101; Dexter *v.* Manly, 4 Cush. (Mass.) 14; Sheets *v.* Joyner, 11 Ind. App. 205, 38 N. E. 830; Carter *v.* Lacy, 3 Ind. App. 54, 29 N. E. 168; Wright *v.* Everett, 87 Iowa 697, 55 N. W. 4; Eisenhart *v.* Ordean, 3 Colo. App. 162, 32 Pac. 495.

A lessee who claims loss resulting to his leasehold estate by reason of its extinction must at least show that the value of the leasehold estate exceeded the rents reserved, otherwise there can be no basis for an award to the lessee on the question of damages. Larkin *v.* Misland, 100 N. Y. 212, 3 N. E. 79.

In Gulliver *v.* Fowler, 64 Conn. 556, 30 Atl. 852, where the lessee of a house which was hired for the purpose of subletting rooms, when sued for rent, set up by answer and counter-claim that he was unable to sublet them owing to inadequate heating facilities, which the lessor had falsely represented and warranted to be capable of heating the entire house thoroughly and well, it was held, (1) that the measure of the lessee's damages would be the fair rental value of the rooms which could not be let on account of the lack of proper heat; (2) that the proof of such damages was not to be limited to evidence of applications actually made and withdrawn on account of the cold condition of the rooms.

In Kohne *v.* White, 12 Wash. 199, 40 Pac. 794, an action against a lessor to recover damages for breach of a covenant to repair the premises, which were used by the lessee as a lodging house, it was held error to permit proof of the gross value of the rooms furnished without deduction for the use of the furniture and the expenses necessarily incident to running the house; that the testimony should have been confined to the net value of the furnished rooms.

In an action against a landlord for breach of a covenant to rebuild contained in the lease, a sub-lease by the lessee and the rent reserved therein may be considered by the jury in determining the amount of damages. Ganson *v.* Tifft, 71 N. Y. 48, where the court said that such evidence "certainly bore upon the question of the rental value of the premises and showed the amount for which the unexpired term could be disposed of to responsible parties. This was some indication as to its value over and above the rent reserved in the lease between the plaintiff and the defendant."

60. In Baumier *v.* Antiau, 79 Mich. 509, 44 N. W. 939, where the lease was for a farm, the plaintiffs were held to have been properly per-

from being kept out of possession, evidence of what the lessor had paid to other tenants for surrendering other lands is not competent.[61]

(2.) Value of the Fee. — The value of the fee may be an element to be taken into consideration in determining the value of the lease, but it is not to be uniformly adopted as the only legal basis of calculation.[62]

(3.) Profits. — Profits, though not recoverable as such, have been allowed to be proved in some cases as affording facts from which the jury may properly estimate the value of the lease to the tenant;[63]

mitted to show the amount of stock they had on the place.

In an action by a lessee to recover damages for an unlawful eviction by his lessor, it is competent for the lessee to show that he had improved the fertility of the land. Taylor *v.* Cooper, 104 Mich. 72, 62 N. W. 157.

61. Taylor *v.* Cooper, 104 Mich. 72, 62 N. W. 157.

62. Clarkson *v.* Skidmore, 46 N. Y. 297. See also Larkin *v.* Misland, 100 N. Y. 212, 3 N. E. 79. *Compare* Seattle & M. R. Co. *v.* Scheike, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503, a proceeding to appropriate a strip of land for a right of way over land leased for a term of years, where it was held error to permit the introduction in evidence on the part of the lessees of the value of the land, of the value of fruit trees growing thereon and of the value of the buildings on the land when they took possession under their lease. The court said: "The question was not one of the value of the premises, for that would not necessarily determine the value of the lease, but of the value of the use of the land for their unexpired term."

63. Hodges *v.* Fries, 34 Fla. 63, 15 So. 682, an action for damages for failure of the lessor to deliver the leased premises to the lessee according to contract. See also Cleveland, C. C. & St. L. R. Co. *v.* Wood, 189 Ill. 352, 59 N. E. 619, which was an action to recover damages for breach of certain covenants contained in a written lease executed by the defendant railroad company to the plaintiff wherein it was agreed by the company to stop its passenger trains for meals at the hotel erected by the lessee, and it was proved that the hotel had practically no guests save such as would be brought to it for meals and lodging by the trains of the defendant company. The court said: "It is manifest that the rental value of a hotel depends on the number of guests likely to come or be brought to it. In forming a conclusion as to the rental value of the premises, the fact that the trains of the appellant company stopped for meals or did not so stop became a necessary factor. It was proper for those having knowledge as to the fact to state the rental value of the premises under both conditions. This would involve consideration of the rental value arising from the facilities enjoyed for receiving patronage. Such testimony is quite distinguishable from that which would establish profits from which to measure damages."

Proof of Profits Actually Realized by the lessee in the immediately preceding years may be shown as tending to show the value to him of the leased premises, deducting therefrom the expense and labor bestowed upon them and the rent. Otherwise he must be limited in his recovery to the difference between the rental value in the market and the rent reserved. Taylor *v.* Cooper, 104 Mich. 72, 62 N. W. 157.

A Tenant Whose Occupancy is Ended by His Landlord's Act is entitled to recovery for injury to his business or loss of profits caused thereby when they are proved with reasonable certainty to have been due to the landlord's act. Murphy *v.* Century Bldg. Co., 90 Mo. App. 621.

In the Case of the Unlawful Dispossession of the Lessee under a lease of land for farming purposes, with an agreement between the lessee and lessor that the profits to be realized from the cultivation of the farm should be divided between

but this should be permitted only when the lessor knew the expected use of the premises,[64] and when the amount of such profits can be estimated with reasonable certainty from established *data*.[65] Where a lessee seeks to compel his lessor to respond in damages for failure to deliver possession of the premises as agreed, the lessee should be permitted to show as a basis for special damages that the lessor knew when he executed the lease that the lessee was carrying on an established business in the same vicinity, and took the lease of the premises in question for the purpose of continuing such business therein, and that he was unable to find other suitable premises.[66] Evidence of what another person using the premises for the same business had made is no proof that the lessee could have established such a business and conducted it with like success.[67]

them, the measure of damages is the difference between the rent agreed to be paid and the value of the premises for the unexpired term at the time of the breach; and in order to ascertain what rent was agreed to be paid it would be necessary to show what would be the probable profits accruing to the lessor from the cultivation of the leased premises in accordance with the terms of the contract. Brincefield *v.* Allen (Tex. Civ. App.), 60 S. W. 1010.

Net Income. — Where a tenant seeks damages for his unlawful dispossession by his landlord, the net income derived by him from his business before the dispossession may be shown by the tenant as a criterion of what he lost by such dispossession. Gildersleeve *v.* Overstolz, 90 Mo. App. 518.

64. A lessee cannot recover damages sustained by him in his business by reason of failure of the lessor to put him in possession of the premises demised, unless he shows that the use to which the premises were to be put was known by the lessor. Townsend *v.* Nickerson Wharf Co., 117 Mass. 501.

65. Snodgrass *v.* Reynolds, 79 Ala. 452, 58 Am. Rep. 601, where the land was a meadow, sown in what was commonly known as "Johnson grass," and at the time of the lease there was a crop ready to be mowed; and it was held that the condition of the land, and of the crop of grass growing thereon, and the kind, nature and usual productive capacity of the grass, established *data* from which the quantity of annual yield could be ascertained with reasonable certainty. The court said: "A party is not confined to proof of value by the opinion of witnesses; it may be proved by facts and circumstances. The state of the land, the kind of grass in which it was sown, the annual yield in the usual course of nature and the market value were facts proper to be considered by the jury in estimating the value of the use of the land for the term — the value of the lease."

66. Poposkey *v.* Munkwitz, 68 Wis. 322, 32 N. W. 35, 60 Am. Rep. 858. In this case the court said: "Carried on in the immediate vicinity of the old stand and by the same person, presumably the business would have been equally prosperous. This presumption may be rebutted by proof of facts and circumstances tending to show that the business would probably have been less remunerative had it been so continued." The court said that of course if the lessee had not a business already established in the same vicinity which, with its good will, could have been transferred to the leased premises, there would have been no basis upon which to estimate the prospective value of the business which the lessee would have done there had he obtained possession and carried on the business; that in such case the profits would have been too conjectural and uncertain. See also Green *v.* Williams, 45 Ill. 206; Chapman *v.* Kirby, 49 Ill. 211.

67. Gross *v.* Heckert (Wis.), 97 N. W. 942, where the court said: "There is no authority, we venture

Conjectural Profits Expected From the Use of the Premises cannot be shown in an action for damages for failure to put the lessee into possession of the premises,[68] or for eviction.[69]

(4.) Opinion Evidence. — The value of the term is a fact to be determined upon the testimony of witnesses.[70] But a general statement of the tenant that he was damaged to a certain amount is not admissible.[71]

to say, to support the proposition that what one person realized for profits in a business conducted in a particular location, such business being of a character dependent largely upon the personal following and qualities of the proprietor, constitutes a legitimate basis upon which to estimate with judicial certainty, so to speak, what another person might make in the same location by engaging in the same business."

Profits Made by Parties Subsequently Occupying the Same Premises cannot be considered as a basis of calculation. Smith *v.* Eubanks, 72 Ga. 280, where the court said: "What other parties in possession made afterward is no basis for recovery by plaintiffs. The successors of plaintiffs may have been more popular, and thus have had more customers. They may have managed better, and made more money. They may have been of better habits, more prudent and more successful business men, more accustomed to this sort of business, and in these and many other ways the business may have been more profitable with them than in the hands of plaintiffs."

68. Smith *v.* Phillips, 16 Ky. L. Rep. 615, 29 S. W. 358, where the profits were arrived at by estimating the probable amount of corn, wheat, etc., and the probable value of the crops. The court, in holding this to be error, said: "The season is an important factor in the calculation. The crops may be large or small, dependent largely upon the season. The price of the products of the farm may be high or low — not within the power of man to tell. There is no basis from which any calculation can be made as to the profits, if any, that may be realized on such an undertaking. An estimate must necessarily be conjectural."

69. In an action to recover damages for the unlawful eviction of a lessee by the lessor, evidence of the probable value of crops intended to be raised on the land by the lessee in the future is incompetent, because too speculative. "It is what gain he can show with reasonable certainty that he would have made that he is entitled to recover for." Taylor *v.* Cooper, 104 Mich. 72, 62 N. W. 157.

70. Chamberlain *v.* Dunlop, 126 N. Y. 45, 26 N. E. 966, 22 Am. St. Rep. 807; McCormick *v.* Stowell, 138 Mass. 431. See also the article "VALUE."

The value of the term must depend upon the circumstances of every individual case; the length of the term and conditions of the lease, the character of the property, its location, the readiness with which it may be let, the condition of the buildings, whether substantial and durable, or requiring frequent repairs, the uniformity of rents in the neighborhood or their fluctuating character; in short, every material consideration which would enter into the mind of a purchaser of the term, in judging what would be a fair price for it, and, like other ordinary questions of value, should be determined, as a matter of fact, upon the testimony of witnesses competent to speak upon the subject. Clarkson *v.* Skidmore, 46 N. Y. 297.

The Diminution in Value of a Leasehold Interest because of the appropriation of a portion of the land demised may be shown by the opinions of witnesses having knowledge of such value or of the rental value of such premises in the neighborhood, and who are acquainted with the character and situation of the premises. Seattle & M. R. Co. *v.* Scheike, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503. See article "VALUE."

71. Smith *v.* Eubanks, 72 Ga. 280, an action for damages for failure to repair according to contract.

c. *Mitigation of Damages.* — **(1.) Generally.** — A lessor cannot mitigate the damages suffered by the lessee from his unlawful eviction by showing that the lessee might have obtained, or did obtain, another lease as profitable, or more so, than the lease in question.[72]

(2.) Carelessness of Tenant. — A lessor sued for damages for breach of covenant to repair can mitigate the damages by showing carelessness or unskillfulness of the lessee in the use of the premises.[73]

(3.) Legal Advice. — Evidence of legal advice upon which the lessor acted is admissible to mitigate vindictive,[74] but not compensatory,[75] damages resulting from an unlawful eviction of the lessee.

d. *Negligence of Tenant.* — Where it is claimed that injury to, or destruction of, the premises was due to the tenant's negligence it is proper to show the exact situation in order that the jury may judge of what was and what was not negligence in the light of all the facts,[76] and the question is not ordinarily one to be submitted to the opinions of witnesses.[77]

72. Baumier *v.* Antiau, 79 Mich. 509, 44 N. W. 939.

73. Cooke *v.* England, 27 Md. 14, 92 Am. Dec. 618.

Where a lessor contracts to put the demised premises in good repair, and so keep and maintain them, he cannot in an action against him by the lessee for breach of such an agreement excuse non-performance of his contract by proof of the lessee's negligence and want of care. Flynn *v.* Trask, 11 Allen (Mass.) 550.

In an action by a lessee to recover money expended by him in repairing premises which had been destroyed by fire, it was held that the lessor may show in defense that the fire occurred in consequence of the carelessness of the lessee. Zigler *v.* McClellan, 15 Or. 499, 16 Pac. 179.

74. In an action by a tenant against his landlord for eviction, claimed not only to be unlawful but to have been malicious, it is error to refuse to permit the defendant landlord to show that he has obtained legal counsel as to the proper course to be pursued, not in justification or mitigation of any actual damages, but in mitigation of vindictive damages sought to be recovered. Cochrane *v.* Tuttle, 75 Ill. 361.

75. In an action against a landlord to recover damages for unlawfully entering upon and ejecting the plaintiff and his family from premises occupied by him as tenant, since only actual compensatory damages are recoverable it is not competent for the defendant to show that in what he did he acted for an honest purpose and upon the advice of counsel after having given him a full and true statement of all the facts within his knowledge. Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476.

76. As, for example, lack of precautions taken to guard against fire. Duer *v.* Allen, 96 Iowa 36, 64 N. W. 682.

In Moore *v.* Parker, 91 N. C. 275, an action to recover damages for the destruction by fire of the leased premises alleged to have been due to the tenant's negligence, it was held that the lessor's knowledge of the use by the tenant of the instrumentalities alleged to have caused the fire did not relieve the tenant from showing proper care in the use of such instrumentalities on the particular occasion.

77. Testimony of an expert that the premises were "conducted in the same manner that an ordinarily prudent man in that business would conduct" such premises is properly excluded. Duer *v.* Allen, 96 Iowa 36, 64 N. W. 682, where the court said: "The question of negligence or diligence in the matter of care or precautions against fire from a furnace, because of boards or other combustibles being near it, is not a question for expert evidence, but one for the jury, upon the particular facts of each case. The evidence, if admit-

2. Rent. — A. Distress. — a. *Presumptions and Burden of Proof.* — A landlord suing out a distress warrant for rent has the burden of establishing the ground upon which he sued out the warrant.[78] But in an action for the unlawful distraint of goods the fact that no rent was due is of the substance of the action, the burden of proving which is on the tenant.[79]

Where Property Distrained Is Injured while in the custody of the landlord or his agent the burden is on him to rebut the presumption of negligence.[80]

b. *Substance and Mode of Proof.* — (1.) **Rent Overdue.** — Ordinarily distress will only lie for rent overdue, and accordingly on a controversy between landlord and tenant as to the legality of a distress the tenant may show that the rent distrained for was not in fact overdue.[81] But on such an issue the landlord cannot show a

ted, would have permitted the witness to find the conclusion for the finding of which the jury was impaneled."

In an action by a landlord against the tenant for waste, the opinions of witnesses that the act in question was not injurious to the inheritance, and therefore not waste, are not admissible, where the act is in contemplation of law *per se* so injurious. McGregor *v.* Brown, 10 N. Y. 114. See article "Negligence."

78. Getzleman *v.* Shuman, 22 Ill. App. 167; Rix *v.* Stubblefield, 12 Ill. App. 309.

Where the tenant has filed a counter-affidavit to a distress warrant for rent the landlord must prove his claim. The distress warrant is not *prima facie* evidence. Reid *v.* Brinson, 37 Ga. 63.

Where a landlord sues out a distress warrant solely on the ground that the rent was due and unpaid, which the tenant denies, the rental contract itself providing for payment of "rent money out of the first cotton gathered," it is incumbent on the landlord to show that the rent debt had matured before the issuance of the distress warrant by evidence showing that the tenant had gathered, or had had a fair and reasonable opportunity to gather, cotton of sufficient value to pay the rent. Holt *v.* Licette, 111 Ga. 810, 35 S. E. 703.

Although the statute prescribing the requisites of an affidavit for a distress warrant contains no provision that the grounds for the writ shall be stated in the affidavit, nevertheless the landlord upon an application for the warrant must show the existence of one of the statutory grounds before he can obtain the writ. Jackson *v.* Corley (Tex. Civ. App.), 70 S. W. 570.

Where a landlord has attached his tenant's property on the ground that the rent was past due and unpaid, which the tenant denies by an appropriate pleading, the burden of proving those facts is upon the landlord; and it is error to impose upon the tenant the burden of proving payment. Cleveland *v.* Crum, 33 Mo. App. 616.

79. Smith *v.* Downing, 6 Ind. 374.

80. Weber *v.* Vernon, 2 Penn. (Del.) 359, 45 Atl. 537.

81. Hall *v.* Wadsworth, 35 W. Va. 375, 14 S. E. 4; Hunnicutt *v.* Chambers, 111 Ga. 566, 36 S. E. 853.

Where the landlord's affidavit for distress warrant alleging that the rent distrained for is now due and unpaid is met by a counter-affidavit that the sum distrained for was not due at the time of showing the warrant, it is proper to permit the tenant to introduce any competent evidence tending to show that no such indebtedness actually existed. Feagin *v.* McCowen, 115 Ga. 325, 41 S. E. 575.

In Dailey *v.* Grimes, 27 Md. 440, where a seizure of personal property by the defendant was attempted to be justified under a distress warrant for rent, the plaintiff proved that by the terms of his tenancy, instead of paying money for rent he was to make improvements and furnish produce

removal by the tenant of crops or other personal property from the premises; such evidence is irrelevant.[82]

(2.) Damages. — If a distress warrant be wrongfully sued out by the landlord, the value of the time spent and expenses incurred by the tenant in regaining possession of his property by lawful measures may be shown.[83]

B. Forfeiture for Non-Payment of Rent. — Where the landlord asserts the right to a re-entry for forfeiture, he must prove it by establishing every fact and showing every circumstance and condition requisite to constitute the forfeiture without the benefit of any presumptions in his favor;[84] thus, in order to show a forfeiture of a non-expired term of a leasehold estate for non-payment of rent it is incumbent on the lessor to show a sufficient and timely demand on the lessee for payment.[85]

sufficient to pay the taxes on the premises; that the improvements which he made were equal in value to the rent, and it was held competent for him to prove by a farmer in the neighborhood having knowledge of the improvements that in the judgment of the witness the improvements made on the farm during the plaintiff's tenancy were a proper equivalent for a fair rent.

In McMahan *v.* Tyson, 23 Ga. 43, a distress warrant wherein the defendant filed his affidavit of illegality on the ground that the entire sum distrained for was not for rent only, but that a part of the consideration of the note distrained on was that the landlord was to do certain repairs upon the premises which he failed to do, by reason whereof the tenant was injured. The court, in holding evidence of the defendant's claim to be admissible, said: "The evidence, if admitted, would have gone to show that what the tenant rented was the land, not as it was, but as it would be when certain improvements should have been put upon it by the landlord; and then to show that the landlord failed to put those improvements on the land. Now, there is nothing in the face of the note to show that the thing meant to be rented was not such a thing as this, for there is nothing in the face of the note to show *what* that thing was. This evidence, then, would not, if admitted, have contradicted the note. True, it would have shown a partial failure of the consideration of the note; but it is lawful to show a partial or total failure of the consideration of a note; and to do so by parol evidence, or by any evidence. And if the evidence had shown a partial failure of the consideration of the note the evidence would have shown that 'some part' of the sum 'distrained for was not due.'"

82. Holt *v.* Licette, 111 Ga. 810, 35 S. E. 703.

83. Watson *v.* Boswell (Tex. Civ. App.), 61 S. W. 407.

84. Re-entry for Breach of Condition Subsequent. — The right of a landlord to re-enter for breach of a condition subsequent is not viewed with favor in the law, and where he claims that a forfeiture has occurred and his right attached it devolves upon him to show that he has done everything that was required upon his part to perfect such right of re-entry rather than resort to an action for damages for a breach of covenant. Meni *v.* Rathbone, 21 Ind. 454.

85. Smith *v.* Whitbeck, 13 Ohio St. 471; Boyd *v.* Talbert, 12 Ohio 212; Remsen *v.* Conklin, 18 Johns. (N. Y.) 447; Weldon *v.* Harrison, 17 Johns. (N. Y.) 66. Chapman *v.* Harney, 100 Mass. 353, where it was held that a waiver was not established by proof of a reply by the lessee to a demand upon him by the lessor upon the proper day, but not on the premises, that he could not then pay the rent.

Where it is necessary to prove a demand for rent, and it appears that rent bills were presented to the ten-

C. LIEN. — Where a landlord claims a lien for rent it is incumbent on him to show that his claim is in fact for rent, and that he is entitled to his lien on the property in question.[86] Whether or not the tenant's removal or disposal of the crop will endanger or has endangered the collection of the rent so as to warrant an attachment therefor as provided by statute is not to be determined by reference to any amount of property he may have other than the crop.[87]

D. THE AMOUNT. — a. *In General.* — Where the contract of letting expressly fixes the amount of rent to be paid, evidence of the fair rental value of the premises is immaterial.[88] But when the parties have not by express agreement fixed the rent to be paid, the right of the landlord's recovery for the use and occupation of the premises is to be ascertained by the question, "What is the fair rental value of the premises under all the circumstances of the case?"[89]

ant, the person presenting them being a competent witness in other respects may testify what his intention and understanding were in presenting them. Norris *v.* Morrill, 40 N. H. 395.

86. Judge *v.* Curtis (Ark.), 78 S. W. 746.

To entitle a landlord to assert his special lien on a crop he must prove to the satisfaction of the jury that the crop which he seeks to subject was raised on his land. Saulsbury *v.* McKellar, 55 Ga. 322, where it was held that the mere fact that the land was rented by the owner to certain persons, and that those persons, or one of them, consigned cotton to certain factors, and that cotton was one of the crops made on the landlord's farm, did not cast upon the defendants, who were third persons in possession of the cotton, the burden of showing that the cotton was not made on the landlord's land, but on some other land.

If he so blends the rent account with other items that it is impossible to separate one from the other; if he so confuses them that when payments are made it is impossible to show which is paid, the rent or some of the other items, he is presumed to have waived his right to the lien. Crill *v.* Jeffrey, 96 Iowa 634, 64 N. W. 625; Smith *v.* Dayton, 94 Iowa 102, 62 N. W. 650.

Under the Georgia Statute giving the landlord a lien for rent whenever the landlord shall furnish the supplies to his tenant, demand for payment is necessary, except under certain circumstances, and in order to entitle a landlord to foreclosure of his lien it is incumbent on him to prove a demand for payment. Saterfield *v.* Moore, 110 Ga. 514, 35 S. E. 638.

87. Dawson *v.* Quillen, 43 Mo. App. 118, where the court said: "The lien being upon the crop, it was intended by that statute to protect the crop for the landlord, regardless of what property the tenant might have. The question is, 'does the removal or disposal of the crop hinder or endanger the collection of the rent out of the crop?'"

88. Despard *v.* Walbridge, 15 N. Y. 374; Simpson *v.* East, 124 Ala. 293, 27 So. 436.

89. Cohoon *v.* Kineon, 46 Ohio St. 590, 22 N. E. 722.

A Parol Agreement Concerning the Amount of Rent To Be Paid, made at the commencement of the occupancy, is competent evidence in determining what would be a reasonable rental. Sargent *v.* Ashe, 23 Me. 201.

In an action to recover damages for an alleged wrongful and forcible holding over by the defendant as lessee, it is proper to permit the plaintiff to prove the yearly rental value of the land as a proper basis upon which to estimate damages for the period the land was detained, especially where it appears that lands such as those in question usually

A Judgment Against a Lessee is *prima facie* evidence of the amount due thereon in an action by the landlord to enforce his lien for rent.[90]

b. *Invalid Lease.* — A writing between the parties fixing the amount of rent to be paid, although void as a lease, may be used to prove the value of the occupation as agreed upon by the parties.[91]

c. *Value of the Premises.* — The value of the premises is not evidence proper to be received as a means of ascertaining their rental value for the time occupied by a tenant.[92]

E. PAYMENT OF RENT. — A receipt for rent for a particular month is presumptive evidence that rent previously accruing has been paid.[93]

IV. DURATION OF THE TERM.

Parol Evidence. — The duration of the term, if not definitely expressed in the lease, may be fixed by reference to collateral or extrinsic circumstances.[94] But a parol demise, void under the

rented by the year. Butterfield *v.* Kirtley, 115 Iowa 207, 88 N. W. 371.

For the purpose of showing the rental value of real estate in an action for the use and occupation thereof, evidence of the amounts for which the premises had rented in years immediately preceding the time in controversy, and of what other similar tenements rented for in the same neighborhood at and about the same time, is admissible. Fog *v.* Hill, 21 Me. 529, where the court said: "If two dwelling houses are nearly contiguous, and one of them has a fixed and known value and the other has not, but its value is to be ascertained, resort may be had to a comparison of the one with the other for the purpose."

90. Foster *v.* Reid, 78 Iowa 205, 42 N. W. 649, 16 Am. St. Rep. 437.

91. Wilson *v.* Trustees of No. 16, 8 Ohio 174. See also Williams *v.* Sherman, 7 Wend. (N. Y.) 109.

Where a lease is not under seal, but fully executed on the part of the lessor, the latter may in an action of assumpsit for use and occupation avail himself of the written agreement whereby the rent certain was fixed as evidence of the amount which he is entitled to recover. Goshorn *v.* Steward, 15 W. Va. 657.

92. Cohoon *v.* Kineon, 46 Ohio St. 590, 22 N. E. 722. The court said: "Proof of the value of the fee simple could hardly aid in ascertaining rental value. The converse of the proposition might be true; indeed would be. But it is matter of common observation that many tracts of real estate of great value have no actual rental value."

In Moore *v.* Harvey, 50 Vt. 297, assumpsit for the use of land of which plaintiff was lessor and which defendant had occupied, it was held that what the plaintiff had paid for the land had no tendency as lawful evidence to show what its use was reasonably worth. In this case the statement of facts showed that the evidence was as to what the plaintiff had paid for the property, but in the opinion, while this is referred to as the fact, the court states it as though it were what the plaintiff paid for the use of the land, which was evidently a misprint.

93. Ottens *v.* Fred Krug Brew. Co., 58 Neb. 331, 78 N. W. 622. As to proof of payment generally, see article "PAYMENT."

94. Horner *v.* Leeds, 25 N. J. L. 106.

Where the lease does not show the duration of the term for which the premises were leased, either party may show by parol evidence the duration of the term, if there was an agreement; and if there was no express agreement on the subject, evidence as to custom and usage is admissible. Brincefield *v.* Allen (Tex. Civ. App.), 60 S. W. 1010.

Where the issue is whether a verbal letting was for a year, evidence of occupancy and three quarterly payments, and no contract confining

statute of frauds, cannot be resorted to for the purpose of ascertaining the duration of the term.[95] And where the law has fixed the duration of a lease, in the absence of an express agreement between the parties, evidence of a usage or custom in this regard is not admissible.[96]

V. DETERMINATION OF THE TENANCY.

1. Notice to Quit. — A. In General. — A notice to quit is evidence tending to show the termination of a tenancy.[97]

B. Proof of Service of Notice. — Proof of service of notice to quit may be shown by the testimony of any one who has knowledge of the fact.[98]

2. Transfers. — When a tenant sued for rent relies upon a transfer of the rents by his landlord to defeat recovery, the burden of proving the transfer is upon him.[99] On the other hand, where the lessor has conveyed the demised premises, but claims that the rents to become due thereafter were reserved by separate instrument, he has the burden of proving that fact.[1]

the tenancy to the quarter, is admissible. Jenkins *v.* Gastonia Cotton Mfg. Co., 115 N. C. 535, 20 S. E. 724.

95. Johnson *v.* Albertson, 51 Minn. 333, 53 N. W. 642.

96. Jackson *v.* Beling, 22 La. Ann. 377.

97. Newell *v.* Sanford, 13 Iowa 191.

Where a tenancy is terminable upon notice and demand of possession, and such notice and demand has been given terminating the tenancy on a certain date, jurisdiction to issue a rule to show cause why the tenant should not be removed from the premises under the New Jersey Landlord and Tenant Act will be acquired on proof of such notice and demand. Wartman *v.* Richards, 54 N. J. L. 525, 24 Atl. 576. See also M. C. & B. Co. *v.* Mitchell, 31 N. J. L. 99.

In Snideman *v.* Snideman, 118 Ind. 162, 20 N. E. 723, an action between a landlord and tenant for the possession of real estate where the tenancy was under a written lease for one year, and notice to quit after the expiration of the lease, though not served in the manner pointed out in the statute, was held competent evidence, the court said: "The admission of a notice in evidence, which was shown to have been read to the tenant, was proper. It was competent, as any conversation or verbal notice to quit the premises would have been. It is not necessary to determine whether the service was such as under the statute would terminate a tenancy from year to year, for the reason that the term of the lease was fixed by the written contract. It was proper to show what had taken place between the parties after the execution of the lease, and that the appellee was insisting on her right to the possession at the termination of the written lease, and that, in addition to relying on the written contract, she also notified him to surrender up the premises at the expiration of the lease."

98. Weeks *v.* Sly, 61 N. H. 89. See also Hollingsworth *v.* Snyder, 2 Iowa 435, where it was held that the service of such a notice could not be proved by the affidavit thereof by one not an officer; that the proof must be made as at common law and subject to the common-law rule relating to cross-examination. This case seemed to turn on the wording of an Iowa statute governing the service of "notices required by law."

99. Gates *v.* Max, 125 N. C. 139, 34 S. E. 266.

1. Allen *v.* Hall (Neb.), 92 N. W. 171, *reversing* 89 N. W. 903.

3. Surrender of the Term. — A. Presumptions and Burden of Proof. — The burden of proving an acceptance of a surrender of the term by the landlord is upon the party asserting that fact.[2] Thus where a tenant claims a discharge from his covenant to pay rent by reason of a substitution and acceptance by his landlord of another as tenant, the burden of proving his claim is upon the tenant.[3]

B. Nature and Sufficiency of Proof. — a. *Terms of Surrender.* — When a surrender of a lease of real estate is required to be in writing, parol evidence is not admissible to prove an executory agreement to surrender.[4] And where the lease,[5] or an agreement to surrender,[6] clearly fixes the terms on which the surrender is to be made, parol evidence of other and different terms agreed upon before the execution of the writing is not admissible.

b. *Executed Parol Agreement.* — A lease, although under seal, may be abrogated, canceled and surrendered by an executed parol agreement.[7]

2. Churchill *v.* Lammers, 60 Mo. App. 244.

In all cases of leasing, in order to show a surrender, a mutual agreement between the lessor and the original lessee that the lease is terminated must be shown. Stewart *v.* Sprague, 71 Mich. 50, 38 N. W. 673.

Where the landlord asserts under an agreement a surrender as a basis for his right to resort to summary proceedings for the possession of the premises, it is incumbent on him to show not only the agreement to surrender, but an actual giving up of the premises to him or some person for him. Fish *v.* Thompson, 129 Mich. 313, 88 N. W. 896.

3. Mere knowledge on the part of the lessor of the occupancy by another and acceptance of rent from the occupant does not show that the lessor has discharged the original lessee from his covenant to pay for the whole term. Ward *v.* Krull, 49 Mo. App. 447.

The mere fact that a third person furnishes money to a lessee to pay his rent does not prove directly or impliedly that the landlord had accepted such third person as his tenant instead of the lessee himself. Ely *v.* Winans, 88 N. Y. Supp. 929.

4. Kittle *v.* St. John, 7 Neb. 73, *following* Bailey *v.* Wells, 8 Wis. 141, 76 Am. Dec. 233.

5. A written lease cannot be varied or controlled by parol evidence of an understanding and arrangement between the parties that it was to be determined and the term cease upon the making of any improvement upon the adjoining lot which would intercept the light, or otherwise interfere with the reasonable enjoyment of the premises. Johnson *v.* Oppenheim, 55 N. Y. 280.

In McGlynn *v.* Brock, 111 Mass. 219, an action for rent under a written lease, it was held that parol evidence of a contemporaneous agreement giving the lessee the privilege of surrendering the premises and his lease at any time desired was not admissible for the purpose of proving the agreement, but was admissible in order to throw light upon and give force to the evidence relied upon to show that there had been a surrender of the lease and acceptance thereof by the lessor.

6. Snowhill *v.* Reed, 49 N. J. L. 292, 10 Atl. 737, 60 Am. Rep. 615.

7. Bloomquist *v.* Johnson, 107 Ill. App. 154.

In James *v.* Coe, 32 Misc. 674, 66 N. Y. Supp. 509, an action for rent under a written lease wherein the defense was that prior to the accruing of the rent sued for there was a surrender of the term by the tenant and acceptance by the landlord, and the defendant offered evidence of such surrender, relying on a lease made by the landlord to a third person for whom the lessee became surety, it was held that the plaintiff

c. *Acceptance of Surrender.* — **(1.) Generally.** — Where the issue is whether or not the lessor had accepted a surrender in fact, all the transactions and acts of the lessor in connection with the premises, and any circumstance tending to show his relation to the premises,[8] or to the alleged assignee,[9] are relevant.

should have been permitted to show that the agreement leading to the execution of the new lease did not contemplate a surrender, but was made pursuant to a clause in the first lease providing that in case of default on the part of the lessee, or if the premises should become vacant during the term of the lease, the lessor might resume possession of the premises and relet for the remainder of the term on the account of the lessee.

In the case of a written lease the lessee can introduce parol evidence to show that before the expiration of the term the lessor had consented that a third person should occupy the premises as his tenant. Such evidence does not contradict the written lease, but only shows a subsequent fact or agreement in relation to it. Cunningham *v.* Caldwell, 7 Rob. (La.) 520.

In Clator *v.* Otto, 38 W. Va. 89, 18 S. E. 378, where the lessee had assigned to a trustee, not the leases, but a stock of goods and fixtures, with power to continue the business until the trustee could sell the property, it was held that oral evidence of an agreement showing a surrender of the leases by the lessee was admissible; that the assignment was one thing and "the surrender of the leases was another thing. He agreed to give them up because he was unable thereafter as he had been before unable to pay rent; he assigned the property to pay past rent — wholly different matters — different contracts."

Under the rule that where a verbal contract is entire and a part only is reduced to writing, parol evidence of the entire contract is competent where the lessor agrees to release the lessee from rent for the unexpired term in consideration of a surrender of the premises for the balance of the term, and an indorsement is made upon the lease merely to the effect that the unexpired term is canceled. It is proper in an action to recover rent for such term to permit the lessee to show the entire agreement. Hope *v.* Balen, 58 N. Y. 380.

8. Churchill *v.* Lammers, 60 Mo. App. 244.

In an action to recover rent reserved in a lease under seal, the record of an action brought by the lessor against the lessee's sub-tenant to recover possession of the premises during the term of the lease is competent evidence upon the issue whether there had been a surrender and a substitution of such sub-tenant for the lessee. Amory *v.* Kannoffsky, 117 Mass. 351.

In Dix *v.* Atkins, 130 Mass. 171, where the lease, which was for two years, provided that if neither party gave to the other three months' notice in writing of his intention to terminate the lease at the end of the term the lease was to continue in force for another term of one year, it was held that the fact that the lessor let or took possession of the premises during the second quarter of the third year, although possibly competent evidence in an action for rent for that quarter, was not competent to show that he accepted a surrender of the lease during the first quarter.

The Acceptance by a Tenant of a New Lease of the same premises, during the term of the first lease, is deemed a virtual surrender of the first lease. Such presumption arises from the acts of the parties, which are supposed to indicate an intention to that effect; but when such intention cannot reasonably be presumed, the presumption will not be supported. Van Rensselaer *v.* Penniman, 6 Wend. (N. Y.) 570.

9. In short, any fact tending to show that the lessor recognized the substitution of the assignee for the lessee is legitimate. Loustaunau *v.* Lambert, 1 Tex. Civ. App. 434, 20 S. W. 937. In this case, where the issue was whether or not the lessor had accepted a surrender in fact and

Declarations of the Occupant to third persons tending to show that his possession is as agent for the tenant, and not under the owner, are admissible.[10]

(2.) Abandonment of Premises and Delivery of Key. — Of course it is proper to show an abandonment of the premises and delivery of the key to and an acceptance of it by the landlord.[11] But the question in such case usually is as to the sufficiency of such proof, the general rule being that something more than this must be shown; that it must also be shown that the landlord subsequently dealt with the premises in such manner as to clearly indicate that he considered the tenancy as at end.[12]

canceled the lease, so far as concerned the original lessee, it was held proper to permit witnesses to testify that they had applied to the lessor to rent the premises, that the lessor had claimed a right therein and had in fact attempted to rent the premises. *Compare* Kiester *v.* Miller, 25 Pa. St. 481, where it was held that proof of offers by a lessor to lease the premises to other persons, although competent, is but slight evidence on the question whether or not the lease was surrendered for the unexpired term, because such an offer is equally consistent with the hypothesis that it was made with intent to rescind the lease provided another good tenant could be found; and that any inference to be drawn from it is rebutted by proof of the fact that the lessor retained the lease in his possession after the alleged surrender.

A surrender of the lease or a release of the lessee is not to be implied from the mere fact that the lessor assented to the assignment of the lease and accepted rent from the assignee in possession. Reese *v.* Lowy, 57 Minn. 381, 59 N. W. 310.

10. Jacobs *v.* Callaghan, 57 Mich. 11, 23 N. W. 454.

11. Hill *v.* Robinson, 23 Mich. 24.

Evidence of an offer by the lessee to surrender, the lessor's silence and non-claim for rent for many years, accompanied with evidence that the lessee had surrendered to his lessor and delivered possession, and that the latter had afterward collected rent from other tenants of the former lessee, is admissible. Pratt *v.* H. M. Richards Jewelry Co., 69 Pa. St. 53.

A Removal of the Tenant from the premises and an unaccepted offer to deliver up the keys are not evidence of the existence of an agreement for the termination of the lease before its expiration. Kiester *v.* Miller, 25 Pa. St. 481; Milling *v.* Becker, 96 Pa. St. 182.

A surrender will not be implied by law from the mere act of the tenant delivering the keys of the premises to the landlord and the latter taking possession of the premises. The law does not infer an acceptance of the surrender from such acts. Ladd *v.* Smith, 6 Or. 316.

12. Alschuler *v.* Schiff, 59 Ill. App. 51.

See also Diehl *v.* Lee (Pa.), 9 Atl. 865, where it was held that the mere fact that the lessor picked up the key of the premises from the doorstep of his own house, where the tenant had thrown it, and kept it did not show an acceptance of the tenant's surrender.

Taking care of the keys to the premises and cleaning the premises after the tenant has left are not conclusive evidence of the landlord's acceptance of a surrender. Milling *v.* Becker, 96 Pa. St. 182.

An acceptance by the landlord of the surrender of the leased premises by the tenant is not shown by proof that the landlord, upon receiving a letter through the mails stating that the tenant proposed to vacate the premises without giving any reason, inclosing the key and rent to the date of the letter, took possession of the premises and attempted to rent them. Joslin *v.* McLean, 99 Mich. 480, 58 N. W. 467.

Evidence that the lessee brought the keys of the building to the lessor's agent and left them on the table, stating that he had abandoned

4. Extinguishment of Landlord's Title. — A tenancy, once shown to exist, is presumed to continue so long as the tenant remains in possession, and until the contrary is shown.[13] This presumption of the continuancy of a tenancy is not a conclusive presumption, but may be rebutted.[14] Thus the tenant may show that since leasing the premises the landlord's title has expired by its own limitation,[15] or has been terminated by the act of the lessor himself,[16] or by operation

the premises because they were untenantable, although competent on the question of surrender, is not conclusive, especially where the evidence is conflicting as to whether the agent accepted the keys. Lucy *v.* Wilkins, 33 Minn. 441, 23 N. W. 861.

13. Word *v.* Drouthett, 44 Tex. 365; Milsap *v.* Stone, 2 Colo. 137; Wheelock *v.* Warschauer, 21 Cal. 309; Camp *v.* Camp, 5 Conn. 291, 13 Am. Dec. 61.

Where the relation of landlord and tenant is once established under a sealed lease for ninety-nine years, renewable forever, the mere fact that the landlord has failed to demand rent will not justify the presumption that he has released or extinguished his right to it under the lease. Myers *v.* Silljacks, 58 Md. 319.

14. The presumption of a continuance of a tenancy may be rebutted, however, for the rule which estops a tenant from disputing the title of his landlord does not prevent him from showing that the tenancy has been determined. He is estopped so long as the tenancy continues, but, the tenancy being dissolved, the disabilities resulting from his position as tenant are removed, and the estoppel ceases. Wheelock *v.* Warschauer, 21 Cal. 309. To the same effect, Camp *v.* Camp, 5 Conn. 291, 13 Am. Dec. 61.

15. *Alabama.* — Crim *v.* Nelms, 78 Ala. 604; Otis *v.* McMillan, 70 Ala. 46.

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

Florida. — Winn *v.* Strickland, 34 Fla. 610, 16 So. 606.

Illinois. — St. John *v.* Quitzow, 72 Ill. 334; Wells *v.* Mason, 5 Ill. 84.

Kentucky. — Swan *v.* Wilson, 1 A. K. Marsh. 73; Casey *v.* Gregory, 13 B. Mon. 505, 56 Am. Dec. 581.

Maine. — Ryder *v.* Mansell, 66 Me. 167.

Massachusetts. — Hilbourn *v.* Fogg, 99 Mass. 11.

Missouri. — Pentz *v.* Kuester, 41 Mo. 447; Robinson *v.* Troup Min. Co., 55 Mo. App. 662.

New Hampshire. — Russell *v.* Allard, 18 N. H. 222.

Pennsylvania. — Newell *v.* Gibbs, 1 Watts. & S. 496.

Life Estate. — The lessee may show that his lessor's estate in the premises was merely that of a life tenant which had terminated by his decease. Heckart *v.* McKee, 5 Watts (Pa.) 385; Lamson *v.* Clarkson, 113 Mass. 348, 18 Am. Rep. 498.

A tenant sued in ejectment may show that his landlord's title has, since the contract of letting, passed out of him, and that he is not now entitled to recover possession. Harvey *v.* Harvey, 26 S. C. 608, 2 S. E. 3.

Where a tenant pays rent after the expiration of the year, which according to the contract of lease was due at its close, such payment will not estop him from showing, in an action by his landlord to recover possession, that the landlord's title was extinguished during the year. Randall *v.* Carlton, 8 Ala. 606.

16. *Alabama.* — Otis *v.* McMillan, 70 Ala. 46.

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

Illinois. — St. John *v.* Quitzow, 72 Ill. 334.

Kentucky. — Gregory *v.* Crab, 2 B. Mon. 234.

Massachusetts. — Hilbourn *v.* Fogg, 99 Mass. 11.

Michigan. — McGuffie *v.* Carter, 42 Mich. 497, 4 N. W. 211.

Nebraska. — Allen *v.* Hall, 92 N. W. 171, *reversing* 89 N. W. 903.

New York. — Jackson *v.* Rowland, 6 Wend. 666, 22 Am. Dec. 557; Hetzel *v.* Barber, 69 N. Y. 1.

Oregon. — West Shore Mills Co. *v.* Edwards, 24 Or. 475, 23 Pac. 987.

of law,[17] whereby the relation has been determined. But the fact and

Tennessee. — Bowser *v.* Bowser, 10 Humph. 49; *s. c.*, 8 Humph. 22.
Wisconsin. — Chase *v.* Dearborn, 21 Wis. 57.
Compare Linam *v.* Jones, 134 Ala. 570, 33 So. 343; Eckles *v.* Booco, 11 Colo. 522, 19 Pac. 465.

Evidence that the landlord has assigned the reversion and that the tenant has attorned to the assignee, or that under a judgment and execution the reversion has been bought in by the tenant or by a third person whom he subsequently attorns to avoid eviction, is admissible in defense of an action by the landlord for the recovery of rent or of possession. Farris *v.* Houston, 74 Ala. 162.

For the purpose of showing that the contract for rent between the landlord and tenant had in legal effect been annulled by the landlord's act of consent that the tenant should rent from other persons, such third persons should be permitted to testify that they had purchased the premises; and the rent obligations of the tenant to such third persons should be received in evidence, and also the testimony of such third persons that the original landlord knew of the new contract of renting between themselves and the tenant. Hill *v.* Williams, 41 S. C. 134, 19 S. E. 290.

In Robertson *v.* Biddell, 32 Fla. 304, 13 So. 358, it was held proper to permit the tenant to show that within a week after the execution of the lease his wife had entered into a contract with the landlord for the purchase of the premises, that the landlord had refunded a portion of the rent paid and notified another cotenant of the premises to attorn to the defendant's wife.

17. Farris *v.* Houston, 74 Ala. 162; Otis *v.* McMillan, 70 Ala. 46; Winn *v.* Strickland, 34 Fla. 610, 16 So. 606.

Rodgers *v.* Palmer, 33 Conn. 155, where the lessee defended by setting up a new lease obtained after the date of the expired lease, from an execution creditor who had levied upon the premises as the property of the grantor of the lessor, and in support of the title of his last lessor offered in evidence the record of a judgment in favor of such last lessor against the plaintiff's grantor and a levy of the execution issued thereon upon the premises in question subsequent to the deed to the plaintiff, together with evidence that the deed was fraudulent and void as against creditors. The court, in holding the exclusion of this evidence error, said that as against creditors of the plaintiff's grantor the deed in question may have been fraudulent and such creditor may have obtained the legal title to the premises by execution, and the defendant by attornment may have become her tenant; that "if these three things were true the defendant had procured a title after the date of the lease, within the letter and spirit of the statute [defining title in this connection to mean a paramount legal right to possession], and had a right to show it in his defense. In order to do so it became necessary not only to show a levy of execution and an attornment, but a title in [the execution debtor] at the time of the attachment or levy, and to attack for that purpose the validity of that deed from" the execution debtor to the plaintiff.

In Fry *v.* Boman, 67 Kan. 531, 73 Pac. 61, an action for the possession of lands, the title to which plaintiff claimed under the M. K. & T. Congressional Land Grant, it was held proper to permit the defendant to show that the title of the plaintiff's grantor, the patentee under the grant, had been set aside and declared null and void.

In all cases it is competent for the tenant to show that the premises have been sold under foreclosure proceedings, under execution, or for taxes, or indeed that the title of the landlord has from any cause expired. Franklin *v.* Hurlbert, 1 W. & W. Civ. Cas. (Tex.) § 816.

Where a tenant is sued by his landlord for possession he may show that the landlord's title was terminated by a sheriff's sale under a judgment against him. Smith *v.* Crosland, 106 Pa. St. 417. See also Wolf *v.* Johnson, 30 Miss. 513; Ryder *v.*

validity of the new title must be established by competent evidence.[18] The rule permitting a tenant to show that title to the premises has been acquired by himself has reference, however, only to a title acquired subsequently to the commencement of the tenancy.[19]

Mansell, 66 Me. 167 (foreclosure sale under mortgage); Casey *v.* Gregory, 13 B. Mon. (Ky.) 505, 56 Am. Dec. 581; Pickett *v.* Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Lancashire *v.* Mason, 75 N. C. 455; Rhyne *v.* Guevara, 67 Miss. 139, 6 So. 736.

"The tenant may show that the title of the landlord has terminated, either by his original limitation or by a conveyance to himself or a third person, or by the judgment and operation of law. If the landlord transfers the estate, the allegiance of the tenant is due to the grantee. If the estate is vested in a third person by operation of law, the tenant holds the possession subject to the title of such person. The tenant may purchase in the premises under a judgment against the landlord, and set up the title thus acquired in bar of an action brought against him by the landlord. In such cases the relation of landlord and tenant becomes dissolved, and the latter no longer holds the premises under the former." Tilghman *v.* Little, 13 Ill. 240.

18. Housam *v.* Kunecke, 4 Mack. (D. C.) 297, where the tenant had attorned to one claiming title to the premises by a tax deed, and it was held that a valid title in the new landlord was not shown by mere production and proof of a tax deed.

Where a tenant attempts to show that subsequent to the leasing by him he had purchased the property at execution sale against his landlord, it is necessary for him to show by legal evidence the execution judgment and the proceedings necessary to establish jurisdiction. Hogsitt *v.* Ellis, 17 Mich. 351.

A sale by a landlord of his interest in the premises cannot be shown by evidence of mere declarations by him. Harner *v.* Leeds, 25 N. J. L. 106.

The tenant's declarations whilst in possession of the premises that he has purchased them from the landlord are not admissible to prove a contract of purchase. Hill *v.* Goolsby, 41 Ga. 289.

19. People's Loan & Building Ass'n *v.* Whitmore, 75 Me. 117.

In an avowry for rent the tenant cannot introduce in evidence a deed dated prior to his lease for the purpose of showing that at the time of making the distress the avowant had no legal title to the premises and hence could not distrain. Giles *v.* Ebsworth, 10 Md. 333.

A tenant in possession of the premises under a written lease cannot show that at a time prior to the execution of the lease the premises had been conveyed by a third person to his wife for her sole and separate use. Miller *v.* Lang, 99 Mass. 13.

LARCENY.

CROSS-REFERENCES:

Burglary;
Embezzlement:
False Personation; False Pretenses;
Receiving Stolen Goods; Robbery.

I. THE CORPUS DELICTI GENERALLY.

In a prosecution for larceny, as in all other prosecutions for crime, there should never be a conviction unless what the law denominates the *corpus delicti* — the essence of the actual crime — has been established.[1]

On a Prosecution for an Attempt to Commit Larceny From the Person, in order to justify a conviction it is necessary for the prosecution to show that the prisoner failed or was prevented in the execution of the offense.[2]

II. THE TAKING AND CARRYING AWAY.

1. Presumptions and Burden of Proof. — A. In General. — The taking and carrying away of the property alleged to have been stolen are essential elements of the crime of larceny, and hence, in order to warrant a conviction, it devolves upon the prosecution to establish those facts beyond a reasonable doubt.[3]

1. *Alabama.* — Bolling *v.* State, 98 Ala. 80, 12 So. 782.
California. — People *v.* Williams, 57 Cal. 108.
Georgia. — Blandford *v.* State, 115 Ga. 824, 42 S. E. 207.
Illinois. — May *v.* People, 92 Ill. 343.
Michigan. — People *v.* Gordon, 40 Mich. 716.
South Carolina. — State *v.* McGowan, 1 S. C. 14.
Tennessee. — Youkins *v.* State, 2 Coldw. 219.
Texas. — Lane *v.* State (Tex. Crim.), 45 S. W. 693.
Vermont. — State *v.* Davidson, 30 Vt. 377, 73 Am. Dec. 312.
Wisconsin. — State *v.* Moon, 41 Wis. 684.
In People *v.* Davis, 64 Hun 636, 19 N. Y. Supp. 781, proof that the complaining witness owned and had in his possession a watch; that in the presence of the defendant he hung up his vest containing the watch, and within twenty minutes after, upon putting on his vest, he missed the watch, sufficiently established the *corpus delicti*; that the "watch was, without the knowledge or consent of the complainant, taken out of his possession and carried away or concealed by some active agency. It could not have gotten away from him without assistance. Such taking or removal from the possession of the owner without his knowledge or consent, followed by concealment, was evidence of larceny. It proved that a crime had been committed and thus established the *corpus delicti*. True, that alone did not prove who committed the crime; only that the crime had been committed."
In Fowler *v.* State, 100 Ala. 96, 14 So. 860, a prosecution for the larceny of an ox, it was held that "the alleged owner was properly permitted to testify that after the ox was missed he was shown some horns, that they were the horns of the ox which he had lost, and to state how he identified them, since such testimony, in connection with the other evidence, tended to prove the *corpus delicti*."
2. Com. *v.* Luckis, 99 Mass. 431, 96 Am. Dec. 769.
3. *Alabama.* — Molton *v.* State, 105 Ala. 18, 16 So. 795, 53 Am. St. Rep. 97.
Arkansas. — Fulton *v.* State, 13 Ark. 168.
Florida. — Long *v.* State, 44 Fla. 134, 32 So. 870.
Illinois. — Keating *v.* People, 160 Ill. 480, 43 N. E. 724.
Mississippi. — Alexander *v.* State, 60 Miss. 953.
Missouri. — State *v.* Boatright, 81 S. W. 450; State *v.* Lambert, 21 Mo. App. 301.
Texas. — Harris *v.* State, 29 Tex. App. 101, 14 S. W. 390, 25 Am. St.

B. Power to Remove. — It is not sufficient on a prosecution for larceny to show that the defendant had the power to remove the property alleged to have been stolen; the evidence must show that there was in fact some removal.[4]

C. Extent of Removal. — In proving the caption and asportation, it is sufficient if the evidence shows that the property was removed from the place where it was; it need not be shown that the property was taken from the premises.[5]

D. Duration of Possession. — The duration of the possession is not material; it is sufficient if the evidence shows that the taker had for an instant the entire and absolute possession or perfect control of the property,[6] although that control may have been inter-

Rep. 717; Cohea *v.* State, 9 Tex. App. 173; Coltharp *v.* State (Tex. Crim.), 60 S. W. 879; Sharp *v.* State, 29 Tex. App. 211, 15 S. W. 176; Buchanan *v.* State, 26 Tex. App. 52, 9 S. W. 57; Boyd *v.* State, 24 Tex. App. 570, 6 S. W. 853, 5 Am. St. Rep. 908.

Evidence that the defendant's first connection with the stolen property was subsequent to the taking, and that he purchased it either in good or bad faith, and whether he knew or did not know the owner, will not sustain a conviction for theft, although it may be sufficient to sustain a conviction for receiving stolen property. Vaughn *v.* State, 17 Tex. App. 562.

In Cross *v.* State, 64 Ga. 443, evidence to the effect that a hog was heard to squeal, that the witness ran to him, that defendant ran away, and that the hog was dead, was held sufficient to show the taking and carrying away with intent to steal.

4. State *v.* Alexander, 74 N. C. 232. See also Molton *v.* State, 105 Ala. 18, 16 So. 795, 53 Am. St. Rep. 97.

In State *v.* Clifford, 86 Iowa 550, 53 N. W. 299, 41 Am. St. Rep. 518, it was held that evidence that one rode to town with a codefendant with a load of clover seed that had been stolen, saw codefendant hide the sacks that had contained the seed under a culvert in the road, and returned with him from town, is not sufficient to support a verdict of simple larceny, in the absence of any direct evidence connecting the accused with the offense charged, or any showing that he exercised any control over the seed, or the team and wagon by which it was conveyed.

5. State *v.* Higgins, 88 Mo. 354; State *v.* Green, 81 N. C. 560; State *v.* Mitchener, 98 N. C. 689, 4 S. E. 26; Gettinger *v.* State, 13 Neb. 308, 14 N. W. 403.

It is not necessary to show that the property stolen was removed from the premises of the owner. To remove it with the requisite felonious intent from one part of the premises to another, or from the spot or house where it was found, is sufficient asportation. Delk *v.* State, 64 Miss. 77, 1 So. 9, 60 Am. Rep. 46.

State *v.* Craige, 89 N. C. 475, 45 Am. Rep. 698, where the asportation consisted of removing wheat at a mill from one garner into the defendant's adjoining garner.

State *v.* Carr, 13 Vt. 571, where the defendant was indicted for larceny of sheep. "It is insisted that there was no sufficient evidence of the asportation or the felonious intent, [but] . . . if the respondent took the sheep and changed their local position, however little, and did this with the felonious intent charged, it was enough."

6. Com. *v.* Luckis, 99 Mass. 431, 96 Am. Dec. 769; State *v.* Hardy, Dud. (S. C.) 236; State *v.* Jackson, 65 N. C. 305; Harrison *v.* People, 50 N. Y. 518, 10 Am. Rep. 517, where the evidence showed that the defendant had put his hand into the coat pocket of another and lifted a purse about three inches from the bottom of the pocket, when he was prevented from removing it; it was held that this showed a sufficient asportation.

rupted by an intervening circumstance not within the power of the accused.[7]

In Kemp *v.* State, 89 Ala. 52, 7 So. 413, it was held that a conviction might be had for the larceny of a hog on proof that the defendant, having shot and killed it, cut its throat. See also Croom *v.* State, 71 Ala. 14. *Compare* Williams *v.* State, 63 Miss. 58, *holding* that proof of shooting an animal, turning it upon its back and cutting its throat, there being no proof of a further act toward removing the animal, was not sufficient to show asportation. Edmonds *v.* State, 70 Ala. 8, where the testimony of a witness to the effect that he gave the defendant an ax, got some corn, and by dropping some on the ground tolled the hog to the distance of about twenty yards; that the defendant then struck the hog with the ax, and upon the hog squealing both defendant and witness ran away, leaving the hog where it was, was held not sufficient to show an asportavit. The court said: "The controlling principle in such cases would seem to be that the possession of the owner must be so far changed as that the *dominion* of the trespasser shall be complete. His proximity to the intended booty must be such as to enable him to assert this dominion by taking actual control or custody by manucaption, if he so wills. If he abandon the enterprise, however, before being placed in this attitude, he is not guilty of the offense of larceny, though he may be convicted of an *attempt* to commit it. It would seem there can be no *asportation,* within the legal acceptation of the word, without a *previously acquired dominion.* The facts of this case, taken alone, do not constitute larceny. It is not a reasonable inference from them that there was such a complete caption and asportation as to consummate the offense."

In State *v.* Butler, 65 N. C. 309, it was held that an indictment at common law for larceny of a cow was not supported by proof that the cow was shot down and her ears cut off by the defendants.

In Wolf *v.* State, 41 Ala. 412, an indictment for the larceny of a hog, where the only witness for the prosecution testified "that he heard a gun fired in the woods, and, immediately afterward, heard a hog squeal; that he saw the defendant, soon afterward, chasing the hog, and pursued him; that the defendant chased the hog about one hundred yards, and was in the act of striking it with his gun when witness came up with him and asked him what he was doing; and that he replied he had shot at a squirrel and hit the hog, and he wanted to see where the hog was shot," it was held that this did not show a sufficient caption or asportavit to consummate the offense of larceny.

"The element of asportation in the statutory crime of the larceny of neat cattle is proved by evidence showing that the defendant had driven the animal about six hundred yards, then killed it and removed and carried away the hide and other parts of the animal, thereby depriving the owner of the immediate possession of it." Wilburn *v.* Territory, 10 N. M. 402, 62 Pac. 968.

Under the Definition of Larceny as Defined by the California Penal Code it must be shown that "the goods were severed from the possession or custody of the owner and in the possession of the thief, though it be but for a moment." People *v.* Meyer, 75 Cal. 383, 17 Pac. 431. In this case the defendant was prosecuted for the larceny of an overcoat that was upon a dummy standing on the sidewalk in front of a store, and it was held that evidence of an attempt by him to carry away the coat, which he was prevented from doing because the coat was chained to the dummy and the dummy tied to the building by a string, did not show a sufficient asportation.

7. As the intervention of a police officer and the seizure of the prisoner while in the act of committing the larceny. Com. *v.* Luckis, 99 Mass. 431, 96 Am. Dec. 769.

In State *v.* Gray, 106 N. C. 734, 11 S. E. 422, the evidence as to asportation showed that the animals

2. Mode of Proof. — A. Testimony of Eye-Witness. — A witness who saw the defendant take the property may testify to that fact.[8]

B. Testimony of Prosecuting Witness. — It is proper to permit the prosecuting witness to state in what manner he ascertained that the property in question had been taken.[9]

C. Declarations by Prosecuting Witness. — Declarations by the prosecuting witness are admissible in evidence when part of the *res gestae;*[10] otherwise not.[11]

D. Indirect or Presumptive Evidence. — a. *In General.* Since the taking and carrying away can seldom be established by direct evidence, indirect or presumptive evidence must generally be resorted to.[12] That the accused had the opportunity to place the

in question were grazing in a field in which there was a vacant house, the entrance to which was barred by boards; that on approaching the house on one occasion the prosecuting witness discovered the defendant in the house with several of the animals, but the arrangement of the boards closing the entrance had been changed; that the defendant seized one of the animals, but upon discovery fled. It was held that the evidence was sufficient to show an asportation; that it was sufficient if the animals were removed from the flock and were even for an instant under the control of the accused.

8. Spiars *v.* State (Tex. Crim.), 69 S. W. 533. See also State *v.* Daly, 37 La. Ann. 576.

9. Licett *v.* State (Tex. Crim.), 79 S. W. 33.

10. People *v.* Piggott, 126 Cal. 509, 59 Pac. 31; State *v.* Ah Loi, 5 Nev. 99; State *v.* Driscoll, 72 Iowa 583, 34 N. W. 428.

A Complaint of Larceny From the Person Made to a Police Officer immediately after its alleged occurrence is admissible for the prosecution as part of the *res gestae.* Driscoll *v.* People, 47 Mich. 413, 11 N. W. 221.

"On a trial for robbery committed in a certain hotel it is competent for the state to prove by the prosecutor that he hurried down from the hotel and met a policeman on the street, to whom he made complaint that he had been robbed, and by the policeman that the prosecutor came down to him on the street and said that he had been robbed at the hotel, that a certain named person had taken his money, and that the accused was present. The evidence indicating that all this took place immediately after the criminal act, and as a natural and probable consequence therefrom, it was admissible as part of the *res gestae.*" Lampkin *v.* State, 87 Ga. 516, 13 S. E. 523.

11. Evidence that the prosecuting witness, after he had been drawn and summoned as a grand juror, proposed to the defendants not to prosecute them if they would pay for the stolen property, which offer they refused, is properly rejected unless shown to be part of the *res gestae.* Williams *v.* State, 52 Ala. 411.

On a larceny prosecution, testimony as to statements and charges against the accused made by the alleged owner of the property to the witness when the accused was not present is mere hearsay and should not be received. Bolling *v.* State, 98 Ala. 80, 12 So. 782.

12. Owens *v.* State, 28 Tex. App. 122, 12 S. W. 506.

That the Drayman Who Hauled the Stolen Goods from the house from which they were stolen participated in the larceny may be inferred from the fact that he carried them to an acquaintance of his own and left them for temporary safekeeping, and afterward said they were sent there by one of the persons who assisted him in loading, which person was not known to the acquaintance who received and took charge of the goods at the drayman's

property where it was found is a circumstance proper to be considered.[13]

b. *Finding Property in Consequence of Information From Accused.* — It is competent for the prosecution to show that the accused directed a witness where to find the stolen property, and that it was found there,[14] if the property so found is identified by other independent evidence as the property stolen.[15]

request. Wynn *v.* State, 81 Ga. 743, 7 S. E. 737.

"Where an unsigned money order was shown to have formed part of the contents of a sealed package which was stolen, and it is traced to the possession of the defendant after the theft of such package, such unsigned order is admissible in evidence as tending to show the larceny of the package that contained it, with other signed orders, even though such unsigned order was without value or binding force." Barnes *v.* State (Fla.), 35 So. 227.

In Flores *v.* State (Tex. Crim.), 63 S. W. 330, it was held that a certain receptacle to which the defendant had access on the night of the alleged larceny was properly admitted, there being evidence identifying it as the one in which the stolen property was found concealed on the defendant's premises, and there being other circumstances in the case connecting him with the larceny.

Fabricated Bill of Sale. — In Williams *v.* State, 27 Tex. App. 466, 11 S. W. 481, it was held proper to permit the prosecution to introduce in evidence a bill of sale conveying the alleged stolen property to the defendant, which bill of sale was found in and taken from the possession of the defendant after his arrest, there being proof that the bill of sale had been fabricated by the defendant.

13. And the further fact that other persons had like opportunity merely weakens the probative force of such circumstance, and does not render it incompetent as criminating evidence. Padfield *v.* People, 146 Ill. 660, 35 N. E. 469.

14. State *v.* Lindsey, 78 N. C. 499; Hudson *v.* State, 9 Yerg. (Tenn.) 408; Belote *v.* State, 36 Miss. 96, 72 Am. Dec. 163. In this case the court said: "It is not the confession of the party that is received in evidence against him, but the facts which are brought to light by his acts, and in consequence of his confessions. It will not do to say that the acts, having been brought about by improper means, are of the same character as confessions produced by the same means; that the influence which produced groundless confessions might also produce groundless conduct; for when the acts of the accused point out and produce the stolen property in its place of concealment, that fact speaks for itself, and is inconsistent alike with the idea of falsehood and of innocence. Property so concealed must be considered as in the custody of the accused, and his production of it is equivalent to its being found upon his person, or in his private keeping at his house; and in such cases the finding or production of the property is evidence of guilt. The testimony permitted by the court to go to the jury was simply, in substance, that the witness charged the accused with stealing the money, and thereupon the accused showed the place where it was concealed, and produced and delivered it to the witness. If the money produced was the same which was stolen from the witness, there cannot be a doubt as to the competency of the testimony."

A Strong Circumstance Indicating Guilt is the finding of part of the stolen property as the defendant suggested it could be hidden. People *v.* Cassin, 62 Hun 623, 16 N. Y. Supp. 926, *affirmed* 136 N. Y. 633, 32 N. E. 1014.

15. Belote *v.* State, 36 Miss. 96, 72 Am. Dec. 163; State *v.* Due, 27 N. H. 256.

c. *Motive.* — Evidence tending to show a motive for the probable taking by the defendant is admissible.[16]

d. *Flight, Etc.* — Flight, escape or attempt to escape constitutes legitimate evidence. How much weight it possesses depends upon the particular circumstances of each case, and the relevancy and competency do not at all depend upon the fact that the flight or attempted flight was made in the endeavor to escape some specific or threatened prosecution. Such evidence is admissible on the ground that it commonly betrays a consciousness of guilt.[17] But while flight

16. In Perrin *v.* State, 81 Wis. 135, 50 N. W. 516, a prosecution for stealing money from the custody of a bank of which the defendant was a bookkeeper, the money having been placed with the bank for safe-keeping, it was held proper to permit the prosecution to show that the defendant was in fact a defaulter shortly previous to the time of the larceny, and that he had falsified the books and accounts of the bank to hide that fact. The court said that it might very well be that one object which the defendant expected to accomplish by the larceny was to pay back to the bank the amount of his defalcations, which were likely to be discovered at any time, and thus destroy evidence of that crime, and that the evidence in question was proper as tending to show a motive.

In Fulmer *v.* Com., 97 Pa. St. 503, "on behalf of the defendant his father testified in chief that he gave the defendant money every time he asked for it, and that he gave him money in July. If this was for any purpose it was to show absence of motive because the son was not in want of money by reason of his father's supplies. It was competent to ask the same witness if the defendant was not in need of money and owed pressing debts. There had been no offer by the commonwealth to prove the defendant's pecuniary condition as evidence of motive for commission of the crime. The defendant attempted to disprove motive by showing that money was furnished for his wants, and he cannot complain of pertinent cross-examination."

In Woods *v.* State, 76 Ala. 35, 52 Am. Rep. 314, where the defendant was indicted for stealing cotton from one with whom he had had a settlement as his landlord, it was held that evidence of declarations by the defendant expressing dissatisfaction with the settlement; that "he had got nothing out of his cotton, and that he was determined to have satisfaction," tended to show a motive for the larceny and was competent against him.

17. State *v.* Moore, 101 Mo. 316, 14 S. W. 182; State *v.* Williams, 54 Mo. 170; State *v.* Lee, 17 Or. 488, 21 Pac. 455; United States *v.* Jackson, 29 Fed. 503; Sewell *v.* State, 76 Ga. 836. See also State *v.* Van Winkle, 80 Iowa 15, 45 N. W. 388; State *v.* Espinozei, 20 Nev. 209, 19 Pac. 677.

Where it appears that the defendant in a larceny prosecution impliedly admitted knowledge of the guilty agent by promising to tell who it was two days afterward, and that in the meantime he fled the neighborhood, these facts are proper to go to the jury as a basis for an inference of guilt. Kemp *v.* State, 89 Ala. 52, 7 So. 413.

In State *v.* Schaffer, 70 Iowa 371, 30 N. W. 639, where the state sought to prove that the defendant fled after the stolen property was found in his possession, and the sheriff testified that he had made a futile search for the defendant, it was held proper to permit the sheriff to state that while making such search he had a warrant for the defendant's arrest on another charge, not for the purpose of proving the defendant guilty of another offense, but to show that the sheriff had a motive in making a thorough search.

State *v.* Lee, 17 Or. 488, 21 Pac. 455, where it was held error to permit the introduction in evidence of the record of the defendant's de-

or attempted flight is strong evidence, it is open to explanation.[18]

e. *Possession of Stolen Property.* — **(1.) Generally.** — The fact that stolen property is found in the possession of a person may always be given in evidence against him upon his trial for the larceny of the property.[19] But possession is not a material ingredient of the offense, and hence need not be established in order to warrant conviction.[20]

Property in Possession of Another. — Where the evidence has connected the defendant and another person as participants in the theft, the fact that the property was found in the possession of such other person is admissible against the defendant.[21] But in order to render such evidence competent there must be evidence of a conspiracy.[22]

(2.) Effect of Proof of Possession. — (A.) GENERALLY. — The effect of proof of possession of recently stolen property is a question as to which the cases contain various statements or so-called rules, and

fault in court on a particular day when his case was called for trial because the evidence in no manner tended to prove flight.

18. State *v.* Seymour, 7 Idaho 257, 61 Pac. 1033.

19. Williams *v.* State, 119 Ga. 564, 46 S. E. 837; State *v.* Daly, 37 La. Ann. 576; Lamater *v.* State, 38 Tex. Crim. 249, 42 S. W. 304. And see cases in succeeding notes.

In Grentzinger *v.* State, 31 Neb. 460, 48 N. W. 148, a prosecution for the larceny of a horse, it was held that testimony by a witness called for the state to the effect that he had seen the prisoner riding the horse in question and inquired of him if he had been trading horses, to which the prisoner replied that he had, was proper to go to the jury, and that an instruction which virtually withdrew it from the jury was erroneous.

In State *v.* VanWinkle, 80 Iowa 15, 45 N. W. 388, a prosecution for the larceny of cattle, where there was testimony tending to show that the defendant, a single man, made his home at his father's house, it was held proper to permit the owner of the cattle to testify that he had found them at such house, the testimony being competent to show not only that the defendant had possession of the cattle, but also as bearing on the question whether they had strayed or been stolen.

In Foster *v.* State (Tex. Crim.), 56 S. W. 58, a prosecution for the larceny of one head of cattle, it was held proper to permit certain witnesses for the prosecution to testify that they dug up on the premises of the defendant certain bones which appeared to be those of a beef corresponding in size to that alleged to have been stolen by him.

In State *v.* Southern, 48 La. Ann. 628, 19 So. 668, an indictment for larceny from unknown owners, it was held competent for the prosecution to prove that the property found in the possession of the defendant did not belong to him, and that for this purpose it was proper to show, the property stolen having been hogs, that the mark on their ears, found in the defendant's possession, was not defendant's mark.

20. Barker *v.* State, 126 Ala. 69, 28 So. 685.

21. Norsworthy *v.* State (Tex. Crim.), 77 S. W. 803; State *v.* Wohlman, 34 Mo. 482, 86 Am. Dec. 117.

On the separate trial of one jointly indicted with others for a larceny, where it was shown that part of the stolen property was found in the defendant's possession, it is proper to show that part of it was also found in the possession of each of his codefendants, where it appears from the testimony of all the defendants that they were together the night the larceny was committed. Branson *v.* Com., 92 Ky. 330, 17 S. W. 1019.

22. State *v.* Drew, 179 Mo. 315,

no one statement of a rule covering all the cases seems possible. Thus the broad doctrine has been laid down that the unexplained possession of property recently stolen always raises a legal presumption of guilt.[23] But this rule has been qualified to the extent of holding that guilt must be self-evident from the bare fact of possession of stolen property in order to justify the judge in laying it down as a presumption made by the law; otherwise it is a case depending on circumstantial evidence, to be passed upon by the jury.[24]

It may be noted that the cases cited in the notes to the rules just stated are from states where apparently it is proper for the trial judge to express his opinion as to the weight of the evidence. It seems to be clear, however, that a party cannot, as a matter of law, be adjudged guilty of larceny upon mere proof that property was stolen, and soon thereafter found in his possession.[25] And it has been held error for the trial judge to charge the jury that such possession, supported by other evidence tending to show guilt, is a strong circumstance against the accused.[26] But merely calling the presumption a presumption of law is not error where as matter of fact the jury are still left with the power to decide for themselves as to its sufficiency.[27] But even conceding this to be so, the courts do not

78 S. W. 594; State *v.* Boatright (Mo.), 81 S. W. 450.

23. State *v.* Bennet, 3 Brev. (S. C.) 514.

24. State *v.* Graves, 72 N. C. 482.

25. Stover *v.* People, 56 N. Y. 315.

The recent possession of stolen property is not of itself sufficient to justify a conviction of the possessor as a thief, but other circumstances nearly always surround the transaction so as to throw light upon the possession. Territory *v.* Doyle, 7 Mont. 245, 14 Pac. 671, *holding* that in that case the distance the defendant was from the range where the animals had been turned loose, his having lately traveled from that country, his making his way out of the territory in the dead of winter, his having a forged bill of sale in his possession, and the unsatisfactory story that he told on the witness stand, were circumstances sufficient, in connection with his possession of the stock, to justify a verdict of guilty.

The possession of goods recently stolen does not raise a presumption as matter of law of the guilt of the possessor, but the presumption arising therefrom is purely a matter of fact to be passed upon by the jury, and of which they are the sole judges. Bellamy *v.* State, 35 Fla. 242, 17 So. 560.

See also State *v.* Hodge, 50 N. H. 510; Blaker *v.* State, 130 Ind. 203, 29 N. E. 1077; Stokes *v.* State, 58 Miss. 677.

In Baker *v.* State, 80 Wis. 416, 50 N. W. 518, it was held that a charge to the jury that the possession by the defendant of a part of the stolen bills, if proved, would make a "strong presumption" against him, was objectionable, since it is the jury's province to determine the strength of a presumption so raised.

26. People *v.* Cline, 74 Cal. 575, 16 Pac. 391; People *v.* Ah Sing, 59 Cal. 400. *Compare* State *v.* Collett (Idaho), 75 Pac. 271.

27. State *v.* Richart, 57 Iowa 245, 10 N. W. 657. In Snowden *v.* State, 62 Miss. 100, where the jury had been charged as follows: "Possession of recently stolen goods is presumptive evidence of guilt of larceny of the goods, and if the jury believe from the evidence in the cause, beyond all reasonable doubt, that the meat or any part of it charged in the indictment to have been stolen was at any time soon after its being stolen in the pos-

agree as to the effect of proof of possession. Thus some of the courts hold that possession is merely a circumstance tending to show guilt, and is to be considered by the jury in connection with all the other circumstances in the case.[28] On the other hand, other courts

session of defendant, then this possession is presumptive proof of defendant's guilt as charged, and the burden of explaining or accounting for such possession is cast upon the defendant, and unless satisfactory explanation is given by him the jury would be warranted in finding him guilty;" the court, in speaking of the confusion of the words "proof" and "evidence" as used in the instruction, held that since the words were used interchangeably in the same sentence, although improper, it was not prejudicial error.

28. *California.* — People *v.* Cline, 83 Cal. 374, 23 Pac. 391; People *v.* Fazan, 66 Cal. 534, 6 Pac. 394.

Idaho. — State *v.* Collett, 75 Pac. 271.

Massachusetts. — Com. *v.* Millard, 1 Mass. 6; Com. *v.* Randall, 119 Mass. 107; Com. *v.* McGorty, 114 Mass. 299.

North Carolina. — State *v.* Williams, 31 N. C. 140.

Texas. — Hernandez *v.* State, 9 Tex. App. 288; White *v.* State, 21 Tex. App. 339, 17 S. W. 727; Williams *v.* State, 4 Tex. App. 178; Hyatt *v.* State, 32 Tex. Crim. 580, 25 S. W. 291; Boyd *v.* State, 24 Tex. App. 570, 6 S. W. 853, 5 Am. St. Rep. 908; Moreno *v.* State, 24 Tex. App. 401, 6 S. W. 299; Bean *v.* State, 24 Tex. App. 11, 5 S. W. 525. See also McIver *v.* State (Tex. Crim.), 60 S. W. 50; Wheeler *v.* State, 34 Tex. Crim. 350, 30 S. W. 913; Lee *v.* State, 27 Tex. App. 475, 11 S. W. 483.

Utah. — People *v.* Chadwick, 7 Utah 134, 25 Pac. 737.

In People *v.* Etting, 99 Cal. 577, 34 Pac. 237, the court charged the jury as follows: "If the jury believe the property was stolen, and was seen in the possession of defendants shortly after being stolen, the failure of the defendants to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show their guilt, and the accused is bound to explain the possession in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence discloses any such. In the instruction immediately preceding the foregoing, the court had instructed the jury that 'the mere possession of stolen property, unexplained by defendant, however soon after the taking, is not sufficient to justify a conviction; it is merely a guilty circumstance, which, taken in connection with other testimony, is to determine the question of guilt,' etc. Again, at the request of defendant, the court instructed as follows: 'The mere possession of property recently stolen is not of itself sufficient evidence upon which to convict the prisoner of the theft. It is a circumstance tending to show guilt, but not of itself sufficient to warrant conviction.'" It was held that the instructions taken together and read as a whole correctly interpreted the law applicable to the case.

In Com. *v.* Bell, 102 Mass. 163, it was held that the jury were properly charged that if soon after the larceny the stolen property was found in the immediate possession of the defendant, or on premises under his immediate control, it was a fact to be considered by them; that such fact should be considered with reference to all the accompanying circumstances, as it was one that would bear with greater or less weight, as it was more or less clearly shown that such possession could not have taken place without the actual agency of the defendant or his knowledge; that it would be stronger evidence against the defendant if a stolen article was found upon his person than if found in his own apartment or his house, and stronger in the latter case than if found in an outbuilding; that the jury were to consider all the circumstances bearing upon the question: whether the prosecution had shown that the stolen property came into the out-

hold that the possession of property recently stolen is not merely a circumstance to be considered as tending to show guilt, but is in fact presumptive evidence, or raises a presumption of fact that the possessor is the thief,[29] imposing upon him the duty of explaining his

building by the agency of the defendant or with his knowledge, as to whether the building was near the house, whether it was accessible to others, whether it was under the lock and key of the defendant, and if the latter, whether the lock was of a common description easily opened by keys of others in common use, or other means.

The possession of such chattel as a horse, two months after the theft, is a circumstance to be considered by the jury, but it does not, even unexplained, raise a conclusive presumption of the prisoner's guilt. The jury may and should give the fact proper weight as evidence, but the matter is for them, and they are not bound to convict unless they are, upon the whole evidence, satisfied of the defendant's guilt. Curtis *v.* State, 6 Coldw. (Tenn.) 9. In this case it was held error to charge the jury that "if the horse so stolen was recently thereafter found in the possession of the defendant, then, under such a state of facts, if they exist, the law presumes he is the thief, and he should be found guilty under this indictment, unless he explains his possession, either by direct evidence or by the attending circumstances or proof of his character and habits of life, or otherwise; and, if he was in possession of the horse of prosecutor within a short time after he was stolen (if you find that he was stolen), and has introduced no proof at all to rebut the presumption, it becomes conclusive that his possession is a guilty possession. The presumption takes the place of plenary proof; in such case no doubt can exist, and the jury are bound to find in favor of the presumption."

On a prosecution for larceny of money, evidence that prior to the alleged larceny the defendant had no money, and immediately thereafter was found in possession of money, especially when it corresponds in denomination and specie to that alleged to have been stolen, is considered a strong circumstance against defendant, and imposes upon him the necessity of showing that he came into possession of the money innocently. State *v.* Nesbit, 4 Idaho 548, 43 Pac. 66.

In Washington a distinction is made between prosecutions for the larceny of range animals and other larceny prosecutions, a statute (2 Bal. Anno. Codes, § 7114) expressly providing that the effect of proof of possession of a range animal by one accused of its larceny is to throw the burden of explaining the possession upon him, while in other larceny prosecutions the possession of recently stolen property is merely a circumstance to be considered by the jury in connection with all the other evidence in the case. State *v.* Eubank, 33 Wash. 293, 74 Pac. 378.

Where it is admitted by the state that the accused did not himself participate actively in the theft; that some other person took the property, and delivered it to him; that the only grounds for accusing him are the fact of his taking possession of stolen property at a distance from the place whence it was taken, and the circumstances surrounding the receipt and disposition of them, the fact of possession alone must necessarily cut a much less figure than where the accused is claimed to have been the person who stole the property. State *v.* Humason, 5 Wash. 499, 32 Pac. 111.

29. *Colorado.* — Van Straaten *v.* People, 26 Colo. 184, 56 Pac. 905.

Delaware. — State *v.* Carr, 4 Pen. 523, 57 Atl. 370; State *v.* Spencer, 4 Pen. 92, 53 Atl. 337; State *v.* Briscoe, 3 Pen. 7, 50 Atl. 271.

Illinois. — Keating *v.* People, 160 Ill. 480, 43 N. E. 724.

Iowa. — State *v.* King, 122 Iowa 1, 96 N. W. 712; State *v.* Kirkpatrick, 72 Iowa 500, 34 N. W. 301; Johnson *v.* Miller, 63 Iowa 529, 17 N. W. 34, 50 Am. Rep. 758; State *v.* Kelley, 57 Iowa 644, 11 N. W. 635.

possession;[30] and if unexplained or unaccounted for in a manner consistent with an innocent possession it may be sufficient to warrant a verdict of guilty.[31]

Kansas. — State *v.* Herron, 64 Kan. 363, 67 Pac. 861.

Nebraska. — Palmer *v.* State, 97 N. W. 235.

North Dakota. — State *v.* Rosencrans, 82 N. W. 422.

The possession of stolen property by the defendant shortly after the larceny, conflicting and unreasonable accounts by him as to his possession, an attempt to dispose of the property to a pawnbroker, and his flight when led to suspect that he was about to be arrested, leaving the property undisposed of with the pawnbroker, were held to constitute sufficient evidence to warrant a conviction in State *v.* Johnson, 33 Minn. 34, 21 N. W. 843.

The possession of stolen property soon after the larceny is evidence of the possessor's guilt, even though the possession be open, undisguised, and unconcealed, and he claims to have come into possession of the property honestly as a purchaser. State *v.* Hogard, 12 Minn. 293.

See also Boykin *v.* State, 34 Ark. 443; Baker *v.* State, 58 Ark. 513, 25 S. W. 603; Shepherd *v.* State, 44 Ark. 39.

In Scott *v.* State, 119 Ga. 425, 46 S. E. 637, it was held that the recent possession of stolen property, coupled with a false statement as to the person from whom the defendant had obtained the same, was sufficient to make out a *prima facie* case of larceny.

The Reason why recent possession is held, *prima facie*, to be guilty possession, is that it occurs so soon after the theft takes place as to be, at first view, not perfectly consistent with innocence. State *v.* Castor, 93 Mo. 242, 5 S. W. 906.

30. *Arizona.* — Territory *v.* Casio, 1 Ariz. 485, 2 Pac. 755.

Indiana. — Jones *v.* State, 49 Ind. 549; Johnson *v.* State, 148 Ind. 522, 47 N. E. 926.

Iowa. — State *v.* Whitmer, 77 Iowa 557, 42 N. W. 442; State *v.* Hessians, 50 Iowa 135.

Kansas. — State *v.* Cassady, 12 Kan. 550.

Louisiana. — State *v.* Daly, 37 La. Ann. 576.

Nevada. — State *v.* Espinozei, 20 Nev. 209, 19 Pac. 677.

New York. — Stover *v.* People, 56 N. Y. 315; Knickerbocker *v.* People, 43 N. Y. 177.

Texas. — Guest *v.* State, 24 Tex. App. 530, 7 S. W. 242.

The burden of proof is cast upon the defendant, and if unexplained, either by direct evidence or the attending circumstances, or by the character and habits of life of the defendant, or otherwise, the presumption of law becomes conclusive that his possession is a guilty possession. This presumption takes the place of plenary proof. In such case no doubt can exist, and the jury are bound to find in favor of the presumption. Hughes *v.* State, 8 Humph. (Tenn.) 75.

31. *Alabama.* — Martin *v.* State, 104 Ala. 71, 16 So. 82; Smith *v.* State, 103 Ala. 40, 16 So. 12; Henderson *v.* State, 70 Ala. 23; Shepperd *v.* State, 94 Ala. 102, 10 So. 663.

Colorado. — Bergdahl *v.* People, 27 Colo. 302, 61 Pac. 228.

Connecticut. — State *v.* Weston, 9 Conn. 527, 25 Am. Dec. 46.

Delaware. — State *v.* Spencer, 4 Pen. 92, 53 Atl. 337.

Florida. — Tilly *v.* State, 21 Fla. 242.

Idaho. — State *v.* Seymour, 7 Idaho 257, 61 Pac. 1033.

Illinois. — Waters *v.* People, 104 Ill. 544; Comfort *v.* People, 54 Ill. 404.

Indiana. — Engleman *v.* State, 2 Ind. 91, 52 Am. Dec. 494; Johnson *v.* State, 148 Ind. 522, 47 N. E. 926; Blaker *v.* State, 130 Ind. 203, 29 N. E. 1077.

Iowa. — State *v.* Hessians, 50 Iowa 135.

Kansas. — State *v.* Cassady, 12 Kan. 550; State *v.* Hoffman, 53 Kan. 700, 37 Pac. 138.

Louisiana. — State *v.* Daly, 37 La. Ann. 576; State *v.* Kimble, 34 La. Ann. 392.

Maine. — State *v.* Merrick, 19 Me. 398.

The Possession of a Part of the Stolen Property of the smallest value, in connection with other circumstances, may clearly fix the guilt of stealing all of the property upon defendant.[32]

The Unexplained Possession by the Defendant of the Box or Wrapper which had contained the stolen property is evidence of equal dignity as though some portion of the stolen property had been found in his possession.[33]

(B.) The Fact of Possession. — The fact of recent possession is a

Massachusetts. — Com. *v.* Deegan, 138 Mass. 182.

Mississippi. — Unger *v.* State, 42 Miss. 642.

Missouri. — State *v.* Moore, 101 Mo. 316, 14 S. W. 182; State *v.* Beatty, 90 Mo. 143, 2 S. W. 215; State *v.* Babb, 76 Mo. 501; State *v.* Butterfield, 75 Mo. 297; State *v.* Donovan, 121 Mo. 496, 26 S. W. 340; State *v.* Hill, 65 Mo. 84; State *v.* Williams, 54 Mo. 170; State *v.* Creson, 38 Mo. 372.

Nebraska. — Williams *v.* State, 60 Neb. 526, 83 N. W. 681; McLain *v.* State, 18 Neb. 154, 24 N. W. 720.

New York. — Knickerbocker *v.* People, 43 N. Y. 177.

Tennessee. — Cook *v.* State, 16 Lea 461, 1 S. W. 254; Fields *v.* State, 6 Coldw. 524; Hughes *v.* State, 8 Humph. 75.

Virginia. — Porterfield *v.* Com., 91 Va. 801, 22 S. E. 352; Price *v.* Com., 21 Gratt. 846.

"The general rule is undoubtedly well settled that the possession by a party of stolen goods, shortly after their loss by the owner, is presumptive evidence of guilt, which, however, may be explained; and if the party in whose possession they are found fails satisfactorily to account for his possession, the presumption of guilt arising from the recent loss by taking and the possession will stand and warrant a conviction. What will be sufficient to account for the possession, or to remove the presumption which may arise therefrom, will depend much upon the length of time which intervened between the loss by the owner and the discovery of possession in the party charged, the nature and character of the goods, and all the circumstances of the case; and this, for the most part, is to be determined by the jury." Belote *v.* State, 36 Miss. 96, 72 Am. Dec. 163.

In People *v.* La Munion, 64 Mich. 709, 31 N. W. 593, where the owner had testified to the time he missed the property and to finding it some months afterward in another county in the possession of an innocent purchaser, witnesses were permitted to testify to having seen respondent with the property in the last-named county soon after it was missed by the owner.

In State *v.* Schaffer, 70 Iowa 371, 30 N. W. 639, the principal circumstance against the defendant was that the stolen property was found in his possession hidden away with other stolen property. The defendant testified that he had purchased the property from another person, and in this was corroborated, but the transaction was attended by many suspicious circumstances; and it was held that the verdict of guilty would not be set aside for want of evidence.

32. State *v.* Barker, 64 Mo. 282; State *v.* Phelps, 91 Mo. 478, 4 S. W. 119; State *v.* Beatty, 90 Mo. 143, 2 S. W. 215.

In Snowden *v.* State, 62 Miss. 100, it was held that the contention that no legal presumption as to grand larceny could arise because only a small portion of the stolen property was found in the defendant's possession was wholly untenable. "Manifestly, a presumption as to the whole must arise from the unexplained discovery of a portion."

If the jury are satisfied that the defendant stole so much of the stolen property as was found in his possession, then they may presume that all the property stolen at the same time and place was stolen by the defendant, unless there is some fact or circumstance tending to show that it was not. People *v.* Fagan, 66 Cal. 534, 6 Pac. 394.

33. People *v.* Block, 60 Hun 583, 15 N. Y. Supp. 229.

question for the jury,[34] and must, in order to warrant the presumption or inference arising therefrom, be established beyond a reasonable doubt.[35]

(C.) Possession Must Assert Right of Property. — The possession must involve a distinct and conscious assertion of property in the possessor.[36]

34. State *v.* Hodge, 50 N. H. 510. An instruction that possession of stolen property being proved the burden of proving it to have been honest is thrown upon the accused, and it is for him to prove that he acquired it honestly, is error. Such an instruction assumes that the defendant had possession of the property, whilst that is a question for the jury. Conkwright *v.* People, 35 Ill. 204, where it was not contested that the property was found in the defendant's store, but it was a question for the determination of the jury whether other persons who had access to the house were capable of stealing the property, and if so whether it was their possession or the possession of the accused. If stolen and placed there by another person without the knowledge of the prisoner it would not be his possession.

35. State *v.* Raymond, 46 Conn. 345; Watts *v.* People, 204 Ill. 233, 68 N. E. 563. See also Trevino *v.* State (Tex. Crim.), 69 S. W. 72; Roy *v.* State, 34 Tex. Crim. 301, 30 S. W. 666.

Evidence in a Larceny Prosecution That the Defendant Claimed Title to the property and said he had a bill of sale for it is not sufficient proof of possession to warrant a charge to the jury on that question. Price *v.* Com., 21 Gratt. (Va.) 846.

Evidence Showing That the Goods Were Found Concealed beneath clothing in the false bottom of a bureau drawer, which the defendant acknowledged to be his, and of which he kept the key, if unexplained, is sufficient proof that the goods were found in his possession to support a conviction on that point. State *v.* Krieger, 4 Mo. App. 584.

Testimony that the defendant was in possession of the animal in question within a few months after it was permitted to run upon the range is sufficient to warrant an instruction as to the effect of proof of possession. State *v.* Eubank, 33 Wash. 293, 74 Pac. 378.

In Brown *v.* People, 20 Colo. 161, 36 Pac. 1040, error was charged in permitting a trunk, containing the property alleged to have been stolen, and other property, to be opened and its contents exhibited in the presence of the jury; it was also charged that the court erred in not instructing the jury as to the purposes for which all the goods so exhibited, and not alleged to have been stolen by the defendant, were to be considered. The trunk was identified as belonging to the defendant. The court said: "In order to show the fact that the goods alleged to have been stolen were found in the possession of defendant, it was necessary to exhibit the trunk and its contents before the jury; and the intermingling of these goods with other property, by the defendant himself, occasioned the exhibition of that other property as well. The property other than that alleged to have been stolen was not produced or introduced as evidence in the case, but its exhibition was unavoidable and was a necessary concomitant of the exhibition of the goods charged, and hence the rule invoked by counsel for plaintiff in error, that obtains in some states, that when testimony of other larcenies is properly admitted for the purpose of connecting the accused with the theft charged, the duty is devolved upon the court to instruct the jury of its own motion as to the purpose for which such testimony is admitted, and limit it to its legitimate purpose, is not applicable."

36. Baker *v.* State, 58 Ark. 513, 25 S. W. 603; Shepherd *v.* State, 44 Ark. 39; People *v.* Hurley, 60 Cal. 74, 44 Am. Rep. 55; Van Straaten *v.* People, 26 Colo. 184, 56 Pac. 905; State *v.* Deyoe, 97 Iowa 744, 66 N.

(D.) Possession Must Be Unexplained. — The possession must be unexplained in order to warrant the presumption under discussion.[37]

(E.) Corpus Delicti Must Be Otherwise Shown. — The possession of property does not of itself raise any presumption, nor is it indeed any evidence, that the property was stolen. There must be

W. 733; Bryant *v.* State, 25 Tex. App. 751, 8 S. W. 937; Lehman *v.* State, 18 Tex. App. 174. See also Trevino *v.* State (Tex. Crim.), 69 S. W. 72.

37. *Alabama.* — Orr *v.* State, 107 Ala. 35, 18 So. 142.

Arkansas. — Baker *v.* State, 58 Ark. 513, 25 S. W. 603.

Indiana. — Blaker *v.* State, 130 Ind. 203, 29 N. E. 1077.

Iowa. — State *v.* Deyoe, 97 Iowa 744, 66 N. W. 733.

Tennessee. — Hughes *v.* State, 8 Humph. 75.

Texas. — Bryant *v.* State, 25 Tex. App. 751, 8 S. W. 937; Moreno *v.* State, 24 Tex. App. 401, 6 S. W. 299; Hyatt *v.* State, 32 Tex. Crim. 580, 25 S. W. 291. See also Williams *v.* State, 11 Tex. App. 275; Bean *v.* State, 24 Tex. App. 11, 5 S. W. 525.

The possession, in order to constitute evidence tending to show guilt of the larceny, or to be sufficient, in connection with other criminating circumstances, to raise a presumption of guilt, must be unaccompanied by any reasonable explanation by the accused or arising out of the evidence in the case as to how he came by the property. State *v.* Gillespie, 62 Kan. 469, 63 Pac. 742.

In Heed *v.* State, 25 Wis. 421, the jury were charged that the fact, if they so found it to be, that the defendants, or one of them, shipped the property from the place where it had been stolen and they received it together at the place to which it was shipped, was evidence of possession within the rule presuming guilt from possession. In holding this charge to be error the court said that while they did not wish to be understood as holding that the possession shown was not a material fact which might justly have great weight with the jury in connection with the other evidence showing the previous connection between the defendants, nevertheless it was not such a possession as justified an instruction such as was given; that such an instruction is applicable only to an unexplained possession; that it must be a possession which the proof disclosing it does not show to have had an origin and inception subsequent to the offense; that on the contrary the very proof in that case showing the possession showed also its origin and inception; that it was obvious, therefore, that a possession which had its inception in a delivery from the carrier could not be the recent unexplained possession which justified the application of the rule given by the court. The court further said, however, that in holding the possession to be explained they meant only that it was explained so far as to prevent the applicability in its full force of the rule relating to recent unexplained possession of stolen property; that nevertheless it may have been a very suspicious circumstance tending to show, in connection with the other evidence, the complicity of the two defendants throughout the entire transaction.

In Nebraska the rule is that the possession of stolen property recently after a larceny thereof, when unexplained, may be sufficient to warrant the jury in drawing an inference of guilt of the party in whose possession it is found. The effect to be given to the fact of possession is solely for the jury to determine when considered in connection with all the other facts and circumstances proved on the trial. And an instruction which omits to state that it is only where the possession of goods recently stolen is unexplained that the presumption, *prima facie*, of guilt arises, is error. Robb *v.* State, 35 Neb. 285, 53 N. W. 134; Thompson *v.* State, 4 Neb. 524; Williams *v.* State, 60 Neb. 526, 83 N. W. 681. See also Dobson *v.* State, 46 Neb. 250, 64 N. W. 956.

other evidence of the *corpus delicti*;[38] and it is error for the court in instructing the jury as to this presumption or inference to assume the fact of larceny where it is controverted.[39]

(F.) Recency of the Possession. — (a.) *Generally.* — Again, whether the effect of proof of possession is to raise a presumption of a taking by the possessor, or the possession is to be regarded merely as a guilty circumstance against him, the possession must have been a recent one after the alleged larceny.[40] Possession at any time will

38. *Alabama.* — Orr *v.* State, 107 Ala. 35, 18 So. 142.

Georgia. — Turner *v.* State, 111 Ga. 217, 36 S. E. 686; Cornwall *v.* State, 91 Ga. 277, 18 S. E. 154.

Indiana. — Blaker *v.* State, 130 Ind. 203, 29 N. E. 1077; Bailey *v.* State, 52 Ind. 462, 21 Am. Rep. 182.

Iowa. — State *v.* Taylor, 25 Iowa 273.

Nebraska. — Smith *v.* State, 17 Neb. 358, 22 N. W. 780.

North Carolina. — State *v.* Shaw, 49 N. C. 440.

Oregon. — State *v.* Huffman, 16 Or. 15, 16 Pac. 640.

South Carolina. — State *v.* Dilley, Riley 302; State *v.* Clark, 4 Strob. L. 311.

Texas. — Schindler *v.* State, 15 Tex. App. 394.

See also Smith *v.* State (Ala.), 31 So. 806.

Where there is no direct proof of the felonious taking of goods found in the recent and unexplained possession of the defendant, and forming part of a stock of merchandise which might have been disposed of in due course of business by the proprietor of the store or some of his clerks, it is not indispensably necessary, in order to establish the *corpus delicti*, that all those having authority to dispose of the goods should be called to testify severally that they had not disposed of them. Roberts *v.* State, 61 Ala. 401, *holding* that in such case the testimony of the clerks introduced as witnesses, and suspicious circumstances connected with the defendant's possession of the goods, might authorize the jury to find that the goods were stolen, although until that fact was found the defendant was not called upon to explain his possession.

"The presumption [arising from possession of recently stolen property] is indulged under proper circumstances for the purpose of determining who took the stolen property, but has no place in the case where the sole question is, was the property stolen. It bears upon the identity of the thief, and not upon the question whether or not there is a thief in the transaction; upon the question of who took the property, and not upon the question of the intent with which it was taken." State *v.* Warden, 94 Mo. 648, 8 S. W. 233.

In Johnson *v.* State, 47 Ala. 62, a prosecution for the larceny of a horse which grazed during the day and regularly returned to his stall at night, it was held that evidence that the horse failed to return to his stall as usual, although slight, was admissible, in connection with proof tracing the horse into defendant's possession, to show a taking by him.

39. Blaker *v.* State, 130 Ind. 203, 29 N. E. 1077. See also Hix *v.* People, 157 Ill. 382, 41 N. E. 862.

40. *Alabama.* — Orr *v.* State, 107 Ala. 35, 18 So. 142.

Arkansas. — Baker *v.* State, 58 Ark. 513, 25 S. W. 603; Shepherd *v.* State, 44 Ark. 39.

Missouri. — State *v.* Castor, 93 Mo. 242, 5 S. W. 906.

Texas. — Porter *v.* State (Tex. Crim.), 73 S. W. 1053; Bryant *v.* State, 25 Tex. App. 751, 8 S. W. 937; Remoero *v.* State, 25 Tex. App. 394, 8 S. W. 641; Moreno *v.* State, 24 Tex. App. 401, 6 S. W. 299; Bean *v.* State, 24 Tex. App. 11, 5 S. W. 525.

Virginia. — Price *v.* Com., 21 Gratt. 846.

"It is not *every* or *any* possession of stolen goods by a party which will authorize the inference of his complicity in the crime of larceny or

not suffice, since "any time may refer to a period too remote."[41] But while the possession of stolen goods, especially at a remote time after the larceny, is not *prima facie* evidence that the possessor is the thief, even when unaccompanied by a reasonable explanation of how the possession was acquired, still evidence of such possession is admissible and proper to be considered by the jury in connection with other evidence and circumstances appearing in the case.[42]

burglary; nor, in fact, every such *unexplained* possession, although it may be *exclusive*, as opposed to the idea of a joint possession with others. Another element is necessary in order to constitute a *guilty* possession. It must be *recent*, or soon after the commission of the offense to which it has reference." White *v.* State, 72 Ala. 195.

"All the cases hold that the possession must be recent after the loss in order to impute guilt; and this presumption is founded on the manifest reason that, where goods have been taken from one person and are quickly thereafter found in the possession of another, there is a strong probability that they were taken by the latter. This probability is stronger or weaker in proportion to the period intervening between the taking and the finding; or it may be entirely removed by the lapse of such time as to render it not improbable that the goods may have been taken by another and passed to the accused, and thus wholly destroy the presumption." Jones *v.* State, 4 Cushm. (Miss.) 247.

In State *v.* Miller, 10 Minn. 313, the only evidence of guilt was the possession by the defendant of the stolen property about a month after it was stolen. It was held that although this was perhaps sufficient to call upon him for explanation of his possession, that explanation was given by the testimony of several witnesses that the defendant had purchased the stolen property, giving the time and place of purchase and the amount paid. The defendant also called a witness who testified to his good reputation for honesty.

In State *v.* White, 89 N. C. 462, the court substantially told the jury that possession did not raise a presumption against the defendant unless it was so recent after the alleged larceny as to exclude from others the opportunity to steal the property.

While recent unexplained possession of stolen goods will justify a conviction for larceny, the mere possession of goods several months subsequent to the time they were alleged to have been stolen, and a failure to satisfactorily account for such possession, will not alone authorize a conviction. Calloway *v.* State, 111 Ga. 832, 36 S. E. 63. See also Turner *v.* State, 111 Ga. 217, 39 S. E. 863.

41. State *v.* Floyd, 15 Mo. 349; State *v.* Wolff, 15 Mo. 168. See also Matlock *v.* State, 25 Tex. App. 654, 8 S. W. 818, 8 Am. St. Rep. 451.

42. State *v.* Reece, 27 W. Va. 375; State *v.* Johnson, 60 N. C. 238, 86 Am. Dec. 434; State *v.* Shaw, 49 N. C. 440; Foster *v.* State, 52 Miss. 695.

The possession of a part of the stolen property at a period somewhat distant from the larceny is competent evidence, but its weight and effect are very different from that of evidence of possession immediately after the larceny. It might be entirely insufficient to raise any such presumption against the party as would call upon him to explain his possession. Com. *v.* Montgomery, 11 Metc. (Mass.) 534, 45 Am. Dec. 227.

In State *v.* Miller, 45 Minn. 521, 48 N. W. 401, although eleven months had elapsed between the date of the larceny and the possession, nevertheless the fact of possession was held competent to be considered in connection with other facts and circumstances tending to criminate the defendant.

In Davis *v.* State, 50 Miss. 86, where eleven months had elapsed between the larceny and the finding,

(b.) *Recent Possession Not Capable of Exact Definition.* — What is meant by recent possession in this connection is not capable of exact or precise definition, and the term has been said to vary within a certain range with the conditions of each particular case.[43] Naturally the nearer the possession to the time of the alleged larceny, the stronger will be the inference of guilt.[44] It must depend not only

the jury were substantially instructed to consider the question as though the property had been found in the possession of the accused shortly after the larceny — that is, that eleven months would not be an "unreasonable time" — but it was held that this was erroneous; that "upon the bare possession there was, after eleven months, no presumption of guilt, but, with all the facts and circumstances adduced by legal evidence, the whole case, including the lapse of time, should have been submitted to the jury without the qualification as to time."

43. White *v.* State, 72 Ala. 195; State *v.* Jones, 20 N. C. 122.

Where the defendant is apprehended immediately after the larceny with the stolen property in his possession there is a violent presumption of his having stolen the property, and the court should instruct the jury that in law he is guilty. Where he is found in possession sometime after the larceny and refuses to account therefor there is a probable presumption, and it is a question of fact for the jury. But where he is not found in possession recently after the loss, as, for example, eighteen months, there is a light or rash presumption, and the court should instruct the jury that the evidence is not sufficient to warrant conviction unless the attendant circumstances tend to implicate the defendant in the larceny, as where he makes false statements in respect to his possession. State *v.* Jennett, 88 N. C. 665. See also Gregory *v.* Richards, 53 N. C. 410, an action for slander.

The finding of stolen property in the possession of the accused a week or two after the theft does not raise a presumption of law against him, but is a circumstance for the jury to consider, the rule being that the evidence is stronger or weaker as the possession is more or less recent. In such case it comes within what is termed a probable presumption. State *v.* Rights, 82 N. C. 675. The court said: "It is a general rule that whenever the property of one, which has been taken from him without his knowledge or consent, is found in the possession of another, it is incumbent on that other to prove how he came by it, otherwise the presumption is that he came by it feloniously. But in applying this rule, due attention must be paid to the circumstances by which such presumption may be weakened or strengthened, depending on the length of time intervening between the theft and the finding of the goods in the possession of the party accused."

44. McAfee *v.* State, 68 Ga. 823; Blaker *v.* State, 130 Ind. 203, 29 N. E. 1077; Snowden *v.* State, 62 Miss. 100; Matlock *v.* State, 25 Tex. App. 654, 8 S. W. 818, 8 Am. St. Rep. 451; Davis *v.* State, 50 Miss. 86; Foster *v.* State, 52 Miss. 695.

Possession of stolen property, if immediately subsequent to the larceny, may sometimes be almost conclusive of guilt, but the presumption weakens with the lapse of time, and may scarcely arise at all if other persons than the accused have had equal access to the place where the property is discovered. Gablick *v.* People, 40 Mich. 292.

The fact that some of the property alleged to have been stolen was found upon the premises of the accused some eighteen months after the larceny, unaccompanied by any other suspicious circumstances, is not *prima facie* evidence that the accused was guilty of the larceny. Warren *v.* State, 1 Greene (Iowa) 106. The court said: "The long space of time which elapsed from the missing to the discovery of the goods, the place, together with the

upon the mere lapse of time, but also upon the nature of the property and the concomitant circumstances of each particular case.[45]

(G.) Exclusiveness of Possession. — The possession must be exclusive in the accused; that is to say, the property must be in such wise in the exclusive control of the accused as to exclude the idea that some other person may have left it where it was found.[46]

peculiar circumstances under which they were found, concur in removing the presumption of the guilt of the prisoner. Such a presumption is only created when the goods are found in the possession of a person within a short period after the larceny. The lapse of three months after the articles were stolen has been recognized as sufficient to rebut the presumption of guilt in a person in whose possession the goods were found; but it has been otherwise determined after the expiration of only two months, when connected with evidence of concealment and other suspicious circumstances. 1 Cowen and Hill's Notes, 425, 426, and the references. After the lapse of sufficient time for the goods to change hands, and when they are of a portable nature, it would often be attended with serious oppression and injustice to require a person to account for the possession. Still more serious would be the consequences of taking a prisoner's guilt for granted, after so remote a period, and under the circumstances which are presented in this case. The place where the articles were found, the very suspicious deportment of one or two of those who participated in the finding, leave ample room to presume that others may have been more intimately connected with the larceny than the prisoner."

45. Rex *v.* Partridge, 7 Car. & P. (Eng.) 551; Rex *v.* Adams, 3 Car. & P. (Eng.) 600; State *v.* Bruin, 34 Mo. 537; Jones *v.* State, 4 Cushm. (Miss.) 247; Davis *v.* State, 50 Miss. 86; Price *v.* Com., 21 Gratt. (Va.) 846; Snowden *v.* State, 62 Miss. 100; Matlock *v.* State, 25 Tex. App. 654, 8 S. W. 818, 8 Am. St. Rep. 451.

What is recent possession depends on the nature, value and portability of the property. State *v.* Castor, 93 Mo. 242, 5 S. W. 906.

As to light, portable articles, the force of the presumption diminishes as time elapses. Davis *v.* State, 50 Miss. 86.

"Where the goods are bulky, or inconvenient of transmission, or unlikely to be transferred, it seems that a greater lapse of time is allowed to raise the presumption than where they are light and easily passed from hand to hand, and likely to be so passed; because, in the one case, the goods may not have passed through many hands, and the proof to justify the possession may, therefore, be more simple and easy; but in the latter case the goods may, very probably, have come to the accused through many persons, and their transit, from the smallness of their nature and value, be much more difficult to be proved." Jones *v.* State, 4 Cushm. (Miss.) 247.

A possession of course is more or less cogent according to the lapse of time, nature of the house and the condition of the household, the manner of keeping the lost property, the proximity to the place of taking, the probability or improbability of statements accounting for the possession, the character of the accused, and the like. Such matters if proved might give significance to a possession which would be of itself of slight import. State *v.* Johnson, 60 N. C. 238, 86 Am. Dec. 434.

46. *California.* — People *v.* Hurley, 60 Cal. 74, 44 Am. Rep. 55.

Colorado. — Van Straaten *v.* People, 26 Colo. 184, 56 Pac. 905.

Illinois. — Conkwright *v.* People, 35 Ill. 204; Watts *v.* People, 204 Ill. 233, 68 N. E. 563.

Mississippi. — Foster *v.* State, 52 Miss. 695.

Missouri. — State *v.* Wilks, 58 Mo. App. 159.

New York. — Knickerbocker *v.* People, 43 N. Y. 177.

North Carolina. — State *v.* Smith, 24 N. C. 402.

Texas. — Bryant *v.* State, 25 Tex.

App. 751, 8 S. W. 937; Moreno *v.* State, 24 Tex. App. 401, 6 S. W. 299.

"The courts, in dealing with this subject of the possession by a person of the fruits of a crime, being evidence of such a character as throws upon the possessor of the property the obligation of showing how he came by it, have said that exclusive possession of the whole or some part of stolen property by the prisoner, shortly after the theft, is sufficient, when standing alone, to cast upon him the burden of explaining how he came by it, or of giving some explanation of that possession, and that no presumption of guilt can be raised from the possession of stolen property, except where the possession is conscious and exclusive on the part of the defendant; and that, where there are no other circumstances to connect the accused person with the crime than that of possession of the stolen property, the exclusive possession must be established." People *v.* Wilson, 7 App. Div. 326, 40 N. Y. Supp. 107.

In State *v.* Castor, 93 Mo. 242, 5 S. W. 906, it was held that the possession in question could not be regarded as an exclusive possession, because, by the defendant's permission, the prosecuting witness had access to the defendant's trunk where the property was found after search, and on several occasions, sometime after the articles were missed, had opened the trunk to borrow certain of defendant's articles; that the defendant at another time had lent the key to the trunk to another person, the key remaining with the borrower several days; that the trunk was frequently left unlocked, and moreover could be unlocked and was unlocked by the prosecuting witness with another key, and could have been unlocked as easily by others familiar with the *locus in quo*.

In State *v.* Phelps, 91 Mo. 478, 4 S. W. 119, where the evidence tended to show that a part of the stolen property was found in the possession of the defendant's wife, which defendant admitted was good evidence against him if it could be proved, it was held that the fact that the remainder of the property was found in a place where they had an opportunity to put it was properly allowed to go to the jury to be considered by them in connection with the other circumstances in the case. The court said that if the defendant and his wife, the defendant being separately tried, were, as the evidence tended to show, together when the goods were stolen, participating in the larceny, the possession of the goods by one of them recently after the theft is criminating evidence against both.

Where it appears that the room was jointly occupied by the prisoner and another person, especially where the room appears to have been more under the control of the latter, no presumption can be indulged against the prisoner, nor is he required to satisfactorily account for the presence of the goods in the room. Turbeville *v.* State, 42 Ind. 490.

Mere finding of stolen goods in the house of the prisoner when there are other inmates capable of stealing the property is insufficient to prove a possession by the prisoner. Conkwright *v.* People, 35 Ill. 204. See also State *v.* Daubert, 42 Mo. 242.

In State *v.* Drew, 179 Mo. 315, 78 S. W. 594, it was held that the fact that the property was in the house of which the defendant was the head, his family consisting of wife and daughter, was at most merely a constructive possession, especially when the character of the goods (an article of female attire of whose existence the father might well be and generally is ignorant until made up) is taken into consideration; that the possession was nothing more than that constructive possession which every head of a family is presumed to have of property in his house or on his premises.

The Fact That the Stolen Property Was Found in the Defendant's Place of Business will not of itself raise a presumption of his guilt where there are other inmates of the place; but where the defendant admitted that he placed the property where it was found, but claimed it as his own, the question of identity of the property is for the jury, and if they find that the defendant had the stolen property or some part of it in his possession, and the possession is not explained, it is presumptive evidence of his guilt. State *v.* Griffin, 71 Iowa 372, 32 N. W. 447.

But the sense of the term " possession " is not necessarily limited to custody about the person.[47] The property may be in any place where manifestly it must have been put by the act of the party or with his concurrence.[48] So, too, it is legally possible that there should be an actual and joint possession in two persons which as to them is exclusive. The term " exclusive " in law is not necessarily limited to one person.[49]

(H.) Place of Possession. — The place of the possession, so long as the other elements are present, seems to be immaterial.[50]

(I.) Identity of Property. — (a.) *Necessity of Proof.* — In order to invoke the presumption of guilt from the possession of property alleged to have been stolen, the property found in the possession of the defendant must be identified as the property which was stolen.[51]

47. State *v.* Johnson, 60 N. C. 238, 86 Am. Dec. 434.

By exclusive possession it is not meant that the property must be found constantly on the person of the accused, or constantly under his immediate control. People *v.* Wilson, 7 App. Div. 326, 40 N. Y. Supp. 107, where it was held that evidence that the property was found in the defendant's lodgings secreted in a bureau drawer, which contained nothing else but the defendant's clothing, sufficiently showed an exclusive possession within the rule.

48. State *v.* Pennyman, 68 Iowa 216, 26 N. W. 82, where the day after the larceny the stolen horse was found ridden by a boy who was traveling with the defendant, and who had been with him the day before the larceny.

State *v.* Johnson, 60 N. C. 238, 86 Am. Dec. 434, where the evidence established as a fact the finding of the stolen property in the house of the defendant, where he and his wife alone resided.

49. State *v.* Raymond, 46 Conn. 345.

If the prosecution in a larceny case rests its case on possession of the stolen porperty alone, then the possession should be absolute and exclusive where one alone is charged with the offense; but when others are charged jointly and other circumstances are proved, proof of joint possession may be sufficient. Lewis *v.* State, 4 Kan. 253.

50. Thus it is held that the recent possession of stolen property in another state raises the same presumption of guilt as if the possession was in the state where the defendant is on trial. McGuire *v.* State, 6 Baxt. (Tenn.) 621. In this case the county where the property was stolen was near the state of Alabama, and there was proof tending to show that soon after the larceny the property was seen in the prisoner's possession in Alabama. It was urged by the defendant that this possession raised no presumption of his guilt provided his possession of the property was in another state, but the court refused to recognize any such distinction, stating that " it is a fact that the prisoner's possession of the stolen property recently after it was stolen raises a presumption against him. It is wholly immaterial where the state line may be with reference to the place of the theft and the place where the prisoner was seen."

51. Roberts *v.* State, 114 Ga. 528, 40 S. E. 697; Hodnett *v.* State, 117 Ga. 705, 45 S. E. 61; State *v.* Nesbit, 4 Idaho 548, 43 Pac. 66; State *v.* Fillmore, 92 Iowa 766, 61 N. W. 191; State *v.* Osborne, 45 Iowa 425; Kaiser *v.* State, 35 Neb. 704, 53 N. W. 610; Doss *v.* State, 28 Tex. App. 506, 13 S. W. 788.

Until the property found in the possession of the defendant has been identified as the property of the alleged owner, and as having been stolen, its possession calls for no explanation whatever. It is the possession of property shown to have been stolen that raises a presumption of guilt of the possessor, not the possession of like property merely.

But it is held to be unnecessary for the prosecution to identify all the property found in the possession of the defendant.[52]

On a Prosecution for the Larceny of Money it is not necessary for the prosecution to particularly describe the money in proving its identity.[53]

(b.) *Mode of Proof. — Witness' Belief, Judgment, Etc.* — It is competent for a witness, testifying to the identity of property found in the defendant's possession, to give his best judgment and belief.[54]

Circumstantial Evidence. — The identity of the property in question may be established by circumstantial evidence;[55] and it has been held

State *v.* Payne, 6 Wash. 563, 34 Pac. 317.

In United States *v.* Candler, 65 Fed. 308, it was held that coin or bank notes found in the possession of the defendant soon after the larceny charged must be clearly identified as the property stolen in order to give rise to a legal presumption of guilt; that mere general resemblance in kind and amount is a fact which the jury may consider only in connection with other proved facts as some evidence of guilt.

52. Pones *v.* State, 43 Tex. Crim. 201, 63 S. W. 1021, *holding* that if part of the property found on the defendant, which in that case was money, was identified, it was a circumstance to be taken by the jury against him.

53. "It would be unreasonable to require a man who has lost a large sum of money to particularly describe the various notes and bills. All that can be done in such a case is to give the best description attainable and show excuse for not doing more." Riggs *v.* State, 104 Ind. 261, 3 N. E. 886.

In State *v.* Buckley, 60 Iowa 471, 15 N. W. 289, where the stolen bills had no particular marks of identification, but their general appearance, manner of folding and denominations were the same as those found on the person of the defendant, it was held sufficient to cast upon defendant the burden of accounting for the possession of the bills found on his person.

In People *v.* Wong Chong Suey, 110 Cal. 117, 42 Pac. 420, where the defendant was charged with stealing money and it was shown that the money found on his person was the same in amount, specie and denomination, and that he had been in a position where he could take the money alleged to have been stolen, it was held that it was not necessary for the prosecution to definitely identify the money as that taken; that the facts shown in connection with the statement of the defendant that he had just been robbed of all his money, and other circumstances of a more or less suspicious nature, were sufficient evidence to go to the jury upon the point.

54. State *v.* Murphy, 15 Wash. 98, 45 Pac. 729.

It is competent for the prosecuting witness to testify that from his personal knowledge of the goods stolen he believes those exhibited to him are his, notwithstanding they bear no private mark whereby they positively can be identified. State *v.* Babb, 76 Mo. 501.

Witnesses familiar with ore alleged to have been stolen from a certain mine may testify to its identity in the same manner and in the same sense as to the identity of other personal property. The extent to which such evidence is satisfactory and reliable depends upon the existence of marked characteristics rendering the ore easy of identification. Absence of such characteristics goes to the value of the testimony, and not to its admissibility. Roberts *v.* People, 11 Colo. 213, 17 Pac. 637.

In Johnson *v.* State, 148 Ind. 522, 47 N. E. 926, where the property consisted of a watch and chain, it was held that the testimony of the prosecuting witness to the effect that the watch found on the defendant was exactly like his watch, and that he could positively identify the chain as his, was sufficient.

55. State *v.* Hoppe, 39 Iowa 468.

that a pertinent, well-connected chain of circumstances affords more satisfactory evidence of the identity of money than the positive testimony of a witness who would swear to the date, number, denomination or private marks upon a large amount of national currency received in the ordinary course of business.[56]

Possession of Other Stolen Property. — Evidence is admissible that other property which had been stolen at the same time was also found in the possession of the defendant at the time he was found in possession of the property with the theft of which he is charged.[57]

Where circumstances are shown plainly leading to the identification of particular goods claimed to be a part of stolen property, it is not necessary, in order to sustain a conviction for larceny, that the identity of the goods be established by special marks. State *v.* Krieger, 4 Mo. App. 584.

In State *v.* Crow, 107 Mo. 341, 17 S. W. 745, a prosecution for the larceny of a cow, it was shown that the defendant killed a cow in his field and took part of the beef and the hide to a certain town on the same day and sold them. On that afternoon, near where the cow had been killed, witnesses picked up pieces of the ears, which had been cut. The hide, which had been sold by the defendant, and the pieces so found were exhibited in evidence against the defendant's objection, but it was held that the evidence was clearly admissible for the purpose of identifying the animal killed and showing that the marks and brands had been mutilated.

In Lue *v.* Com. (Ky.), 15 S. W. 664, a prosecution for the larceny of an animal, it was held that the hide of the animal or a similar one was admissible on the question of identity, or at least to corroborate the testimony of the prosecution in the effort to connect the defendant with the felony.

In State *v.* Kiger, 115 N. C. 746, 20 S. E. 456, an indictment for the larceny of brandy, it was held that evidence as to marks upon the barrels containing the brandy was competent to identify the packages. The court said that it was sufficient to charge the larceny of so many gallons of brandy, and as matter of evidence it was competent to show that the brandy was in barrels, and identify the barrels, although if the state had charged the larceny of barrels of brandy it would have been held to proof of the brandy having been in barrels when stolen.

56. State *v.* Hoppe, 39 Iowa 468.

57. Johnson *v.* State, 148 Ind. 522, 47 N. E. 926; Smith *v.* State, 21 Tex. App. 46, 17 S. W. 560; Smith *v.* State, 21 Tex. App. 133, 17 S. W. 558.

In Parker *v.* United States, 1 Ind. Ter. 592, 43 S. W. 858, the court, in speaking of the admissibility of evidence showing the possession by the defendant of other stolen property, for the purpose of identifying the stolen property in question, said: "Cases arising under the fourth proposition usually occur when the alleged stolen property found in the possession of the defendant is similar to others of that class, but without marks of identification whereby it may be distinguished, or the brands and marks may have been destroyed, or the property so mutilated as to leave it without means of identification. In such cases, proof that the defendant, recently after the larceny, was in possession of other stolen property, taken about the same time and place, is admissible for the purpose of identifying that which is in controversy, and found in his possession. If the property named in the indictment be shown to have been stolen, but the identity of that found in possession of the defendant, claimed to be the stolen property, is in doubt, then the fact that he was found with other stolen property, which had been taken from or about the same place, and at the same time, would so connect the two articles as that the identification of one would tend to identify the other; but if not taken from or about the same place,

Declarations of a Third Person that property in the possession of one claiming to have obtained it from the defendant was the property of the prosecuting witness are mere hearsay and not admissible.[58]

Production of Articles. — An article like that stolen, but not identified otherwise, may be shown to the jury for them to determine whether or not it was the one stolen.[59] But in order to render competent the testimony of the alleged owner as to the identity of the property, it is not necessary to produce the property in court, even though it was taken upon a search warrant and is in the sheriff's custody at the time of the trial.[60]

(3.) **Rebuttal of Proof of Possession.** — (A.) GENERALLY. — Proof of possession, whether treated as merely a suspicious circumstance or as raising a presumption of guilt, is not to be taken as conclusive, but may be overcome by countervailing evidence showing a possession consistent with innocence.[61]

(B.) EXPLANATION OF POSSESSION. — (a.) *Generally.* — As previously noted, the law devolves upon the possessor of recently stolen property the duty of accounting for his possession;[62] and hence any explanation given by him at the time he is found in possession is admissible in his behalf.[63] But it is error for the trial judge to charge that, if the defendant fails to make proper explanation, the jury must

although it may have been taken at the same time, and found in the possession of the defendant, it would have no such tendency, and therefore for that purpose the proof of it would be inadmissible."

58. State *v.* Hargrave, 97 N. C. 457, 1 S. E. 774.

59. State *v.* Miller, 144 Mo. 26, 45 S. W. 1104.

60. Spittorff *v.* State, 108 Ind. 171, 8 N. E. 911, *holding* that the owner may be permitted to describe the kind and quality of the property lost by him and subsequently found in the possession of one of the persons accused.

61. *Arkansas.* — Boykin *v.* State, 34 Ark. 443.

Connecticut. — State *v.* Raymond, 46 Conn. 345.

Georgia. — Tucker *v.* State, 57 Ga. 503.

Louisiana. — State *v.* Daly, 37 La. Ann. 576; State *v.* Kimble, 34 La. Ann. 392.

Massachusetts. — Com. *v.* McGorty, 114 Mass. 299.

Mississippi. — Davis *v.* State, 50 Miss. 86; Jones *v.* State, 30 Miss. 653, 64 Am. Dec. 175.

Missouri. — State *v.* Kelly, 73 Mo. 608.

Nebraska. — Grentzinger *v.* State, 31 Neb. 460, 48 N. W. 148.

New York. — Dillon *v.* People, 1 Hun 670, 4 Thomp. & C. 203.

Tennessee. — Curtis *v.* State, 6 Coldw. 9; Wilcox *v.* State, 3 Heisk. 110; Hughes *v.* State, 8 Humph. 75.

Virginia. — Price *v.* Com., 21 Gratt. 846.

In Reed *v.* State, 54 Ark. 621, 16 S. W. 819, it was held that an instruction that "the presumption that the possessor of recently stolen property is the thief is not a presumption of law, and a weak one of fact; it is not at all conclusive, and of itself is not sufficient for conviction," was properly refused because if given it would have invaded the province of the jury to weigh the evidence.

62. See *supra* "Effect of Proof of Possession Generally."

63. *Alabama.* — Smith *v.* State, 103 Ala. 40, 16 So. 12.

Delaware. — State *v.* Spencer, 4 Pen. 92, 53 Atl. 337.

Idaho. — State *v.* Seymour, 7 Idaho 257, 61 Pac. 1033.

Indiana. — Jones *v.* State, 49 Ind. 549.

Louisiana. — State *v.* Young, 41 La. Ann. 94, 6 So. 468; State *v.* Kimble, 34 La. Ann. 392.

or should find a verdict of guilty.[64] It is not necessary that the

Mississippi. — Foster *v.* State, 52 Miss. 695; Davis *v.* State, 50 Miss. 86; Payne *v.* State, 57 Miss. 348.

Missouri. — State *v.* Moore, 101 Mo. 316, 14 S. W. 182; State *v.* Ware, 62 Mo. 597.

New York. — People *v.* Crapo, 76 N. Y. 288, 32 Am. Rep. 302.

North Carolina. — State *v.* Bishop, 98 N. C. 773, 4 S. E. 357.

Texas. — Goens *v.* State, 35 Tex. Crim. 73, 31 S. W. 656; Brown *v.* State, 34 Tex. Crim. 150, 29 S. W. 772; Lopez *v.* State, 28 Tex. App. 343, 13 S. W. 219; York *v.* State, 17 Tex. App. 441; Schultz *v.* State, 20 Tex. App. 315; Irvine *v.* State, 13 Tex. App. 499.

"Possession Is a Continual Asportation. — A Continuing Commission of the Larceny. — The statements, therefore [by the defendant in explanation of his possession] were to be considered as making a part of this prolonged act. Consequently they were admissible under the rule of *res gestae.*" Walker *v.* State, 28 Ga. 254.

In People *v.* Dowling, 84 N. Y. 478, some of the stolen property was found in the defendant's possession, he claiming to have purchased it, and he offered to prove what was said as to the mode of obtaining the property at the time of the alleged purchase by the persons from whom the purchase was made. It was held that while it was not competent to prove that the alleged vendors came by the property in the mode asserted, it was relevant and competent upon the issue of guilty knowledge. The court said that since it was competent for the defendant to prove the acts by which the property came into his possession, if he was able to do so, it was competent to prove all pertinent sayings and doings that then were made and done; the weight of which, however, was solely for the jury.

What the defendant said immediately upon being charged with the larceny, when his trunk was searched and the property found therein, is part of the *res gestae* and admissible in his favor, as well as against him. And if his statements concerning the goods, made on the spur of the moment, without time to concoct a story for the occasion, appear to the jury, considering all the circumstances, to be reasonable, and are not shown by the prosecution to be false, their weight for the defendant is regarded as very considerable. State *v.* Castor, 93 Mo. 242, 5 S. W. 906.

On a trial for larceny the defendant should be permitted to show statements made by him at the time he was found in possession of the property to the effect that he thought the property had been stolen, and that he thought he could bring the thief to the person to whom the statements were made. People *v.* Shepard, 70 Mich. 132, 37 N. W. 925.

In Com. *v.* Rowe, 105 Mass. 590, the defendant showed that she had gone with another woman into two stores successively; that in the second store the other woman requested the defendant to hold her shawl, and the defendant took it without knowing that it contained anything, and while holding it the property charged to have been stolen dropped out and was picked up by the defendant and carried to the counter, and it was held that the defendant should have been permitted to prove a conversation had by her with the clerk at the counter in explanation of how she had come into possession of the property.

In Hodge *v.* State, 41 Tex. Crim. 229, 53 S. W. 862, a prosecution for cattle stealing where the first notice the defendant had that certain cattle in his possession were claimed by another was by service of a writ of sequestration, it was held that a statement made by him to the officer serving the writ as to how he had acquired some of the cattle, and disclaiming any title to the others, should have been admitted.

64. State *v.* Jordan, 69 Iowa 506, 29 N. W. 430; Orr *v.* State, 107 Ala. 35, 18 So. 142; Tucker *v.* State, 57 Ga. 503. See also McIver *v.* State (Tex. Crim.), 60 S. W. 50; State *v.* Deuel, 63 Kan. 811, 66 Pac. 1037;

defendant himself directly introduce explanatory evidence.[65] And what was said by the defendant when found in possession of the property may be used against him.[66] And of course when the prose-

Jones *v.* State, 49 Ind. 549; Matthews *v.* State, 61 Miss. 155.

It is error to charge the jury that "the possession of property recently stolen is *prima facie* evidence that the possessor is the thief, and if he fails to account for such possession to the satisfaction of the jury such presumption 'continues;'" this, under the facts and circumstances of each particular case, is a question for the jury, especially after the lapse of considerable time between the larceny and the finding. Davis *v.* State, 50 Miss. 86.

65. The jury have a right to look to all the circumstances brought by either party to determine whether any inference of guilt arising from the possession was counterbalanced. Curtis *v.* State, 6 Coldw. (Tenn.) 9.

"When it is said that the burden of proof is upon the person in possession to show how he came into the possession, it is only another form of expression for saying that the possession is sufficient to convict unless rebutted; and when it is said that unless he shows such possession to be honest the law will presume that he stole the property, it is no more than saying that he must rebut the presumption arising from such possession. He need not rebut this presumption by independent evidence, and we do not understand this instruction to so hold. There may be facts and circumstances connected with the possession which rebut guilt, or it may be shown in evidence that he has such an unexceptionable reputation as an honest man as to lead the jury to believe, in the absense of other evidence of guilt, that he acquired the possession of the property honestly." State *v.* Hessians, 50 Iowa 135.

On a larceny prosecution it is error to charge the jury that if the stolen property was in the possession of the accused it is incumbent upon him to prove how that possession was obtained. Thompson *v.* People, 4 Neb. 524, where the court said: "Altogether too much importance is here given to the simple possession of the property by the accused, for even if the felonious taking were fully established, and the possession of the fruits of the larceny were the only evidence implicating the defendants in the transaction, they were not bound to 'prove' how that possession came about."

It is error to charge the jury that the defendant in a larceny prosecution in whose possession the property was found recently after it was stolen may rebut the presumption arising from such possession, "either by positive evidence of the manner in which he came by it, or of his own good character." The word "positive" is objectionable. It is not incumbent on the prisoner to produce positive evidence to repel the presumption, but it is sufficient for him to produce any kind of legal evidence which may satisfy the jury that he is not guilty. Price *v.* Com., 21 Gratt. (Va.) 846.

66. Hubbard *v.* State, 107 Ala. 33, 18 So. 225; State *v.* Rodman, 62 Iowa 456, 17 N. W. 663.

If the defendant in such case be silent, or hesitate, or make inconsistent statements, it is a circumstance against him; if he is self-possessed and gives a clear and consistent explanation it is a circumstance in his favor. State *v.* Worthington, 64 N. C. 594.

If, in attempting to rebut the presumption of larceny arising from the recent possession of stolen property, it be proved that the defendant after the larceny found the property in the possession of another person from whom he received it, claiming it as his own, but that before such finding he gave an exact description of the stolen articles which he alleged he had lost; that he made different statements to different persons as to the time he lost his property; that after finding the property he put false marks upon it, and that afterward he left the state in consequence of the indictment, all these circumstances furnish evidence

cution offers against the defendant a part only of what was stated, he unquestionably has the right to prove all of the statement or statements.[67]

Larceny From the Person.— The same rules as to explanation of recent possession that obtain in other larceny prosecutions apply upon a trial for larceny from the person.[68]

(b.) *Time of Explanation.* — The explanation is equally admissible whether made when the accused is in actual possession or after he has parted with possession, so long as it was made when his right to the property was first questioned.[69] But it is not admissible where

tending to connect the defendant with the felonious possession of the property anterior to the time when he found it in the possession of such other person. State *v.* Jones, 20 N. C. 122.

In Com. *v.* Bell, 102 Mass. 163, it was held that statements made by the defendant at the time officers came to his brother's house to search for the stolen property, advising his brother not to permit the search to be made, and that he would not permit his own premises to be searched, it appearing that the goods were found in an outbuilding on his premises, might be considered by the jury as bearing upon the question whether the stolen property was in the outbuilding with the knowledge or by the agency of the defendant.

In Shelton *v.* State, 11 Tex. App. 36, where several defendants were jointly indicted for larceny, it was held that everything said by all or any one of the confederates at the time and place when first found in possession of the property, and explanatory of their possession thereof, was part of the *res gestae* competent to be proved on a trial of all or any one of them.

67. Sager *v.* State, 11 Tex. App. 110; Massey *v.* State, 1 Tex. App. 563.

Where the prosecution in a larceny case has introduced evidence that the defendant was in possession of the property the next day after it was stolen, and of what he said with reference to borrowing money and pledging the property as security, the defendant unquestionably has the right to prove all he said in that conversation, not only as a part of the *res gestae,* but as a part of the conversation. Comfort *v.* People, 54 Ill. 404, where it was held error to refuse to permit the defendant to show that when he applied for the loan of money he stated that he did not own the property, but wanted the money for a person with whom he had just then been talking, and that the property was just then handed to him to raise the money, and that such third person heard these statements.

In Long *v.* State, 22 Ga. 40, where a witness for the state testified that the defendant was in possession of a horse when the witness with others arrested him on suspicion, and that he offered to sell the horse to the witness' father, it was held error for the court to refuse to permit the defendant, upon cross-examination of the witness, to show all that was said by the defendant at the time he offered to sell the horse.

68. In Roberts *v.* State, 33 Tex. Crim. 83, 24 S. W. 895, the court said: "While the different phases of theft are constituted by different facts, yet if the possession of the supposed stolen property is reasonably accounted for in either case, and the property is obtained otherwise than fraudulently, the state must fail. An honest possession of the property would apply as well to defeat one charge as the other, or a possession not fraudulently obtained from the owner would operate in either case to defeat the state. The office or effect of the 'reasonable explanation' of the possession of recently stolen property is to rebut the idea of fraud, and this would evidently apply as well to theft from the person as to ordinary theft."

69. Heskew *v.* State, 17 Tex.

it appears that he has had opportunity to concoct a self-serving story.[70]

(c.) *Number of Explanations.* — Nor is there any rule of law confining the defendant to but one explanation; and if the state relies upon the fact that the defendant was in possession of the stolen property at different times he has the right to introduce explanations made by him each time.[71]

(d.) *Requisites and Sufficiency of Explanation. — Reasonableness.* — The explanation given by one in possession of recently stolen property should be reasonable in order to overcome the effect of the proof of possession,[72] and its reasonableness must necessarily depend in a

App. 161; Taylor *v.* State, 15 Tex. App. 356; York *v.* State, 17 Tex. App. 441; Anderson *v.* State, 11 Tex. App. 576. See also Hampton *v.* State, 5 Tex. App. 463.

"The statement in regard to the possession is equally admissible, whether made where the party is in actual possession or after parting with possession. The explanation in regard to possession of property recently stolen can only apply where the party is either in possession at the time of making the statement or has been in possession. The explanation of such possession cannot occur when the party has not been in possession, nor when made prior to possession. The account of possession of property necessarily carries with it the fact of possession." Eastland *v.* State (Tex.), 59 S. W. 267; Taylor *v.* State (Tex. Crim.), 75 S. W. 35.

70. State *v.* Moore, 101 Mo. 316, 14 S. W. 182. See also State *v.* Ware, 62 Mo. 597.

If at the time one is found in possession of stolen property, and before he has had the opportunity to concoct evidence exculpatory of himself, he gives a reasonable and probable account of the manner in which he became possessed of the property, this evidence should always be allowed to go to the jury to rebut the presumption of guilt which otherwise might arise. Henderson *v.* State, 70 Ala. 23, where the court said that this principle had not always been observed in the past decisions of the Alabama court, notably in the case of Taylor *v.* State, 42 Ala. 529, and perhaps in Maynard *v.* State, 46 Ala. 85; that these cases failed to make the proper distinction between an explanation given at the time the defendant is first discovered in possession of the property and his declarations made at other times when there was opportunity for the deliberate premeditation of a false story. In the Henderson case the evidence for the prosecution showed that part of the property stolen was found in the defendant's house a short time afterward, while the defendant's evidence tended to show that he was absent in another state at the time of the alleged larceny, and it was held permissible for him to show by one who was present at the time that on his return home, and as soon as he first discovered the property, he asked his wife whose property it was and how it came there.

71. Castellow *v.* State, 15 Tex. App. 551. See also Andrews *v.* State, 25 Tex. App. 339, 8 S. W. 328.

72. Bellamy *v.* State, 35 Fla. 242, 17 So. 560; Porter *v.* State (Tex. Crim.), 73 S. W. 1053; Brown *v.* State, 34 Tex. Crim. 150, 29 S. W. 772; State *v.* Carr, 4 Pen. (Del.) 523, 57 Atl. 370.

In Roy *v.* State (Tex. Crim.), 43 S. W. 77, an instruction as follows was held properly refused: "If you find from the evidence that the defendant took the animal mentioned in the indictment, and you further find that, the first time his right to the said animal was called in question, he gave an explanation of such possession, and such explanation was reasonable, then you are instructed that it devolves upon the state to prove the explanation false;' because in the first place, if the defend

great measure upon the deportment of the accused in relation to the property found in his possession, and upon the time and the circumstances under which it is found.[73]

Satisfactoriness. — But the explanation need not be satisfactory; that is requiring too high a degree of proof from the accused. It is only necessary for him to raise a reasonable doubt that he came by the property as charged;[74] and an instruction requiring him to

ant took the animal his explanation could not be reasonable, because that explanation was that he had bought it from a third person.

In Nelson *v.* People, 22 Colo. 330, 44 Pac. 594, a prosecution for the larceny of live stock, the defendant sought to show that two of the animals found in his possession were his own, and that in cutting them out from a herd on the range other animals ran out with them, and that he intended as soon as they had quieted down to cut out and leave the other animals. It was held that evidence that the two animals bore his brand and were his property had a tendency to show the reasonableness of his explanation of how the other animals came into his possession, and should have been admitted.

73. If the article be small, and such as is easily and quickly transmissible from one person to another, and when it is found in the possession of the accused it is openly exposed where the owner may readily find it, and will probably discover it, and no effort is made to conceal it, but accused gives an account of his possession which is probable from the nature of the article, these circumstances will be sufficient to destroy the presumption of guilt arising from mere possession, and to raise the presumption of innocence. Jones *v.* State, 30 Miss. 653, 64 Am. Dec. 175; Davis *v.* State, 50 Miss. 86.

"Courts have undertaken to decide whether the defendant's possession was unexplained, or whether his explanation was satisfactory. This explanation is often understood to be not the evidence produced by the defendant at the trial, but the account given by him of his possession at the time the property is found in his possession or when he is accused or arrested. . . . When courts thus undertake to decide what is a satisfactory explanation or reasonable account of the defendant's possession they manifestly express an opinion on the facts and the weight of the evidence, and not on any question of law." State *v.* Hodge, 50 N. H. 510.

74. *Colorado.* — Van Straaten *v.* People, 26 Colo. 184, 56 Pac. 905.

Florida. — Bellamy *v.* State, 35 Fla. 242, 17 So. 560; Leslie *v.* State, 35 Fla. 171, 17 So. 555.

Illinois. — Hoge *v.* People, 117 Ill. 35, 6 N. E. 796.

Indiana. — Hall *v.* State, 8 Ind. 439; Blaker *v.* State, 130 Ind. 203, 29 N. E. 1077.

Iowa. — State *v.* Manley, 74 Iowa 561, 38 N. W. 415; State *v.* Kirkpatrick, 72 Iowa 500, 34 N. W. 301.

Missouri. — State *v.* Moore, 101 Mo. 316, 14 S. W. 182.

The defendant, even when the stolen property is found in his possession and under his control within a short time after the commission of the larceny, is not bound to show to the reasonable satisfaction of the jury that he became possessed of it otherwise than by stealing; the evidence may fall far short of establishing that, and yet create in the minds of the jury a reasonable doubt of his guilt. State *v.* Merrick, 19 Me. 398.

In State *v.* Hopkins, 65 Iowa 240, 21 N. W. 585, it was held error to charge the jury as follows: "If property recently stolen be found in the possession of a person other than the owner, the law presumes that the person so in possession stole such property, unless his possession is satisfactorily explained or accounted for consistently with innocence. Such explanation or satisfactory accounting for the possession of the stolen property may appear from the circumstances attending the possession, as shown by the state, or other proof, and by the

overcome the presumption arising from such possession by a preponderance of evidence is erroneous.[75]

preponderance, which means the greater weight or value, of the evidence, and not merely by the greater number of witnesses who have testified to a particular fact or state of facts."

For the court to charge that if the larceny was committed at a certain time and place and the goods stolen were afterward found in the possession of the accused such facts would "raise the presumption under the law of the prisoner's guilt, and it is incumbent on the prisoner, the goods stolen having been found in his possession, to explain that possession to the satisfaction of the jury;" or that if the goods were found in his possession, and such possession is left unexplained, "the law raises the presumption from that possession that he committed the larceny," is error, but does not require a new trial where the verdict is demanded by the evidence. Griffin *v.* State, 86 Ga. 257, 12 S. E. 409.

75. State *v.* Richart, 57 Iowa 245, 10 N. W. 657. See also State *v.* Emerson, 48 Iowa 172, where the court said: "Now, the jury may not convict unless they are satisfied beyond a reasonable doubt of defendant's guilt. The testimony may establish the larceny, and defendant's recent possession, beyond a reasonable doubt. But if that possession was innocent, defendant is not guilty. We discover that the character of the possession and the *animus* of defendant are essential ingredients in determining his guilt. His innocence may not be presumed after the *corpus delicti* and recent possession are shown, but the burden of proving it is cast upon him. Innocence, under such circumstances, is in the nature of a defense to the case made by the recent possession. But when a reasonable doubt exists as to the character of the recent possession, whether it be innocent or guilty, a reasonable doubt exists as to defendant's guilt. If such doubts exist, he cannot be convicted. Now, such doubt may arise in the minds of the jury upon less than a preponderance of testimony. It was, therefore, erroneous to direct the jury that they could find defendant guilty unless defendant, by a preponderance of testimony, 'reasonably satisfied' them his possession of the cattle was innocent. It will be readily seen that defendant's guilt may have wholly turned upon the *animus* of his possession of the property. No question may have existed as to the *corpus delicti* or the recent possession. In that case, if they could have found defendant guilty because he had not established the innocence of his possession by a preponderance of proof, he would have been deprived of the benefit of the doctrine of reasonable doubt."

An instruction that the possession by accused of property proved to have been recently stolen is sufficient to fasten the guilt of larceny upon him, *prima facie,* and calls upon him to prove the innocence of his possession, is objectionable because it in effect shifts the burden of proof to the accused. While the defendant is required to introduce evidence tending to show that he came honestly by the property, he is not obliged to establish the innocence of his possession thereof by a preponderance of the evidence. Robb *v.* State, 35 Neb. 285, 53 N. W. 134, *holding* that the mere fact that later in the charge the jury were told in effect that if they entertained a reasonable doubt as to whether the defendant obtained possession of the property honestly or not they should acquit did not cure the error, for the reason that the jury were left in doubt as to which portion of the instruction contained a correct statement of the law.

In State *v.* Peterson, 67 Iowa 564, 25 N. W. 780, the court instructed the jury as follows: "The defendant claims, and has offered testimony to prove, that he came into the possession of the goods in controversy in this case by finding them. If this be satisfactorily shown by the evidence the defendant should be acquitted. It is only necessary for this

(e.) *Proof of Falsity of Explanation. — Competency.* — Unquestionably it is competent for the prosecution to show the falsity of statements made by one in possession of recently stolen property,[76] and it is not enough merely to impeach the witness testifying to the truth of defendant's explanation by showing that he had elsewhere and previously to the trial denied that he knew anything about the case; "it is the truth of the explanation, whether supported by evidence or not, if the same is reasonable, that must be disproved."[77]

The falsity of the defendant's statements as to when he got the property in question may be proved by circumstantial evidence,[78] and where the prosecution has given evidence tending to show that the explanation offered by the defendant was a recent fabrication, it is proper for the defendant to show that he had made the same statements before there was any motive to fabricate.[79]

Necessity. — The general rule seems to be that when one in whose possession stolen property is found gives a reasonable account of how he came by it the prosecution must show the falsity of the

explanation to be shown by a preponderance of the evidence, or to such extent as to leave it reasonably doubtful whether he acquired the possession by theft." The court, in holding the instruction proper, said: "It is true that in one clause it is stated that it is only necessary to explain the possession by a preponderance of the evidence, but this is immediately followed by what may be regarded as explanatory of what is meant by a preponderance of the evidence; that is, that it is sufficient to acquit if the evidence leaves it 'reasonably doubtful whether he acquired the possession by theft.' Taking the whole instruction together, we think it is in substantial accord with the rule announced by this court in the cited cases."

76. State *v.* Weaver, 104 N. C. 758, 10 S. E. 486; Turner *v.* State, 102 Ind. 425, 1 N. E. 869; Com. *v.* Grose, 99 Mass. 423; State *v.* Bishop, 98 N. C. 773, 4 S. E. 357, *holding* that the testimony of the prosecuting witness was competent to show that such statements by the defendant were untrue.

In State *v.* Smith, 4 Idaho 733, 44 Pac. 554, a prosecution for the larceny of cattle, upon the examination of a witness to whom it appeared the defendant had sold the cattle it developed that upon their sale the defendant gave to the witness what purported to be a bill of sale, in which he attempted to state from whom he had gotten the cattle, and it was further shown on the examination of other witnesses for the state that the defendant had told them from whom he procured the cattle. It was claimed by the defendant that it was incumbent on the state to disprove the statements which the witnesses for the state testified the defendant had made as to how and from whom he had procured the cattle, but the court held that they knew of no rule of law requiring such proof.

The jury are not authorized to convict one found in the possession of recently stolen property upon the falsity of his explanation of the possession, but are merely authorized to consider the falsity of the explanation as a circumstance together with all the other circumstances in the case in passing upon his guilt. Smith *v.* State (Tex. Crim.), 56 S. W. 54.

77. Loving *v.* State, 18 Tex. App. 458.

78. Barfield *v.* State, 41 Tex. Crim. 19, 51 S. W. 908.

79. Ballow *v.* State, 42 Tex. Crim. 263, 58 S. W. 1023; Dicker *v.* State (Tex. Crim.), 32 S. W. 541.

account before a conviction can properly be asked.[80] But the explanation, so called, may be so improbable, unsatisfactory or unreasonble upon its face as to require no proof of its falsity.[81]

80. *Delaware.* — State *v.* Carr, 4 Pen. 523, 57 Atl. 370.

Massachusetts. — Com. *v.* McGorty, 114 Mass. 299.

Mississippi. — Foster *v.* State, 52 Miss. 695.

Missouri. — State *v.* Castor, 93 Mo. 242, 5 S. W. 906.

Texas. — Schultz *v.* State, 20 Tex. App. 315; Porter *v.* State (Tex. Crim.), 73 S. W. 1053; Lee *v.* State, 27 Tex. App. 475, 11 S. W. 483; Reveal *v.* State, 27 Tex. App. 57, 10 S. W. 759; Anderson *v.* State, 25 Tex. App. 593, 9 S. W. 43; McLaren *v.* State, 21 Tex. App. 513, 2 S. W. 858; Wheeler *v.* State, 34 Tex. Crim. 350, 30 S. W. 913; York *v.* State, 17 Tex. App. 441; Brown *v.* State, 34 Tex. Crim. 150, 29 S. W. 772; Trevino *v.* State (Tex. Crim.), 69 S. W. 72; Lacy *v.* State, 31 Tex. Crim. 78, 19 S. W. 896; Hyatt *v.* State, 32 Tex. Crim. 580, 25 S. W. 291.

Compare People *v.* Buelna, 81 Cal. 135, 22 Pac. 396.

The Correct Rule is that where one is found in possession of goods recently stolen, and directly gives a reasonable and credible account of how he came into such possession, or such an account as will raise a reasonable doubt in the minds of the jury, who are the sole judges of its reasonableness, probability and credibility, then it becomes the duty of the prosecution to establish the falsity of such explanation, and in the absence of such proof an acquittal is proper. Bellamy *v.* State, 35 Fla. 242, 17 So. 560. See also Leslie *v.* State, 35 Fla. 171, 17 So. 555.

In People *v.* Hurley, 60 Cal. 74, 44 Am. Rep. 55, a prosecution for the larceny of cattle, where it was shown that certain hides had been found in the defendant's barn, it was held that the defendant's explanation that he knew nothing about the hides being there was the only one which he could give unless he did know something about their being there, and that the only way to prove his explanation to be false was to prove that he did know something about it; that if true his explanation was as satisfactory as any ever given of the possession of stolen property, and it was incumbent on the prosecution to prove it untrue before asking a conviction. It was held further that until the defendant's declarations that he knew nothing about the hides being in his barn were shown to be false, he was not called upon to give any explanation as to how they came there.

Compare Payne *v.* State, 57 Miss. 348, where it was held that the better rule is to admit the explanation, allowing the jury to give it such weight as its inherent probability, coupled with the failure of the state to disprove it, where the means of doing so lie peculiarly within its power, may in their judgment entitle it to.

81. Com. *v.* McGorty, 114 Mass. 299; Foster *v.* State, 52 Miss. 695.

The prosecution is not required to show that the defendant's explanation of his possession is false so long as the circumstances attending it are such as to indicate its falsity. "No arbitrary and unbending rule exists upon this subject applicable to all cases of possession of stolen property. What the law requires is that the defendant's statement should be credited where it appears to be probable and consistent with the facts. While, on the other hand, the jury is not only at liberty, but it is their duty, to decline to adopt and act upon it when it is inconsistent with other facts proved tending to establish guilt, and it is suspicious and improbable in itself." Dillon *v.* People, 1 Hun 670, 4 Thomp. & C. (N. Y.) 203.

"If the account given by him be unreasonable or improbable on its face, the *onus* of proving its truth lies on him." Davis *v.* State, 50 Miss. 86; Jones *v.* State, 30 Miss. 653, 64 Am. Dec. 175.

(f.) *Question for Jury.* — Whether the explanation offered is credible or satisfactory is a question for the jury.[82]

(C.) Rebuttal Evidence Not Limited to Explanatory Evidence. (a.) *Generally.* — A defendant in a larceny prosecution is not to be limited, however, in his evidence rebutting the presumption from, or overcoming proof of, recent possession of the property alleged to have been stolen, to the production of such evidence merely as tends to account for or explain his possession.[83] The

82. Orr *v.* State, 107 Ala. 35, 18 So. 142; State *v.* Hodge, 50 N. H. 510; State *v.* King, 122 Iowa 1, 96 N. W. 712; State *v.* Kimble, 34 La. Ann. 392. See also Boykin *v.* State, 34 Ark. 443.

"It is always a question for the jury, applying to the solution of the problem the common experiences and observations of life, whether they are satisfied, from all the attending circumstances and other facts in evidence, that the possession was honest or felonious. The conduct of the accused at the time he was found in possession, his explanation of how he came by it, his subsequent conduct, his good character, are legitimate subjects of proof, and will seldom fail to enable the jury to draw a proper deduction and conclusion." Foster *v.* State, 52 Miss. 695.

In State *v.* Jennings, 81 Mo. 185, 51 Am. Rep. 236, the court approved an instruction as follows: "Where property has been stolen, and recently thereafter the same property is found in possession of another, such person is presumed to be the thief, and, if he fails to account for his possession of such property in a manner consistent with his innocence, this presumption becomes conclusive against him; but in this case the jury are instructed that the defendant relies, in part, for his defense upon the claim that he was not present when the mare was stolen, as charged in the indictment, but was some distance from the place where said mare was taken at the time of said taking. Now, if the jury find, and believe from the evidence, that at the time said mare was stolen the defendant was not present at the place from which she was stolen, but was some distance from said place, then the jury must acquit him, as the presumption of guilt from such recent possession would be rebutted by such proof made to the satisfaction of the jury."

83. Arispe *v.* State, 26 Tex. App. 581, 10 S. W. 111; Johnson *v.* State, 148 Ind. 522, 47 N. E. 926. See also Davis *v.* State, 50 Miss. 86; Com. *v.* Howe, 2 Allen (Mass.) 153.

In Jones *v.* State, 49 Ind. 549, the court charged the jury that if they found from the evidence that the property in question had been feloniously taken, and that recently thereafter it was found in the exclusive possession of the defendant, such possession, unaccounted for and unexplained by the defendant, would raise a presumption of his guilt, but that such presumption might be explained or repelled by opposing circumstances, such as unsuspicious conduct connected with the possession. It was held that the instruction correctly stated the presumption, but that it was too narrow and restricted in stating the mode in which the presumption might be repelled or explained; that it limited the explanation to opposing circumstances, and further restricted the opposing circumstances to unsuspicious conduct connected with the possession, thereby excluding from the consideration of the jury the direct evidence introduced by the defendant as to the purchase of the property, and the effect of good character and habits of life of the defendant.

It is admissible for the defendant on a trial for larceny to introduce any evidence to show that he came into possession of the property honestly, and evidence showing that he was misled by the statements of another is not hearsay, but is primary evidence. Chambers *v.* State, 62 Miss. 108, where it was held er-

circumstances under which he was found in possession of the property, the time, the place, his conduct, are all matters proper to be considered by the jury.[84]

(b.) *Purchase of Property in Good Faith.*— The defendant in a larceny prosecution, in whose possession stolen property was found, should be permitted to show that he bought the property in good faith from a third person.[85] But his failure to ascertain the whereabouts of such third person and to produce him may be well calculated to weaken the force of his testimony.[86]

(c.) *Good Character.* — The previous good character of the accused may be shown in rebuttal of proof of possession of the

ror for the court to refuse to permit the defendant to show that he was induced to take possession of the property as agent for one who claimed to be its owner.

84. Com. *v.* McGorty, 114 Mass. 299; Davis *v.* State, 50 Miss. 86.

The attending circumstances, such as the open and notorious possession of the property, and unsuspicious conduct of the accused in reference to the possession, use and claim of ownership, should all be considered. Johnson *v.* State, 148 Ind. 522, 47 N. E. 926.

"The character of the property, the distance which it is conveyed, the time transpiring after the larceny before it is found in the defendant's possession, his words, acts or silence when it is found, and numerous other concomitant circumstances, characterize each case and distinguish it from every other. What weight should be given to this evidence, when considered as a part of a chain of circumstances, is a question solely for the jury, and the court cannot properly say, in any case, that the evidence of good character, or the fact that the possession of stolen property is undisguised and open, is a satisfactory explanation of such recent possession. It is for the jury to determine the relative weight to which each item of evidence is entitled." State *v.* Hogard, 12 Minn. 293.

Where the defendant in a larceny prosecution claims that the property never came into his possession with his knowledge, it is proper for the jury to consider how far the conduct of the prisoner, in reference to the place where the property was found, tallied with his defense in that particular. State *v.* Castor, 93 Mo. 242, 5 S. W. 906.

85. State *v.* Merrick, 19 Me. 398. See also Harwell *v.* State, 22 Tex. App. 251, 2 S. W. 606; Way *v.* State, 35 Ind. 409; State *v.* Boone, 70 Mo. 649.

In Jones *v.* People, 12 Ill. 259, where the court had already charged the jury that if the property was found in the possession of the prisoner soon after it was stolen a *prima facie* case was made against him, and he was bound, in order to discharge himself, to show satisfactorily how he had obtained the possession, it was held error to refuse a further instruction, based on the hypothesis that the defendant had fairly acquired the property by purchase, that "if it came into his hands that way the subsequent possession was entirely consistent with his innocence."

Where one accused of larceny of goods found in his possession claims to have purchased them in good faith from a third person, paying cash therefor, he should be permitted to show that he had at the time sufficient funds to pay for the property. Jones *v.* State, 49 Ind. 549.

86. Jones *v.* State, 49 Ind. 549.

The fact that one from whom the defendant claims to have purchased the property alleged to have been stolen is not present to testify as a witness for the defendant is a circumstance proper for the jury to consider in determining the probable truth or falsity of the defendant's statement as to how he came by the property. People *v.* Cline, 83 Cal. 374, 23 Pac. 391.

property alleged to have been stolen.[87] But whether or not it is conclusive is not clear.[88]

(d.) *Hearsay.* — The effect of proof of possession of recently stolen property cannot be overcome by mere hearsay evidence.[89]

87. *United States.* — United States *v.* Jackson, 29 Fed. 503.

Delaware. — State *v.* Carr, 4 Pen. 523, 57 Atl. 370.

Illinois. — Conkwright *v.* People, 35 Ill. 204.

Indiana. — Johnson *v.* State, 148 Ind. 522, 47 N. E. 926.

Kansas. — State *v.* Hoffman, 53 Kan. 700, 37 Pac. 138; State *v.* Deuel, 63 Kan. 811, 66 Pac. 1037.

Missouri. — State *v.* Castor, 93 Mo. 242, 5 S. W. 906; State *v.* Sasseen, 75 Mo. App. 197; State *v.* Kelly, 73 Mo. 608.

Nevada. — State *v.* Slingerland, 19 Nev. 135, 7 Pac. 280.

New York. — Stover *v.* People, 56 N. Y. 315.

Virginia. — Price *v.* Com., 21 Gratt. 846.

In State *v.* Kennedy, 88 Mo. 341, as there was no evidence of the good character of the defendant, but on the contrary the evidence showed his bad character, it was held proper to charge the jury that recent possession of stolen property warrants the presumption that the possessor is the thief, and if he fails to account for his possession in a manner consistent with his innocence the presumption becomes conclusive against him. See also State *v.* Crank, 75 Mo. 406.

88. State *v.* Richart, 57 Iowa 245, 10 N. W. 657, where the court said, in speaking of such evidence, that "it must have a tendency to prove that a person charged with a larceny was not guilty, and in a case where the only evidence of guilt was the recent possession of stolen property the jury might conclude that a person of unblemished character had come honestly into the possession of the property, but was unable to account therefor. The presumption of honesty which should be indulged in a case where good character is shown might be sufficient in the estimation of the jury to overcome the presumption arising from the possession of the property."

"Proof of good character may sometimes be the only mode by which an innocent man can repel the presumption of guilt arising from the recent possession of stolen goods. As, for instance, where the party really guilty, to avoid detection, thrusts, unobserved in a crowd, the article stolen into the pocket of another man. This may be done, and the innocent party be unconscious of it at the time. And yet good character is not proof of innocence, although it may be sufficient to raise a reasonable doubt of guilt." State *v.* Merrick, 19 Me. 398.

"The better opinion seems to be that the presumption arising from possession alone is completely removed by the good character alone of the prisoner." People *v.* Hurley, 60 Cal. 74, 44 Am. Rep. 55.

Compare State *v.* King, 122 Iowa 1, 96 N. W. 712, where the defendant insisted that proof of good character ought to be held so far defensive as to overcome any inference of guilt to be drawn from proof of possession, but the court said that such evidence "is received as merely tending to show that the accused would not have been likely to have committed the crime charged, and is to be given such weight only as the jury may deem it entitled to receive."

89. Upon a larceny prosecution, testimony of certain witnesses that they had heard a person other than the defendant say that he and not the defendant had stolen the property is mere hearsay, and is not admissible for the purpose of rebutting and overcoming the presumption of guilt arising from the possession of the stolen property by the defendant. Daniel *v.* State, 65 Ga. 199. "To allow such hearsay as this to rebut and overcome so strong a legal presumption of guilt would be about equivalent to holding that if the prisoner could get some one to say that he committed the crime for which the accused was indicted and

f. *Possession of Other Stolen Property.* — Evidence that other stolen property than that alleged in the indictment was found in the possession of the defendant is admissible, not for the purpose of proving the defendant guilty of another offense, but to identify him and thus connect him with the larceny charged.[90] But it must

then offer witnesses to prove that they had heard it said, then in all such cases it would be the duty of the jury to acquit. No court within our reading has so held, and this will not certainly be the first to establish such a precedent."

In Sneed *v.* State, 4 Tex. App. 514, it was held proper to refuse to permit witnesses to testify that subsequent to the finding of the indictment the owner, who had died, had stated to them that the defendant had taken the property with his permission; the evidence was mere hearsay.

In Sayres *v.* State, 30 Ala. 15, a prosecution for the larceny of bank notes from the person, it was held that evidence of declarations by the person from whom the bank notes were alleged to have been stolen, made on the morning after the night of the prisoner's arrest, to the effect that he and the prisoner were drunk together on that night, that he had let the prisoner have the bank notes for investment, and that they were not stolen, was not competent for the prisoner, although the declarant had since died; that the testimony was nothing more than hearsay.

90. Grant *v.* State, 55 Ala. 201; State *v.* Ditton, 48 Iowa 677; Yarborough *v.* State, 41 Ala. 405; Twiner *v.* State, 102 Ind. 425, 1 N. E. 869; State *v.* Moore, 101 Mo. 316, 14 S. W. 182; State *v.* Weaver, 104 N. C. 758, 10 S. E. 486; Webb *v.* State, 8 Tex. App. 115.

Compare Tinney *v.* State, 111 Ala. 74, 20 So. 597, a prosecution for the larceny of two hogs, where it was held that evidence that the defendant at the time he sold the hogs alleged to have been stolen, to a third person, had in his possession or sold and delivered to the same person other hogs, some with ear-marks the same, and others with ear-marks different from those of the hogs alleged to have been stolen, was irrelevant, illegal and inadmissible.

In State *v.* Schaffer, 70 Iowa 371, 30 N. W. 639, a prosecution for the larceny of harness, the state was permitted to prove that another person had lost some fence wire, that a search warrant had been sued out therefor, and that such person and the sheriff went to the premises of the defendant, making search under authority of the warrant, and while so searching found the stolen harness. It was held that there was no error in admitting the evidence in regard to the wire in explanation of the manner in which the harness was discovered in the defendant's possession. In the same case defendant testified that he had purchased the property and had hidden it in the place where it was found for fear it would be stolen, and it was held proper to ask him on cross-examination why he had in the same place certain other property which in his examination in chief he had admitted was stolen by him.

In State *v.* Labertew, 55 Kan. 674, 41 Pac. 945, the defendant was charged with the larceny of three head of cattle belonging to a certain person, and it appeared on the trial that thirteen head of other cattle belonging to various individuals were stolen and driven away with those described in the information; it was held proper to permit witnesses to testify with reference to all the cattle taken and their ownership that they were all found together in the defendant's possession.

In Com. *v.* Johnson, 150 Mass. 54, 22 N. E. 82, a prosecution for the larceny of sheep, there was evidence showing that the sheep in question were in a pasture together with sheep of P., and that all the sheep of both owners were stolen at the same time. There was evidence tending to show that a short time afterward sheep were found in the

be clearly shown that such other property was stolen.[91] And of course the defendant has a right to meet such evidence by counter-evidence tending to show that he came by the property honestly.[92]

g. *Other Larcenies.* — As a general rule the guilt of the accused or his participation in the commission of another larceny wholly disconnected with the larceny for which he is on trial cannot be introduced in evidence against him.[93] But where the evidence offered directly tends to prove the particular larceny charged it is to be received, although it may also tend to prove the commission of another separate and distinct offense; but to admit the evidence there must be a connection or blending which renders it necessary that the whole matter should be disclosed in order to show its bearing on the issue at trial.[94]

defendants' possession which by marks resembled the sheep stolen, and it was held competent to show that some of these sheep so found, identified by peculiar marks, were the sheep of P. Such evidence tended to identify the whole flock as the flock that was stolen, and thus to show that some of the sheep were the property of the owner laid in the indictment. The fact that the evidence might prove another crime committed by defendants was immaterial.

But when the property stolen was found in the possession of another with whom the defendant had been living a short time as an employe the evidence is not admissible. State *v.* Wolff, 15 Mo. 168.

91. Neeley *v.* State, 27 Tex. App. 315, 11 S. W. 376.

92. People *v.* Dowling, 84 N. Y. 478.

93. *California.* — People *v.* Hartman, 62 Cal. 562.

Indiana. — Smith *v.* State, 10 Ind. 106.

Kentucky. — Com. *v.* Williamson, 96 Ky. 1, 27 S. W. 812, 49 Am. St. Rep. 285; Snapp *v.* Com., 82 Ky. 173, 6 Ky. L. Rep. 34.

Michigan. — People *v.* Jacks, 76 Mich. 218, 42 N. W. 1134.

Missouri. — State *v.* Goetz, 34 Mo. 85; State *v.* Boatright, 81 S. W. 450.

Tennessee. — Wilcox *v.* State, 3 Heisk. 110.

Texas. — McIver *v.* State (Tex. Crim.), 60 S. W. 50; Grant *v.* State, 42 Tex. Crim. 273, 58 S. W. 1026; Unsell *v.* State (Tex. Crim.), 45 S. W. 1022.

In Endaily *v.* State, 39 Ark. 278, a prosecution for the larceny of a horse, it was held that evidence of the stealing of a saddle from another person soon afterward to equip the horse for riding was not admissible for the purpose of proving the intent in taking the horse, nor could the jury consider it, if admitted as a circumstance, in making up their verdict as to the larceny of the horse; it was a distinct offense, and one theft cannot be proved by evidence of another.

In Bonsall *v.* State, 35 Ind. 460, a prosecution for the larceny of bank bills alleged to have been snatched by the defendant from the prosecuting witness, it was held error to permit the prosecution to show that on the next day the defendant enticed the prosecuting witness into an alley and there knocked him down and beat him and robbed him of other money.

94. *Missouri.* — State *v.* Daubert, 42 Mo. 242; State *v.* Harrold, 38 Mo. 496.

Tennessee. — Sartin *v.* State, 7 Lea 679.

Texas. — Gentry *v.* State, 25 Tex. App. 614, 8 S. W. 925; Conley *v.* State, 21 Tex. App. 495, 1 S. W. 454; Nixon *v.* State, 31 Tex. Crim. 205, 20 S. W. 364; Robinson *v.* State (Tex. Crim.), 48 S. W. 176; Davis *v.* State, 32 Tex. Crim. 377, 23 S. W. 794.

In Parker *v.* United States, 1 Ind. Ter. 592, 43 S. W. 858, the court, in

III. CHARACTER OF THE TAKING.

1. Presumptions and Burden of Proof. — A. The Intent. — a. *In General.* — In order to warrant a conviction for larceny the prosecution must show that the taking was with a felonious intent.[95]

speaking of the admissibility of proof that other stolen property was found in the possession of the defendant for the purpose of showing that the alleged theft was part of a continuous transaction or scheme of larceny, said: "Under the second proposition, it may be shown that the alleged stolen property was found in the possession of the defendant, together with a number of other stolen articles, taken at different times and places, not too remote from the time and place of the alleged larceny, not for the purpose of showing that the defendant is a common thief, or of proving an independent crime against him, but as tending to show that the alleged taking was a part of a continuous transaction or scheme of larceny, and thus shedding light on the transaction in controversy."

"The test of the admissibility of evidence of other offenses than the one charged is the connection between the offenses in the mind of the criminal. When such a connection is shown, evidence of the others is admissible for the purpose of establishing identity in developing the *res gestae*, or in making out the guilt of the defendant by a chain of circumstances connected with the crime for which he is on trial. If, however, the evidence of another offense serves in no way to identify the thing stolen, or connect the defendant with the offense for which he is on trial, it forms no part of the *res gestae;* and all evidence of a distinct offense, unconnected in character and purpose with the offense charged, is inadmissible." People *v.* Cunningham, 66 Cal. 668, 4 Pac. 1144, 6 Pac. 700, 846. See also Nixon *v.* State, 31 Tex. Crim. 205, 20 S. W. 364.

95. *Alabama.* — Dozier *v.* State, 130 Ala. 157, 30 So. 396; Green *v.* State, 68 Ala. 539.

Arkansas. — Gooch *v.* State, 60 Ark. 5, 28 S. W. 510; Blair *v.* State, 71 Ark. 643, 71 S. W. 482.

Delaware. — State *v.* Conlan, 3 Pen. 218, 50 Atl. 95.

Florida. — Long *v.* State, 44 Fla. 134, 32 So. 870.

Georgia. — Johnson *v.* State, 12 S. E. 471; Johnson *v.* State, 119 Ga. 563, 46 S. E. 839; Johnson *v.* State, 86 Ga. 90, 13 S. E. 282.

Idaho. — State *v.* Riggo, 69 Pac. 947.

Kansas. — State *v.* Shepherd, 63 Kan. 545, 66 Pac. 236.

Kentucky. — Ross *v.* Com., 14 Ky. L. Rep. 259, 20 S. W. 214.

Louisiana. — State *v.* Young, 41 La. Ann. 94, 6 So. 468.

Michigan. — People *v.* Hillhouse, 80 Mich. 580, 45 N. W. 484; People *v.* Taugher, 102 Mich. 598, 61 N. W. 66; People *v.* Walburn, 132 Mich. 24, 92 N. W. 494; People *v.* Walker, 38 Mich. 156.

Missouri. — State *v.* Rutherford, 152 Mo. 124, 53 S. W. 417; State *v.* Shermer, 55 Mo. 83; State *v.* Gresser, 19 Mo. 247; Witt *v.* State, 9 Mo. 671.

Nebraska. — Mead *v.* State, 25 Neb. 444, 41 N. W. 277.

Nevada. — State *v.* Ryan, 12 Nev. 401, 28 Am. Rep. 802.

New Jersey. — State *v.* South, 28 N. J. L. 28, 75 Am. Dec. 250.

New York. — McCourt *v.* People, 64 N. Y. 583; People *v.* McGarren, 17 Wend. 460.

Oregon. — State *v.* Huffman, 16 Or. 15, 16 Pac. 640.

South Carolina. — State *v.* Gorman, 2 Nott & Mc C. 90, 10 Am. Dec. 576; State *v.* Thurston, 2 McMull. 382.

Tennessee. — Truslow *v.* State, 95 Tenn. 189, 31 S. W. 987.

Texas. — Parks *v.* State, 29 Tex. App. 597, 16 S. W. 532; Lewis *v.* State, 29 Tex. App. 105, 14 S. W. 1008; Knutson *v.* State, 14 Tex. App. 570.

West Virginia. — State *v.* Caddle, 35 W. Va. 73, 12 S. E. 1098.

b. *Taking Need Not Be Lucri Causa.* — It is not necessary that the evidence, to establish larceny, should show an intent to appropriate the goods to the use of the defendant; it is sufficient if it shows a criminal intent on his part to deprive the owner of the property.[96] There is authority, however, that in order to warrant a conviction

"To constitute the crime of larceny there must be evidence of a felonious intent in the taking. Something more than the mere act of taking is necessary to be shown before the jury can proceed to inquire into the intent. There must be evidence to show that the taking was done under circumstances inconsistent with an honest purpose." State *v.* Foy, 131 N. C. 804, 42 S. E. 934.

In State *v.* Babb, 76 Mo. 501, it was held error to charge the jury that the defendant could be found guilty of larceny if he "voluntarily took, etc., any of the goods, wares and merchandise then in said store;" because the defendant was only punishable on account of such goods as were charged in the indictment and proved to have been stolen; and further for charging the jury that defendant was guilty of larceny if he "feloniously sold, took or carried away any of the goods," because the jury might well have inferred that a felonious caption of the goods was unnecessary to constitute the offense of larceny.

In State *v.* Dewitt, 32 Mo. 571, it appeared that the defendant had retaken property belonging to him which had been seized under execution on a judgment against him, there being no evidence that the defendant was present when the levy was made or knew that the property had been levied upon; it was held that the prosecution should have shown that the defendant knew of the existence of the execution against him and knew of the seizure, since without such evidence it was impossible to fix upon the defendant a criminal or felonious intent.

In State *v.* Gilbert, 68 Vt. 188, 34 Atl. 697, it was held that evidence that the defendants killed an animal which was running at large in the inclosure of its owner by striking it upon the head with an ax, having a felonious intent to kill it and carry away the meat, which they did, tended to support an indictment for larceny of the animal.

In Fort *v.* State, 82 Ala. 50, 2 So. 477, the evidence showed that the taking and asportation were with the intent of depriving the owner of property which was absolutely his and in his possession, and fraudulently placing it where the taker could assert a lien or claim to hold it until certain charges were paid him by the owner; false charges, which only his fraudulent act, if undetected, would have given him a seeming right to demand as a condition for restoring the property to its rightful owner. It was held that such evidence sufficiently showed secrecy, fraudulent purpose and intent to deprive the owner of an interest in his property — elements which distinguish larceny from a civil trespass.

If the jury have a reasonable doubt as to the existence of the intent the defendant is entitled to an acquittal. Best *v.* State, 155 Ind. 46, 57 N. E. 534.

96. *Alabama.* — Williams *v.* State, 52 Ala. 411.

Indiana. — Keely *v.* State, 14 Ind. 36; Best *v.* State, 155 Ind. 46, 57 N. E. 534.

Minnesota. — State *v.* Wellman, 34 Minn. 221, 25 N. W. 395.

Mississippi. — Delk *v.* State, 64 Miss. 77, 1 So. 9, 60 Am. Rep. 46; Hamilton *v.* State, 35 Miss. 214.

Nevada. — State *v.* Ryan, 12 Nev. 401, 28 Am. Rep. 802; State *v.* Slingerland, 19 Nev. 135, 7 Pac. 280.

New Jersey. — State *v.* South, 28 N. J. L. 28, 75 Am. Dec. 250.

Utah. — State *v.* McKee, 17 Utah 370, 53 Pac. 733.

West Virginia. — State *v.* Caddle, 35 W. Va. 73, 12 S. E. 1098.

Compare State *v.* Hawkins, 8 Port. (Ala.) 461, 33 Am. Dec. 294.

If property be taken with an intent to deprive the owner thereof it is larceny, although the evidence does not disclose that the property

it is necessary that the evidence show that the taking was with the intention of securing an advantage of some sort to the taker, although it is not necessary that it be a pecuniary advantage.[97]

c. *Time of Formation of Intent.* — It is not sufficient that the evidence show that after the taking the property was converted to the use of the defendant with a felonious intent; it is necessary to show that the intent to steal existed at the time of the taking.[98] But when it appears that the taking was fraudulent or tortious it is not necessary that the evidence should show the existence of a felonious intent at the time of the original taking.[99]

was sold or otherwise disposed of by the defendant. Davis *v.* State, 10 Lea (Tenn.) 707.

In Whalen *v.* Com., 90 Va. 544, 19 S. E. 182, it was argued that if the accused in fact took the pocketbook in question the crime of larceny was not complete, because his abandoning it negatived the idea that he took it *lucri causa*, or with the intent to convert it or its contents to his own use; but it was held that since the taking was fraudulent and with intent wholly to deprive the owner of his property, that was sufficient to make out a case of larceny.

97. State *v.* Palmer, 4 Pen. (Del.) 126, 53 Atl. 359; Fields *v.* State, 6 Coldw. (Tenn.) 524. In People *v.* Woodward, 31 Hun (N. Y.) 57, it was held that in order to constitute the offense of larceny there must be an intent upon the part of the taker to reap some advantage or benefit from the taking; in other words, that the taking must have been *lucri causa*.

98. *Alabama.* — Smith *v.* State, 103 Ala. 40, 16 So. 12; Beckham *v.* State, 100 Ala. 15, 14 So. 859.

Arkansas — Fulton *v.* State, 13 Ark. 168.

Iowa. — State *v.* Wood, 46 Iowa 116.

Kentucky. — Smith *v.* Com., 96 Ky. 85, 27 S. W. 852, 49 Am. St. Rep. 287.

Massachusetts. — Com. *v.* Dimond, 3 Cush. 235.

New York. — Wilson *v.* People, 39 N. Y. 459.

North Carolina. — State *v.* Scott, 64 N. C. 586.

Texas. — Siemirs *v.* State (Tex. Crim.), 55 S. W. 334; Wilson *v.* State, 20 Tex. App. 662; Owens *v.* State, 21 Tex. App. 579, 2 S. W. 808; Cain *v.* State, 21 Tex. App. 662, 2 S. W. 888.

Utah. — People *v.* Miller, 4 Utah 410, 11 Pac. 514.

99. Dozier *v.* State, 130 Ala. 57, 30 So. 396. See also State *v.* Davenport, 38 S. C. 348, 17 S. E. 37; Beatty *v.* State, 61 Miss. 18; Weaver *v.* State, 77 Ala. 26.

In State *v.* Coombs, 55 Me. 477, 92 Am. Dec. 610, the court said: "Suppose one takes his neighbor's horse from the stable, without consent, to ride him to a neighboring town, with the intention to return him, but subsequently sells him and converts the money to his own use, without his neighbor's consent. Is he a mere trespasser? or is he guilty of larceny? In other words, must the felonious intent exist at the time of the original taking, when that is fraudulent or tortious, to constitute larceny? When property is thus obtained the taking or trespass is continuous. The wrongdoer holds it all the while without right, and against the right and without the consent of the owner. If at this point no other element is added, there is no larceny. But if to such taking there be subsequently superadded a felonious intent — that is, an intent to deprive the owner of his property permanently without color of right or excuse, and to make it the property of the taker without the owner's consent — the crime of larceny is complete."

"If it be sought to convict of theft one who lawfully obtained possession of the alleged stolen property, it devolves upon the state to show affirmatively, in addition to the subsequent appropriation of the

d. *Secrecy.* — While secrecy is usually a part of the evidence of felonious intent, it is not such an essential accompaniment of larceny as to require proof.[1]

e. *Finding Lost Property.* — In the case of a finder of lost articles, guilt must be established by evidence showing that the intent to steal accompanied the act of taking, and that the conduct of the accused showed a larcenous character from the beginning, and that at the time of the finding he knew, or then had means of ascertaining, from marks about the property, or otherwise, who was the owner.[2]

property, that the possession was obtained by a false pretext, or by a then present intention on the part of the taker to deprive the owner of the value of the property and to appropriate the same to his own use. To establish the first ground it would devolve upon the state to prove beyond a reasonable doubt, first, that the lawful possession was acquired by means of a pretext, and, second, that the pretext was false; and to establish the second ground the state would be required to prove the existence of the intent to appropriate the property at the very time the possession was lawfully obtained. In either case, as already stated, an actual appropriation must also be established." Hernandez *v.* State, 20 Tex. App. 151.

In Com. *v.* Rubin, 165 Mass. 453, 43 N. E. 200, the court said: "The rule that if a man abuse an authority given him by the law he becomes a trespasser *ab initio,* although now it looks like a rule of substantive law and is limited to a certain class of cases, in its origin was only a rule of evidence by which, when such rules were few and rude, the original intent was presumed conclusively from the subsequent conduct. It seems to have applied to all cases where intent was of importance. . . . But since it has been settled that the intent may be decisive as to larceny, the less extreme and more rational proposition which led to the technical rule, namely, that the subsequent conduct is some evidence of the original intent, has been acted on frequently in England by leaving the case to the jury when the whole evidence consisted of an ambiguous receipt and a subsequent conversion."

The mere fact that, subsequent to his acquisition of the property, the taker appropriated it to his own use and benefit, does not by inference establish the falsity of the pretext upon which he acquired possession, or that at the time he obtained the possession it was his intention to appropriate the property to his own use. But the lapse of time before the appropriation may be an important consideration. Hernandez *v.* State, 20 Tex. App. 151.

1. State *v.* Hill, 114 N. C. 780, 18 S. E. 971; State *v.* Powell, 103 N. C. 424, 9 S. E. 627, 14 Am. St. Rep. 821, 4 L. R. A. 291, *overruling* State *v.* Deal, 64 N. C. 270. *Compare* Cook *v.* State, 29 Ga. 75, where judgment of conviction was reversed because the evidence failed to show any attempt to conceal the property taken.

In State *v.* Ledford, 67 N. C. 60, it was held that in order to constitute larceny the felonious taking must be done fraudulently and secretly, so as to not only deprive the owner of his property, but also to leave him without knowledge of the taker.

2. State *v.* Briscoe, 3 Pen. (Del.) 7, 50 Atl. 271; Griggs *v.* State, 58 Ala. 425, 29 Am. Rep. 762; Smith *v.* State, 103 Ala. 40, 16 So. 12; Weaver *v.* State, 77 Ala. 26; Stepp *v.* State, 31 Tex. Crim. 349, 20 S. W. 753; Warren *v.* State, 17 Tex. App. 207; Bailey *v.* State, 52 Ind. 462, 21 Am. Rep. 182; Perrin *v.* Com., 87 Va. 554, 13 S. E. 76. See also Ransom *v.* State, 22 Conn. 153; Lane *v.* People, 10 Ill. 305.

"It is no doubt true that the finder of lost goods which have no marks by which the owner could be identified, and who does not know to whom they belong, is not guilty of larceny, even if he does not exercise diligence to discover who the owner of

f. *Question of Fact for Jury.* — On an indictment for larceny, whatever may be the circumstances of the taking, it is for the jury to determine whether the taking was with a felonious intent.[3]

2. Mode of Proof. — A. DIRECT EVIDENCE. — The intent to steal

the goods may be. And it is likewise true that the crime must consist in the original taking, and not in a subsequent conversion. But where the property is so marked as to be capable of identification, proof of the possession and of the immediate subsequent conversion is admissible, and such proof in itself tends to establish the *corpus delicti.* Allen *v.* State, 91 Ala. 19, 8 So. 665; State *v.* Weston, 9 Conn. 527; Com. *v.* Titus, 116 Mass. 42; Ransom *v.* State, 22 Conn. 153-160; State *v.* Reed, 8 Tex. App. 40. The only distinction made between theft of lost goods and theft of other property seems to be that, at the time of finding, not only must the intent to steal exist, but the finder must know, or have the reasonable means of knowing or ascertaining, the owner." State *v.* Hayes, 98 Iowa 619, 67 N. W. 673, 60 Am. St. Rep. 219, 37 L. R. A. 116.

If goods were lost by the owner and found by another, and the taking was *bona fide,* and not under a mere pretense of finding, and the finder afterward feloniously determined to appropriate them to his own use, it would not be larceny. But if the finder, at the time of taking the goods, knew who was the owner, the subsequent appropriation in a secret manner, or his denial of any knowledge of the goods or any other acts showing a felonious intent, would be evidence from which the jury might infer that the original taking was with a felonious intent. State *v.* Roper, 14 N. C. 473, where the defendant in picking up a shawl which had been dropped took it up in a public manner, was ignorant of the owner, and afterward appropriated it to his own use.

To constitute the finding and conversion of lost property larceny under the Iowa statute, § 4242, it must be shown that the finding and conversion were with knowledge of the ownership of the property; without proof of this knowledge conviction is improper. State *v.* Taylor, 25 Iowa 273.

Under the Minnesota Penal Code, in order to render the finder of lost property guilty of larceny in appropriating it to his own use, it is necessary to show that he found it under circumstances which gave him knowledge or means of information as to the true owner, although it is not necessary to show that he knew who the owner was, provided he had such means of inquiry on that subject as to give him reason to believe that with reasonable effort on his part the owner could be found. State *v.* Boyd, 36 Minn. 538, 32 N. W. 780, where it was held that the evidence as to the circumstances under which the defendant stated he found the property would have fully justified the jury in finding that the defendant had knowledge or means of inquiring as to the owner.

In a prosecution for larceny of a stray animal it is not necessary, in order to sustain a conviction, that it be shown that at the time of taking the property the defendant knew or had reason to believe who was the owner thereof; it is sufficient if the defendant knew that the animal did not belong to him, and if he drives it off and converts it feloniously to his own use he is as much guilty of larceny when he is ignorant of its true owner, and its owner is ignorant of where it is, as he would be if both he and the owner had full knowledge on both these points. Lamb *v.* State, 40 Neb. 312, 58 N. W. 963. See also State *v.* Martin, 28 Mo. 530; Brooks *v.* State, 35 Ohio St. 46.

The original taking cannot be construed with a felonious intent where the evidence establishes clearly that the article alleged to have been stolen was found in the highway and bore no marks by which the owner could be ascertained. Tyler *v.* People, Breese (Ill.) 293, 12 Am. Dec. 176.

3. State *v.* Smith, 2 Tyler (Vt.)

by the taking is the gravamen of the offense of larceny, and it is competent for the defendant to testify to the intent with which the property was taken.[4] A witness in testifying to the conduct of the accused preceding the taking should not be permitted to state that in his opinion such conduct was suspicious.[5]

B. INDIRECT EVIDENCE. — a. *In General.* — The existence *vel non* of the intent to steal is not often capable of direct proof, but is matter of inference from circumstances;[6] and accordingly circum-

272; Robinson *v.* State, 113 Ind. 510, 16 N. E. 184; Witt *v.* State, 9 Mo. 671.

Whether the felonious intent existed in the mind of one accused of larceny at the time of the commission of the alleged larceny must of necessity be inferred and found from other facts which in their nature are the subject of specific proof; and for this reason, with the other constituents of the crime being proved, it must ordinarily be left to the jury to determine from all the circumstances whether the felonious intent existed. In some cases the inference is irresistible and in others it may be and often is a matter of great difficulty to determine whether the accused committed the act charged with a criminal intent. But there are usually found in connection with the act charged attendant circumstances which characterize it, and if these are absent or the circumstances proved are consistent with innocence a conviction cannot safely be allowed. McCourt *v.* People, 64 N. Y. 583.

4. United States *v.* Stone, 8 Fed. 232; Com. *v.* Greene, 111 Mass. 392.

In State *v.* Williams, 95 Mo. 247, 8 S. W. 217, 6 Am. St. Rep. 46, the defense relied upon was that the defendant had bought a due bill on the owner of the property, and at the time of the purchase was informed that the owner was willing to let the property go in payment thereof, and under the belief that this was the fact he took the property without any intent to steal. It was held that the defendant should have been permitted so to testify.

In People *v.* Quick, 51 Mich. 547, 18 N. W. 375, where the charge was the larceny of a watch, the taking of which the defendant did not deny, the sole issue being the felonious intent, it appeared that the defendant had picked up the owner of the watch from the ground in the street where, as he testified, the owner was lying partly on his face, the defendant having raised him up and tried to stand him on his feet; and the defendant was asked by his counsel "Why did you do that?" It was held error to refuse to permit him to answer the question.

In Alabama a defendant in a larceny prosecution "should not be permitted in making his statement to the jury to state his intention, motive or belief unless those were made known at the time the act was done, the facts of which he is permitted to state; it is for the jury to infer intention, motive or belief from the facts and circumstances in the case." Whizenant *v.* State, 71 Ala. 383.

5. "Whatever inferences were to be drawn from the acts and conduct of [the accused] should have been left to the jury." Spiars *v.* State (Tex. Crim.), 69 S. W. 533. See also Jones *v.* State, 30 Tex. Crim. 426, 17 S. W. 1080.

6. McMullen *v.* State, 53 Ala. 531; Weaver *v.* State, 77 Ala. 26; People *v.* Hawksley, 82 Mich. 71, 45 N. W. 1123.

In Swanner *v.* State (Tex. Crim.), 65 S. W. 186, it was held that a mortgage executed by the defendant on the alleged stolen property was pertinent as evidence for two purposes: First, to show the permanent appropriation, and second, to answer the defendant's claim that he had voluntarily returned the property before any prosecution.

Fraudulent intent may be inferred from the fact of property having been taken and carried away, its attempted concealment, and a denial by the taker of its possession. State

stantial evidence is resorted to to establish the intent.[7] And it is proper for the defendant to give any legal evidence tending to explain the intent and show that it was not felonious.[8]

v. Patton, 1 Marv. (Del.) 552, 41 Atl. 193.

7. The sale of stolen property by the accused at a grossly inadequate price is a fact proper to be shown and considered by the jury. State *v.* Herron, 64 Kan. 363, 67 Pac. 861.

Taking the property without the owner's consent and with no apparent purpose of returning it is, in the absence of explanatory circumstances, evidence of an intent wholly to deprive the owner of his property. Robinson *v.* State, 113 Ind. 510, 16 N. E. 184. See also State *v.* Davis, 38 N. J. L. 176, 20 Am. Rep. 367.

In Com. *v.* Williams, 96 Ky. 1, 27 S. W. 812, 49 Am. St. Rep. 285, where the defendants were charged with procuring mattresses filled with goose feathers which they agreed to renovate and return, but which were returned filled with chicken feathers, it was held proper to show that at about the time of the transaction in question the defendants were shipping large lots of goose feathers and receiving chicken feathers in return; that the ownership and possession of the articles thus shipped formed the very subject-matter of the dispute and investigation.

In Watson *v.* State, 36 Miss. 593, it was held that the prosecution might, for the purpose of proving the intent with which the property was taken, introduce evidence showing that the prosecuting witness was of weak and imbecile intellect, and under the care and protection of the defendant, and that the latter procured a bill of sale of the property from the prosecuting witness by fraudulent representations, and without consideration, and under pretense that it was for the purpose of protecting the title of the prosecuting witness.

In People *v.* Evans, 69 Hun 222, 23 N. Y. Supp. 717, a prosecution for the larceny of money deposited by the complaining witness with the defendant as security for his faithful services as the defendant's employe, the defendant executed to the complaining witness a chattel mortgage to secure the repayment of the deposit; it was held that the evidence that the defendant never had the title to the mortgaged property bore upon the intent of the defendant in obtaining money, and was competent.

"Evidence tending to show adulterous intercourse between the defendant and the wife of the owner of the property was admissible and proper as going to show that the defendant knew that the taking was against the will of the husband, and tending to show that the defendant took the same with intent to deprive the husband of it. The improper intercourse did not make the offense larceny, but it threw a clear light upon the intent of the taking, as showing that the wife's consent was without her husband's knowledge, against his will, and that the defendant knew the facts, and that his intention in taking it was to steal it from the husband." People *v.* Swalm, 80 Cal. 46, 22 Pac. 67, 13 Am. St. Rep. 96.

8. State *v.* Lewis, 133 N. C. 653, 45 S. E. 521. Grimes *v.* State, 68 Ind. 193. In this case the evidence showed that the defendant had borrowed the property in question from the prosecuting witness, stating that he was going to a certain town. It was shown that instead of going to that town he went to another town and sold the property and appropriated the proceeds. It was held that the defendant should have been permitted to show by a witness that he and the witness had a day or two before borrowed the property and made an arrangement to go together to the town first named, but that the arrangement had not been carried out because of sickness in the family of the witness. The court said that if the offer had been to prove such previous arrangement by the statements of the defendant alone it would have been proper to exclude the evidence, but that since the of-

Although the Facts That the Defendant Was Weak-Minded, there being no evidence of mental unsoundness, and that he may have been voluntarily in a state of intoxication, furnish no defense against a felonious taking, yet they may be considered as bearing upon the intent with which he took the property.[9]

The Omission To Use the Ordinary and Well-Known Means of Discovering the owner of goods found raises a presumption of fraudulent intent more or less strong against the finder.[10]

The Inconsiderable Value of the Property taken is material to show a lack of criminal intent.[11]

b. *Surrounding Circumstances.* — The circumstances surrounding the taking of the property may indicate the intent with which it was taken.[12]

c. *Pecuniary Circumstances.* — Evidence that one charged with larceny was reputed at the time to be a person of means has no

fer was to prove facts independent of the defendant's statements, although coupled with them, tending to show that such arrangement had been made with the witness, the exclusion of the evidence was proper; that if the facts had been proved it was for the jury to say whether such an arrangement had been made in good faith for the purpose stated, or whether it was made as a mere contrivance by which feloniously to obtain possession of the property.

In People *v.* Eastman, 77 Cal. 141, 19 Pac. 266, the defendant was charged with the larceny of property which he had pledged to the prosecuting witness, and it was held error for the court to refuse to permit the defendant to show that he had been working for the prosecuting witness, and that the latter owed him wages amounting to the sum for which the property had been pledged.

On an indictment against the owner of property for its larceny from an attaching officer, evidence is admissible to show that the defendant intended to leave and did leave enough property in the custody of the officer to satisfy the claim against him. Such evidence tends to explain and qualify the transaction, and to show that the defendant's purpose was not to defraud the officer or the creditor. Com. *v.* Greene, 111 Mass. 392.

In Bodee *v.* State, 57 N. J. L. 140, 30 Atl. 681, where the defendants were prosecuted for stealing coal which had dropped from railroad cars while being unloaded, it was held that evidence offered by the defendants respecting the custom of owners of coal on the one hand and of poor people on the other with regard to gathering up the coal thus dropped was legitimate on the question whether the owners had abandoned such coal, and whether others who picked it up believed that it was abandoned; but that the exclusion of such evidence in that particular case was not error because it appeared on the trial as an undisputed fact, proved by the defendants themselves, that they knew the complainant before and at the time of the alleged larceny was insisting on his right to the coal.

9. Robinson *v.* State, 113 Ind. 510, 16 N. E. 184.

10. State *v.* Briscoe, 3 Pen. (Del.) 7, 50 Atl. 271, *holding* further that this explanation is more readily and naturally made by evidence that he endeavored to discover the owner and kept the goods safely in his custody until it was reasonably supposed that the owner could not be found, or that he openly made known the finding so as to make himself responsible for the value to the owner when he should appear.

11. Fletcher *v.* Com., 26 Ky. L. Rep. 227, 80 S. W. 1089.

12. State *v.* Palmer, 4 Pen. (Del.) 126, 53 Atl. 359; State *v.*

legal tendency to prove that the taking of the property was not felonious, and hence is properly excluded.[13]

d. *Property Taken Openly.* — That the property was taken openly and in the presence of third persons is a circumstance proper to be considered on the question of felonious intent.[14]

e. *Unreasonableness and Falsity of Explanation.* — Among other things which may indicate a felonious intent on the part of the defendant in a larceny prosecution is the fact that the explanation given by him of the transaction is unreasonable and apparently false.[15]

f. *Paying for Stolen Property* will not purge the original taking of its felony, or constitute any defense to a prosecution for the larceny, and hence evidence of that fact is properly excluded.[16] Nor is it competent for the prosecution to show that defendant had compromised and settled an action by the prosecuting witness to recover the value of the property.[17]

g. *That the Property Alleged To Have Been Stolen Was Returned,* or that the alleged thief was apparently on the way to return it, is proper to be considered as indicative of an intent in the first instance not permanently to deprive the owner of his property, although this

Hollingsworth, 1 Marv. (Del.) 528, 41 Atl. 143.

13. Com. *v.* Stebbins, 8 Gray (Mass.) 492.

14. State *v.* Fisher, 70 N. C. 78; State *v.* Huffman, 16 Or. 15, 16 Pac. 640. *Compare* Jackson *v.* State, 137 Ala. 96, 34 So. 609.

Where the taking is open and there is no subsequent attempt to conceal the property, and no denial, but an avowal, of the taking, a strong presumption arises that there was no felonious intent, which presumption must be repelled by clear and convincing evidence before a conviction is authorized. But whether the presumption favorable to the defendant arising from these circumstances is or is not repelled is a question to be determined by the jury in view of all the evidence. McMullen *v.* State, 53 Ala. 531.

When property, the subject of larceny at common law, is taken otherwise than by apparent robbery, in the presence of the owner and others, and the taker is conscious of their presence, the publicity of the taking affords strong presumption that the intent to steal does not exist. Newsom *v.* State, 107 Ala. 133, 18 So. 206.

Although the taking may be open and in the presence of other persons, and with the avowed intention of caring for the property for a sleeping and intoxicated friend from whom the property was taken, the subsequent conduct of the taker may be such as to throw doubt upon the good faith of the taking and raise an inference of the existence of a secretly entertained intent at the time of the taking to convert the property larcenously to his own use, and warrant a conviction for larceny. People *v.* Hansen, 84 Cal. 291, 24 Pac. 117.

15. May *v.* State, 38 Neb. 211, 56 N. W. 804. In State *v.* Hunt, 45 Iowa 673, where the defendant claimed an animal which had been placed in the pound, and sold it, and showed upon the trial that he had owned one resembling it in appearance, but failed to show that his animal had strayed away or that he had made inquiry for it, it was held that his claim of property in the animal was inconsistent with truth and honesty.

16. Truslow *v.* State, 95 Tenn. 189, 31 S. W. 987.

17. State *v.* Emerson, 48 Iowa 172. *Compare* State *v.* Furr, 121 N. C. 606, 28 S. E. 552.

may be overcome by circumstances showing an original intent to defraud.[18]

h. *Proof That the Property Was Taken Under a Claim of Right,* color of title, or by mistake, disproves any felonious intent.[19] That the defendant had within a short time previous to the alleged larceny offered to purchase property similar to that stolen is not admissible on his behalf.[20]

Legal Advice. — The fact that the defendant, in taking the property, acted under legal advice has been held proper to be shown under certain circumstances.[21] But the prosecution cannot inquire as to such advice of an attorney who had advised the defendant.[22]

18. Robinson *v.* State, 113 Ind. 510, 16 N. E. 184. In State *v.* Shermer, 55 Mo. 83, where the defendant was accused of having stolen a horse which it appeared he had bought from the prosecuting witness on credit, the title to remain in the latter until paid for, and that he had taken the horse and started for another county ostensibly to obtain employment, it was held that he should have been permitted to show that before leaving he had made arrangements to have the horse returned to the prosecuting witness after it had been driven to the defendant's destination; that such evidence was competent to explain his conduct and show his intention at the time of the departure.

19. State *v.* Huffman, 16 Or. 15, 16 Pac. 640. In Randle *v.* State, 49 Ala. 14, a prosecution for the larceny of a bale of cotton, where the proof showed that one of two bales placed together belonged to the defendants and they intended to take their own, but it was doubtful which they did take, it was held they should have been acquitted. A defendant in a larceny prosecution who claims that he took the property under claim of right, color of title, or by mistake, need not establish that fact by a preponderance of the evidence or by the weight of the testimony. State *v.* Huffman, 16 Or. 15, 16 Pac. 640.

For the purpose of showing on a prosecution for larceny of timber that the defendant did not take and carry away the timber *animo furandi,* it is not necessary that he should show a deed of conveyance; he may show by parol a purchase from one who owned the land or who was believed by him to be the owner of the land. Morningstar *v.* State, 59 Ala. 30.

In State *v.* Chaney, 9 Rich. L. (S. C.) 438, where the prisoner's defense was that he had purchased the property from a third person, it was held that a bill of sale evidencing the purchase was not admissible in his favor upon mere proof of the handwriting of the subscribing witness.

20. In Foster *v.* People, 18 Mich. 266, the court said that they could not see "how a desire or offer to purchase a horse tends to prove that a person did not subsequently steal one. Even the most inveterate thieves sometimes purchase articles; and the fact that they do so would not at all interfere with their misconduct as to others."

21. In People *v.* Schultz, 71 Mich. 315, 38 N. W. 868, where a judgment debtor's property had been seized and sold on execution and left by the judgment creditors on trial with a prospective purchaser, the larceny charged consisting of having taken it away from such prospective purchaser, it was held that the defendant should have been permitted to show that before he took the property he had legal advice as to what his rights were; that he was advised that he was the owner of the property and could take it wherever he found it, and, believing the advice to be correct, he in good faith took the means he did to secure possession of it, and had no intention of stealing it.

22. Where the defendant,

i. *Other Larcenies.* — On the question of intent, evidence of similar larcenies by the defendant has been received.[23]

j. *Acts Preceding Taking.* — The acts, conduct and situation of the accused in relation to the property, preceding the caption and asportation, are evidence to show his original and continued fraudulent intent.[24]

k. *Acts and Declarations Contemporaneous With Taking.* — What was said and done by the defendant at the time of the taking is part of the *res gestae,* and properly receivable on the question of his intent.[25]

l. *Subsequent Acts and Conduct.* — The acts and conduct of the defendant with relation to the property subsequent to his taking it are admissible to show intent.[26]

charged with larceny of property on which he held a chattel mortgage, claims to have taken it under the mortgage, it is error to permit the prosecution to prove by an attorney what advice he had given the defendant as to his right so to take the property. People *v.* Hillhouse, 80 Mich. 580, 45 N. W. 484.

23. *Arkansas.* — Reed *v.* State, 54 Ark. 621, 16 S. W. 819.

California. — People *v.* Cunningham, 66 Cal. 668, 4 Pac. 1144, 6 Pac. 700, 846; People *v.* Fehrenbach, 102 Cal. 394, 36 Pac. 678.

Indiana. — Johnson *v.* State, 148 Ind. 522, 47 N. E. 926.

Indian Territory. — Parker *v.* United States, 1 Ind. Ter. 592, 43 S. E. 858.

New York. — People *v.* Lewis, 62 Hun 622, 16 N. Y. Supp. 881, *affirmed* 136 N. Y. 633, 32 N. E. 1014; People *v.* Lovejoy, 37 App. Div. 52, 55 N. Y. Supp. 543.

North Carolina. — State *v.* Weaver, 104 N. C. 758, 10 S. E. 486.

Tennessee. — Links *v.* State, 13 Lea 701.

Texas. — Conley *v.* State, 21 Tex. App. 495, 1 S. W. 454; Nixon *v.* State, 31 Tex. Crim. 205, 20 S. W. 364. See also Lee *v.* State (Tex. Crim.), 65 S. W. 540; Carter *v.* State, 23 Tex. App. 508, 5 S. W. 128.

On a prosecution for larceny of money deposited by the complaining witness with the defendant as security for the faithful performance of a contract of employment, it is proper on the cross-examination of the defendant, on the question of intent, to show that he had obtained money from other persons by like means, which he had not repaid. People *v.* Evans, 69 Hun 222, 23 N. Y. Supp. 717.

In People *v.* Williams, 58 Hun 278, 12 N. Y. Supp. 249, it was held that evidence showing that on the day of the alleged larceny the defendant, in the same way and by the same means, committed other larcenies, is competent to prove that he was engaged in similar larcenies about the same time, the transactions being so connected as to time and so similar in their relations that the same motive might reasonably be imputed to them all. This was a case of larceny by means of the flim-flam game.

24. Watson *v.* State, 36 Miss. 593; Spiars *v.* State (Tex. Crim.), 69 S. W. 533. See also People *v.* Cole, 141 Cal. 88, 74 Pac. 547.

25. Reese *v.* State, 43 Tex. Crim. 539, 67 S. W. 325. In Viberg *v.* State, 138 Ala. 100, 35 So. 53, where the defendant was charged with larceny from the person, it was held that what was said between him and the prosecuting witness from the time of their first meeting until they reached the place where the larceny was committed being part of the transaction which culminated in the commission of the offense, was admissible as part of the *res gestae.*

26. Beatty *v.* State, 61 Miss. 18; State *v.* Wood, 46 Iowa 116. See also People *v.* Cole, 141 Cal. 88, 74 Pac. 547, *holding* it competent for the prosecution to show that when con-

C. Parol Evidence. — The defendant may contradict by parol a written instrument given in evidence to show intent.[27]

IV. NON-CONSENT OF OWNER OR CUSTODIAN.

1. Burden of Proof. — On a prosecution for larceny it must be shown that the taking was without consent of the owner or custodian.[28] Mere possession of property alleged to have been stolen is

fronted with the facts as to the taking of the property the defendant lied.

Protestations of Innocence by One Accused of the Larceny may be entitled to little weight, but the fact that his family are implicated is quite a sufficient reason for the anxiety manifested by him to settle the prosecution, and his pertinacious efforts to settle it after his having been repeatedly cautioned are not, under such circumstances, any evidence of guilt, but on the contrary show great determination to settle a matter which if prosecuted might result in the conviction of a member or members of his family, and are in fact consistent with his innocence. Newman *v.* State, 26 Ga. 633.

27. In People *v.* Barringer, 76 Hun 330, 27 N. Y. Supp. 700, a prosecution for larceny, it appeared that the charge grew out of a transaction terminating in a written agreement between the prosecuting witness and the defendant, whereby the defendant had in consideration of $2000 agreed to employ the prosecuting witness at a compensation of one-half of the net proceeds of the business, and that at the expiration of the contract the $2000 was to be returned in a lump. The writing contained nothing further as to what the $2000 represented. The larceny charged was the misappropriation of the $2000, and the prosecution introduced the written instrument on the question of felonious intent. The defendant sought to show by parol evidence that it was the understanding of the parties at the time the money was paid over that it was to be invested in a certain way, and not to be held merely as security, but the trial judge excluded the evidence on the ground that the rule prohibiting parol evidence to contradict a written instrument was applicable. The court, in holding this to be error, said that on the question of the felonious intent of the defendant under such a state of facts she was not precluded from showing that the felonious intent did not exist simply by the production of a paper wherein she had written or signed something inconsistent with her claim of the non-existence of a felonious intent; that the jury had a right to consider the writing in determining the question as to the credibility of the witnesses and the weight to be given to the testimony, but that there was no ground for the application of the rule that parol evidence could not be offered to rebut the claim of felonious intent, especially as the agreement itself was not of that definite and explicit character to deprive the defendant, even as between the parties, of the right to give testimony as to the purposes for which the money was to be used.

28. Bubster *v.* State, 33 Neb. 663, 50 N. W. 953; Thurmond *v.* State, 37 Tex. Crim. 422, 35 S. W. 965; Johnson *v.* State, 34 Tex. Crim. 254, 30 S. W. 228; Graves *v.* State, 25 Tex. App. 333, 8 S. W. 471; Lowe *v.* State, 44 Fla. 449, 32 So. 956; Anderson *v.* State, 14 Tex. App. 49; McMahon *v.* State, 1 Tex. App. 102.

To constitute the crime of larceny there must be a trespass in the original taking of possession. The taking must be against the will of the owner, and the property must be in his actual or constructive possession. Hite *v.* State, 9 Yerg. (Tenn.) 198.

In California non-consent is not a material element in the crime of larceny, but is matter simply of defense, and the absence of it does not enter into a *prima facie* case. Peo-

not evidence of caption and asportation without the owner's consent.[29] And where the property is charged and shown to belong to several owners, the prosecution must show beyond a reasonable doubt the non-consent of all the owners.[30] And when the ownership is laid in one person and the possession in another for the owner, non-consent of both owner and possessor must be shown.[31]

2. Mode of Proof. — A. Testimony of Owner of Property. In larceny prosecutions the owner of the property ordinarily must be called as a witness to prove the non-consent to the taking of the property.[32] It is held, however, that where circumstantial evidence shows an absolute want of consent to the taking, it will not be cause for reversal that the want of consent was not proved by the direct and positive testimony of the owner, although he may have been a

ple *v.* Davis, 97 Cal. 194, 31 Pac. 1109.

Under the Texas Statute (Rev. Stat., art. 2851), although the property may be the separate property of the wife, the husband is the sole manager thereof during the marriage, and *prima facie* the wife cannot legally consent to the taking without being joined in the consent by her husband; and accordingly it is held unnecessary for the prosecution to show non-consent of the wife. Coombes *v.* State, 17 Tex. App. 258.

29. Shepherd *v.* State, 44 Ark. 39.

30. And it is not for the defendant to prove the consent of the several owners. People *v.* Parsons, 105 Mich. 177, 63 N. W. 69, recognizing the rule stated, but holding that it was not applicable to the facts of that case. That case was a prosecution for the larceny of certain railroad bonds. There being no contest as to their ownership, and no claim made that they were taken by authority, it was held sufficient for the people to prove that the bonds were taken from the vault where they were kept, without the consent of the surviving member of the firm to which they belonged, or of an executor of one of the deceased partners, who had actual charge of the bonds, it appearing that the other executor, as also a co-executor with the survivor of the third partner, had nothing to do with the management of the partnership business.

See also Woods *v.* State, 26 Tex. App. 490, 10 S. W. 108. *Compare* Wiegrefe *v.* State, 66 Neb. 23, 92 N. W. 161.

31. Schultz *v.* State, 20 Tex. App. 308. *Compare* Williamson *v.* State, 13 Tex. App. 514; Erskine *v.* State, 1 Tex. App. 405.

32. Sutton *v.* State, 67 Ark. 155, 53 S. W. 890; Bubster *v.* State, 33 Neb. 663, 50 N. W. 953; Perry *v.* State, 44 Neb. 414, 63 N. W. 26.

This is upon the principle that his testimony is the primary and best evidence that the property was taken without his consent, and hence secondary evidence of the fact cannot be resorted to until the prosecution lays the proper foundation therefor. State *v.* Moon, 41 Wis. 684; State *v.* Morey, 2 Wis. 494, 60 Am. Dec. 439. See also Fowle *v.* State, 47 Wis. 545, 2 N. W. 1133.

In Texas the rule is settled that the want of consent of the owner to the taking must be proved by positive testimony where this is attainable, and circumstantial evidence, no matter how strong, will not suffice in such case. Spiars *v.* State (Tex. Crim.), 69 S. W. 533, *following* Ridge *v.* State (Tex. Crim.), 66 S. W. 774, and Wisdom *v.* State, 42 Tex. Crim. 579, 61 S. W. 926, which last case overruled Hoskins *v.* State (Tex. Crim.), 43 S. W. 1003. See also Good *v.* State, 30 Tex. App. 276, 17 S. W. 409; Anderson *v.* State, 14 Tex. App. 49; Love *v.* State, 15 Tex. App. 563; Clayton *v.* State, 15 Tex. App. 348; Miller *v.* State, 18 Tex. App. 34; Pratt *v.* State, 19 Tex. App. 276; Scott *v.*

witness in the case.[33] And there is authority to the effect that the non-consent of the owner is simply one of the elements of larceny to be proved by the same means and in the same manner as the other elements must be proved.[34] The rule requiring the testimony of the owner to prove non-consent does not apply where property is stolen from a bailee or another holding possession thereof.[35]

B. Circumstantial Evidence. — Where direct evidence cannot be had to show non-consent, that fact may be proved by circumstances,[36] or the circumstances surrounding the taking may be such

State, 19 Tex. App. 325; Schultz *v.* State, 20 Tex. App. 308.

33. In Hoskins *v.* State (Tex. Crim.), 43 S. W. 1003, the prosecutor did not, in direct, positive terms, state his want of consent to the taking of the property by the defendant, but his testimony did show that as soon as he missed the property he accused the defendant of stealing it; that he secured an officer and sought out the defendant, and the defendant denied the theft, whereupon the officer searched him and took the stolen goods from his person; that the prosecutor immediately preferred the charge of theft against the accused, and had him arrested and placed in jail. It was also proved by the injured party that the property was taken from him while he was asleep. It was held that the circumstances and actions of the parties sufficiently showed non-consent to the taking. *Compare* Texas cases in preceding notes.

34. Palmer *v.* State (Neb.), 97 N. W. 235. State *v.* Wong Quong, 27 Wash. 93, 67 Pac. 355, where the court said: "The question of the sufficiency of such circumstances to establish the fact is usually one for the jury and not for the court. It will not do to say that it can be proven only by the owner. The public have an interest in seeing that the guilty are punished, and this rule would permit the escape of all at whose trial the state was unable to procure the attendance of such owner." See also People *v.* Jacks, 76 Mich. 218, 42 N. W. 1134, *holding* that the fact that the owner or custodian of the property alleged to have been stolen did not consent to the taking may be proved by any person having knowledge of the facts, as well as by such owner or custodian.

Evidence of threats made by the accused against the owner of the property at the time of the taking tends to show that the owner parted with the property because of a reasonable fear of immediate injury to himself and his family, and hence is admissible on the question of consent. State *v.* Kallaher, 70 Conn. 398, 39 Atl. 606.

35. Bubster *v.* State, 33 Neb. 663, 50 N. W. 953; State *v.* Moon, 41 Wis. 684; Wilson *v.* State, 12 Tex. App. 481.

36. Wilson *v.* State, 45 Tex. 76; Kemp *v.* State, 38 Tex. 110; McMahon *v.* State, 1 Tex. App. 102; Trafton *v.* State, 5 Tex. App. 480; Clayton *v.* State, 15 Tex. App. 348; Mackey *v.* State, 20 Tex. App. 603.

Owner Dead. — As, for example, it may be shown, as a circumstance tending to show his want of consent, that the alleged owner, who was dead at the time of the trial, had during his lifetime attended court as a witness on behalf of the state. Sapp *v.* State (Tex. Crim.), 77 S. W. 456. And in Taylor *v.* State (Tex. Crim.), 75 S. W. 35, it was held that evidence that on the night of the alleged larceny the owner immediately went in pursuit, followed the thief to a certain town, secured the officers and followed on until he found the defendant, arrested him, claimed the property and took it away, was sufficient proof of non-consent.

Where the Alleged Owner of the Property Is Incompetent to testify as a witness, his want of consent to the taking of the property may be proved by circumstantial evi-

as to dispense with the necessity of producing direct proof of non-consent.[37]

V. OWNERSHIP OF THE PROPERTY.

1. Burden of Proof. — On a larceny prosecution there should not be a conviction unless the evidence shows beyond a reasonable doubt that the property in question was the property of the alleged owner,[38] and not of the accused.[39]

2. Mode of Proof. — A. Direct Testimony. — The prosecuting witness may testify directly on the question of his ownership of

dence, such as search for the property shortly after it was missed. Guin *v.* State (Tex. Crim.), 50 S. W. 350.

The inability of the prosecution to produce the owner of the property for the purpose of testifying to the effect of non-consent may be established by the case of the defendant himself so as to permit proof of the non-consent by circumstantial evidence. Atkins *v.* State, 44 Tex. Crim. 291, 70 S. W. 744.

37. As, for example, where the owner was at the time lying on his deathbed and wholly unconscious of what was passing around him. Van Syoc *v.* State (Neb.), 96 N. W. 266.

38. *Alabama.* — Bolling *v.* State, 98 Ala. 80, 12 So. 782.

Georgia. — Hawkins *v.* State, 95 Ga. 458, 20 S. E. 217.

Illinois. — Keating *v.* People, 160 Ill. 480, 43 N. E. 724; Hix *v.* People, 157 Ill. 382, 41 N. E. 862.

Indiana. — Bell *v.* State, 46 Ind. 453.

Indian Territory. — Murray *v.* United States, 35 S. W. 240.

Maine. — State *v.* Furlong, 19 Me. 225.

Nebraska. — Wells *v.* State, 11 Neb. 409, 9 N. W. 552.

Texas. — Hendricks *v.* State (Tex. Crim.), 56 S. W. 55; Yates *v.* State (Tex. Crim.), 42 S. W. 296; Mixon *v.* State, 28 Tex. App. 347, 13 S. W. 143.

Utah. — People *v.* Tidwell, 4 Utah 506, 12 Pac. 61.

Virginia. — Jones *v.* Com., 17 Gratt. 563.

If the prosecuting witness was in possession of the property accompanied by a special ownership, it is not material to inquire in whom the general ownership was so long as it does not appear to be in the defendant; although it does not follow that on the question whether the prosecuting witness had a special property or not it is not competent to prove general ownership. Renfro *v.* State, 6 Baxt. (Tenn.) 517, *holding* that it was error to exclude testimony looking to the general ownership, especially as the evidence tended to deny the special ownership of the prosecuting witness. See also Ledbetter *v.* State, 35 Tex. Crim. 195, 32 S. W. 903.

Where the property is stolen from a corporation it is not necessary on a prosecution for the larceny to introduce in evidence the articles of association or charter of the corporation; it is sufficient to show that such a corporation in fact was in existence and possessed the property stolen. Braithwaite *v.* State, 28 Neb. 832, 45 N. W. 247. See also State *v.* Grant, 104 N. C. 908, 10 S. E. 554; People *v.* Oldham, 111 Cal. 648, 44 Pac. 312.

On a trial for larceny of property from the possession of a receiver it is not necessary for the prosecution to show that the receiver had given bond and qualified as such; it is sufficient to show that he was an acting receiver under a proper order of court, and that the defendant knew he was so acting. State *v.* Rivers, 60 Iowa 381, 13 N. W. 73, 14 N. W. 738.

39. Benton *v.* State, 21 Tex App. 554, 2 S. W. 885; Fletcher *v.* State, 16 Tex. App. 635; Tarin *v.* State, 19 Tex. App. 359.

the property,[40] even though his interest in the property is evidenced by written contract.[41] It is not necessary, however, to prove by the alleged owner that the stolen property belonged to him; that fact may be established by the testimony of other persons.[42]

Contradictory Statements by Prosecuting Witness. — Where the prosecuting witness has testified to his ownership of the property in question, it is proper to show that he has made contradictory statements as to the property and his ownership thereof.[43]

B. Former Judgment. — On a prosecution for larceny, the proceedings and judgment against the accused in a former action by the alleged owner of the stolen property are matters *inter alios acta*, and irrelevant to the issue involved.[44]

40. Shackelford *v.* State (Tex. Crim.), 53 S. W. 884.

41. Stevens *v.* State (Tex. Crim.), 49 S. W. 105. See also State *v.* Lucas, 24 Or. 168, 33 Pac. 538. In this case the defendant was charged with larceny of money received by him for a specific purpose, a receipt for which specified the purpose of the fund and the name of the person from whom it was received and to whom it was to be returned, but did not specify the owner of the fund. It was held proper to permit the introduction of parol evidence to show to whom the money belonged; and the court said that even if the receipt had stated who was the owner of the money, that fact would not have precluded the prosecution from proving who was the real owner.

42. Lowrance *v.* State, 4 Yerg. (Tenn.) 145.

It is not improper to permit the ownership of the stolen property to be established by the son of the owner, the owner himself being absent from the state and without the process of the court. Taylor *v.* Com., 77 Va. 692.

On a prosecution for larceny of timber, testimony of a witness as to who was in possession of the land on which the strip of timber grew is not a legal conclusion, but is testimony concerning a fact. Morningstar *v.* State, 59 Ala. 30.

Under an indictment for larceny of part of an outstanding crop in which ownership of the stolen property is alleged in the wife, it is not error to permit the husband to testify that the title to the land is in his wife, that being but another form of stating the collateral fact of the ownership of the land. Johnson *v.* State, 100 Ala. 55, 14 So. 627.

43. Leach *v.* State, 67 Ark. 314, 55 S. W. 15. In this case the prosecuting witness had testified that the property, which was cattle, was marked in a certain way, and it was held error to exclude evidence showing that previously he had stated in a mortgage given on the alleged property that he was the owner of cattle of a certain description different from that to which he testified as a witness.

44. Tinney *v.* State, 111 Ala. 74, 20 So. 597.

Where two defendants are indicted for larceny, on the trial of one of them a possessory warrant sued out by the prosecutor against that defendant to recover the property with the judgment of the magistrate thereon for the defendant is not admissible. Edwards *v.* State, 69 Ga. 737.

Where the defendant in a larceny prosecution claims that the property in question belongs to a copartnership consisting of himself and the prosecuting witness, and had been paid for partly with partnership funds and partly with individual funds of himself and the prosecuting witness, the record of a judgment instituted by him against the prosecuting witness after the alleged larceny, deciding that no partnership existed between the defendant and the prosecuting witness, is not admissible against the defendant, even on the theory that the defendant had opened the way for its introduction

C. Indirect Evidence. — a. *In General.* — Direct evidence of the ownership of the property need not be produced in all cases; necessarily a resort to circumstantial evidence is proper.[45]

b. *Possession.* — The possession of personal property is evidence of ownership,[46] and ordinarily is regarded as sufficient, in the absence of countervailing evidence.[47]

by an inquiry of the prosecuting witness on cross-examination whether the defendant had not instituted such an action. People *v.* Leland, 73 Hun 162, 25 N. Y. Supp. 943. The court said that assuming even that the inquiry by the defendant had for its purpose the strengthening of his position before the jury in respect to the alleged partnership, its utmost effect was to show that defendant claimed the existence of the partnership; that evidence that he claimed to be a partner at the time in question, whether shown by evidence that he then commenced a suit to dissolve the partnership, or otherwise, did not justify the people in attempting to introduce, nor furnish any legal basis for the introduction of, a judgment which could not have other than an almost controlling weight with the jury in passing upon the question which it was the defendant's right to have them decide upon the evidence presented at the trial. The evident purpose of introducing this judgment was under the rule of *res adjudicata.*

45. The question of ownership is material, and all testimony tending to throw light upon it should be received. Wells *v.* State, 11 Neb. 409, 9 N. W. 552. In this case, to disprove the allegation of ownership of the property, as alleged in the indictment, the prisoner offered in evidence a chattel mortgage, or bill of sale, to a third person, executed while he (the defendant) was the acknowledged owner, and which antedated the sale under which the alleged owners claimed, and it was held that the exclusion of this instrument was error necessitating reversal.

Unrecorded Bill of Sale. — An unrecorded bill of sale executed in favor of the alleged owner conveying all cattle of a certain brand, which brand had been originally placed upon the animal charged to have been stolen, is admissible on a trial for the larceny of such animal. Wilson *v.* State, 32 Tex. Crim. 22, 22 S. W. 39.

46. Morris *v.* State, 84 Ala. 446, 4 So. 912, so holding notwithstanding the fact that title to it was acquired by a written instrument.

47. Carl *v.* State, 125 Ala. 89, 28 So. 505; People *v.* Davis, 97 Cal. 194, 31 Pac. 1109; State *v.* Patton, 1 Marv. (Del.) 552, 41 Atl. 193; State *v.* Stanley, 48 Iowa 221; State *v.* Donovan, 121 Mo. 496, 26 S. W. 340. See also Fowler *v.* State, 100 Ala. 96, 14 So. 860; Stevens *v.* State (Tex. Crim.), 49 S. W. 105; Morrow *v.* State, 22 Tex. App. 239, 2 S. W. 624.

In Barnes *v.* People, 18 Ill. 52, 65 Am. Dec. 699, on the question of proof of general ownership by the prosecutor of the property charged to have been stolen, the court said: "The same general evidence of property is admissible, and is sufficient in criminal as in civil cases. Possession with general acts of ownership over the horse, such as riding to the hotel and putting up as a guest, are sufficient to warrant the verdict where there is no evidence offered to rebut or contradict the right of property. No evidence of any other general owner is shown. The special property in the landlord, by bailment to him as innkeeper, might also support an allegation of property in him; but the existence of such special property in the innkeeper will by no means prevent the prosecution from alleging property in the general owner."

In Taylor *v.* State (Tex. Crim.), 75 S. W. 35, it was held that proof that the alleged owner was in charge of the property and had the control, care and management of it, was sufficient proof of ownership to satisfy the Texas statute, and that the fact

c. *Marks and Brands.* — Several of the states have statutes governing the recording of brands on animals and the use of the record on the question of the ownership of animals.[48] But marks on an animal are admissible on the question of ownership without regard to the record.[49] And an unrecorded brand, while it cannot be used as proof of ownership, may be used as any other flesh mark in connection with other testimony to identify the animal.[50]

A brand recorded before the theft of an animal branded with it affords proof of ownership, but a brand recorded after the theft affords no proof of ownership, but may be shown as a circumstance with others to identify the animal stolen, and the jury should be limited in its consideration by this rule.[51] Where an animal at the time of its being stolen was unmarked and unbranded,

that the property, which was in that case cattle, escaped into an adjoining pasture did not relieve that possession.

48. A New Mexico statute provides that when the title to any live stock is involved, the brand on an animal shall be *prima facie* evidence of ownership by the person whose brand it may be, provided that such brand has been duly recorded as provided by law. But the brand law does not require that the ownership of an animal must be proved by the brand itself. Ownership may be proved by flesh marks or any other proper evidence in the same way as if no brand law existed. Proof by brand under such a statute is only an additional method of proving ownership, and is especially applicable in the case of range animals. Territory *v.* Chavez (N. M.), 30 Pac. 903. In this case it was held proper to permit a witness to testify that he was the present owner of the brand introduced in evidence, although he was not the owner at the time it was recorded.

In Nevada, by statute, it is provided that upon the trial of any public offense concerning any neat cattle, horse, mule, or other animal running at large upon any range in that state, the brand and other marks upon the animal are *prima facie* evidence of ownership. See State *v.* Cardelli, 19 Nev. 319, 10 Pac. 433.

In Colorado a statute expressly provides that in any proceeding, civil or criminal, wherein the ownership or title of stock is involved, the brand on an animal shall be *prima facie* evidence of ownership by the person whose brand it may be, provided that the brand has been duly recorded as provided by law; and in Chestnut *v.* People, 21 Colo. 512, 42 Pac. 656, it was held that the record of a brand is admissible in evidence when it appears in all respects to conform to the requirements of the statute, although it fails to show a formal certificate signed by the owner.

49. Sapp *v.* State (Tex. Crim.), 77 S. W. 456; Shackelford *v.* State (Tex. Crim.), 50 S. W. 884.

Larceny of Hog Not Marked or Branded. — In Bazell *v.* State, 89 Ala. 14, 8 So. 22, it was held that a conviction might be had for the larceny of a hog running at large, although it was not marked or branded as required by law, if the animal was otherwise sufficiently identified and the ownership proved as alleged; that the neglect on the part of the owner to properly mark or brand the animal would not justify the larceny of his property by the defendant.

50. Lockwood *v.* State, 32 Tex. Crim. 137, 22 S. W. 413. See also Coombes *v.* State, 17 Tex. App. 258.

51. Chowning *v.* State, 41 Tex. Crim. 81, 51 S. W. 946; Unsell *v.* State (Tex. Crim.), 45 S. W. 1022; Crowell *v.* State, 24 Tex. App. 404, 6 S. W. 318; Welch *v.* State, 42 Tex. Crim. 338, 60 S. W. 46. See also Turner *v.* State, 39 Tex. Crim. 322, 45 S. W. 1020.

the fact that it was subsequently marked and branded cannot be introduced as a criminative fact against the accused.[52]

VI. VALUE OF THE PROPERTY.

1. Burden of Proof. — Where the statute does not declare the property to be the subject of larceny without reference to value, the prosecution must show that the property is of some value,[53] with the possible exception of money.[54] And when the degree of the offense depends on the value of the property, such value must be established, as other facts, beyond a reasonable doubt.[55] But where

52. Wallace *v.* State (Tex. Crim.), 66 S. W. 1102.

53. *Alabama.* — Parker *v.* State, 111 Ala. 72, 20 So. 641; Lucas *v.* State, 96 Ala. 51, 11 So. 216.

Georgia. — May *v.* State, 111 Ga. 840, 36 S. E. 222; Hawkins *v.* State, 95 Ga. 458, 20 S. E. 217; Benjamin *v.* State, 105 Ga. 830, 31 S. E. 739; State *v.* Allen, R. M. Charlt. 518.

Massachusetts. — Com. *v.* McKenney, 9 Gray 114.

Texas. — Ellison *v.* State, 25 Tex. App. 328, 8 S. W. 462; Hall *v.* State, 15 Tex. App. 40.

An article to be the subject of larceny must be of some value, but it may be worth less than the smallest coin. Wolverton *v.* Com., 75 Va. 909. An indictment in this case charged the value of the lock stolen to be thirty cents. There was no distinct proof of any specific value, and it was held that that was unnecessary, the evidence showing that it had a key in it and was used in fastening a door.

In Com. *v.* Lawless, 103 Mass. 425, a prosecution for the larceny of a discharge from the military service of the United States, of the alleged value of $100, it was held that evidence that the alleged owner of the discharge paper had been a soldier in a regiment of the Massachusetts volunteers, that the paper in question was a discharge from the military service of the United States, and that the defendant stole the discharge paper, sufficiently informed the jury what it was and enabled them to know whether it was or might be of value to the owner, and that its inspection by the jury would not have aided them further.

In Yarborough *v.* State, 41 Ala. 405, the only witness examined as to the value of the property stated on his direct examination that the property was worth about $100, but on cross-examination, being asked what the property was worth in gold coin, stated that it was worth about $60 or $70 in gold coin. On this evidence the defendant asked the court to charge the jury that in assessing the value of the property they must assess it according to its value in gold coin; but it was held that the requested charge was properly refused because the grade of the offense did not depend upon the value of the property stolen.

In Whalen *v.* Com., 90 Va. 544, 19 S. E. 182, a prosecution for the larceny of a check, it was held that since the law presumes that the face value of the check is its actual value, no proof of its actual value is necessary. The amount of the check in this case was held sufficient to make the case one of grand larceny.

Where an article stolen is of intrinsic worth, evidence of its precise value is not necessary in order to sustain a conviction for petit larceny. State *v.* Slack, 1 Bail. (S. C.) 330.

54. See *infra* this section.

55. *Alabama.* — Dubois *v.* State, 50 Ala. 139.

Colorado. — Chestnut *v.* People, 21 Colo. 512, 42 Pac. 656.

Florida. — Whitehead *v.* State, 20 Fla. 841.

Georgia. — Powell *v.* State, 88 Ga. 32, 13 S. E. 829.

Iowa. — State *v.* Wood, 46 Iowa 116.

Mississippi. — Unger *v.* State, 42 Miss. 642.

the statute declares a larceny a felony, whatever the value of the property, it is unnecessary to prove any particular value;[56] that the property was of some value may be inferred by the jury from the facts and circumstances in the case, even though there be no direct testimony upon the point.[57]

Money, Etc. — The value of American gold and silver coin, national currency, notes, etc., being fixed by law, proof of their value is not necessary in order to sustain a conviction for their larceny.[58]

Nebraska. — Engster *v.* State, 11 Neb. 539, 10 N. W. 453; Brooks *v.* State, 28 Neb. 389, 44 N. W. 436; Edmonds *v.* State, 42 Neb. 684, 60 N. W. 957.

New York. — People *v.* Kehoe, 64 Hun 663, 19 N. Y. Supp. 763.

South Carolina. — State *v.* Tillery, 1 Nott & McC. 9.

Texas. — Moore *v.* State, 17 Tex. App. 176.

In People *v.* Harris, 77 Mich. 568, 43 N. W. 1060, it was held that the testimony of the owner that he had paid $50 for the property a short time before the larceny, and of another witness employed by the defendant to assist him in trying to make a sale of the property that the defendant had told him to ask $30 or $40 for it, was sufficient to go to the jury on the question of the value of the property, and was sufficient evidence that the value was in excess of $25.

In Com. *v.* McKenney, 9 Gray (Mass.) 114, it was held that under the Massachusetts statute in existence at that time, where the indictment alleged the value of the property stolen as exceeding $100, there must be proof of that fact, but that if the indictment alleged the value of the property as not exceeding $100 it was not necessary to show the precise value of the property; it was enough to show that the property was of some value. See also Com. *v.* Riggs, 14 Gray (Mass.) 376, 77 Am. Dec. 333.

56. Where the punishment of the offense of larceny from the person does not depend upon the value of the articles taken, the precise value of the property is immaterial and need not be shown; the inspection of the articles by the jury for the purpose of ascertaining that they are of some value is competent, and if by such inspection they are satisfied that the articles are of value they are authorized so to find. Com. *v.* Burke, 12 Allen (Mass.) 182. *Compare* Edmonds *v.* State, 42 Neb. 684, 60 N. W. 957.

The Value of Property Privately Stolen From the Person of another is not a constituent of that offense as defined by the Texas Penal Code, and hence in prosecutions for such an offense the value of the stolen property need not be established. Shaw *v.* State, 23 Tex. App. 493, 5 S. W. 317. So also in Nebraska. Flannagan *v.* State, 32 Neb. 114, 49 N. W. 220.

57. Territory *v.* Pendry, 9 Mont. 67, 22 Pac. 760. See also Green *v.* State, 28 Tex. App. 493, 13 S. W. 784.

58. Grant *v.* State, 55 Ala. 201; Collins *v.* People, 39 Ill. 233; State *v.* Moseley, 38 Mo. 380; Ector *v.* State, 120 Ga. 543, 48 S. E. 315.

Money, Etc. — The commercial value of United States treasury notes, commonly called greenbacks, is what their face imports, and on the prosecution for the larceny of such a note it is not necessary in order to warrant conviction that there be proof of its value other than what its face purports. Duvall *v.* State, 63 Ala. 12, *holding* further that a charge to the jury that they must acquit if the evidence failed to show the value of the property alleged to have been stolen, although it asserted a correct general proposition, was properly refused in that case because without explanation it might have misled the jury in inducing the belief that extraneous evidence of the value of the stolen treasury notes was necessary.

Treasury notes are legal tender for the payment of debts, and are, therefore, worth their face value.

2. Mode of Proof. — A. Opinion Evidence. — In larceny prosecutions, witnesses properly qualified may testify to the value of the property stolen, as in other cases where witnesses testify to such facts.[59]

B. Circumstantial Evidence. — a. *In General.* — It is not essential that direct evidence be adduced in proof of the value of the property; circumstantial evidence may be sufficient.[60]

b. *Market Value.* — If the alleged stolen property has a market

National bank notes, being redeemable in United States treasury notes with ample security behind them, must be regarded in law as worth their face value; and silver certificates, though not legal tender, are receivable for all public dues. Their value is fixed by law, and if genuine their production in evidence authorizes the jury to infer their value. Keating *v.* People, 160 Ill. 480, 43 N. E. 724.

In State *v.* Pratt, 20 Iowa 267, a prosecution for the larceny of national currency, it was held that on proof of the loss of the money, corresponding with that charged, and its value, the genuineness of the bills would be presumed.

On a prosecution for the larceny of national bank notes, that such notes passed currently in the community as genuine is *prima facie* evidence of their genuineness. Hummel *v.* State, 17 Ohio St. 628.

Evidence that the bill stolen was "greenback and good money" is sufficient proof of value. State *v.* Evans, 15 Rich. L. (S. C.) 31.

On a prosecution for the larceny of United States treasury notes the fact that the notes passed currently is *prima facie* evidence of their genuineness and that they were of the value imported on their face. Vincent *v.* State, 3 Heisk. (Tenn.) 120, where witnesses testified that the defendant had admitted to them that he had passed or spent the money alleged to have been stolen. See also Baldwin *v.* State, 1 Sneed (Tenn.) 411.

In State *v.* Ford, 21 Wis. 610, where the alleged larceny was of treasury notes, and a witness testified that each of them was worth the sum in and by it promised to be paid, it was held that the jury might reasonably infer from such testimony that the notes were genuine.

59. State *v.* Finch, 70 Iowa 316, 30 N. W. 578, 59 Am. Rep. 443; Brooks *v.* State, 28 Neb. 389, 44 N. W. 436; Edmonds *v.* State, 42 Neb. 684, 60 N. W. 957; Engster *v.* State, 11 Neb. 539, 10 N. W. 453; Baden *v.* State (Tex. Crim.), 74 S. W. 769. See also Dozier *v.* State, 130 Ala. 57, 30 So. 396. See also article "Value."

One who complained of the theft of a sealskin cloak which she has worn for some months, and who testified that she has priced such articles, is competent to testify to its value. Printz *v.* People, 42 Mich. 144, 3 N. W. 306, 36 Am. St. Rep. 437.

The paying teller of a bank is competent to testify to the genuineness of national bank notes. Keating *v.* People, 160 Ill. 480, 43 N. E. 724.

60. Saddler *v.* State, 20 Tex. App. 195; Martinez *v.* State, 16 Tex. App. 122.

On the trial of an indictment for stealing a horse it is not necessary to prove by direct evidence that the horse was of some value, but this may be sufficiently established by proof of facts from which the jury may infer it. Houston *v.* State, 13 Ark. 66. In this case the prisoner first stated that he borrowed the horse, and again that he had stolen it, and it was held that it might be inferred that the animal was of some value, since no one would borrow or steal a horse totally valueless. It was further held that evidence that a witness had gone a hundred miles or more to hunt the horse after it was stolen tended to prove that it was of some value, since one would hardly go so far to hunt for a worthless horse. It was further held that proof that the horse pos-

value that is the correct measure of its value,[61] and it is only where the property does not possess a market value that recourse may be had to proof of value by some other criterion.[62] Where a witness testifies generally to the value of an article in common use, it will be assumed that the market value is meant, unless it appears from his testimony that he bases the value upon some other consideration.[63]

C. Production of Property. — It is not essential that the property alleged to have been stolen should be produced on the trial;[64]

sessed the power of locomotion and traveled a hundred miles and back tended to show that the horse was of some value.

While it may be true that things of no value are not subjects of larceny, still articles enumerated in the statute defining larceny as subjects thereof are, from their very nature and use, of some value, and this value may be inferred by the jury from their description, even though there is no direct evidence upon that point. Chestnut *v.* People, 21 Colo. 512, 42 Pac. 656, so holding in the case of larceny of live stock.

61. *Oklahoma.* — Filson *v.* Territory, 11 Okla. 351, 67 Pac. 473.

Texas. — Smith *v.* State (Tex. Crim.), 44 S. W. 520; Saddler *v.* State, 20 Tex. App. 195; Cannon *v.* State, 18 Tex. App. 172; Martinez *v.* State, 16 Tex. App. 122; Odell *v.* State, 44 Tex. Crim. 307, 70 S. W. 964; Baden *v.* State (Tex. Crim.), 74 S. W. 769; McBroom *v.* State (Tex. Crim.), 61 S. W. 480.

In determining the grade of the offense of larceny the inquiry as to the value of the property should be, not of its value to the owner, but its value in the open market. State *v.* Doepke, 68 Mo. 208, 30 Am. Rep. 785.

In proving the value of clothing on a trial for the larceny thereof the testimony should not be confined to current prices among dealers in second-hand clothing; the better rule for ascertaining the value of such property is to deduct from the market value of new goods of like kind a reasonable amount for the depreciation in value caused by their wear and use. Pratt *v.* State, 35 Ohio St. 514, 35 Am. Rep. 617.

In Brooks *v.* State, 28 Neb. 389, 44 N. W. 436, where the testimony showed that the property stolen consisted wholly of ready-made clothing which had been worn on Sundays by the owner for about seven months, and he could not testify to its actual value, it was held that an instruction that "as to the wearing apparel you will find its real value to the owner at the time of its being stolen," was erroneous. The court said that even if such evidence is admissible in certain cases, as where the clothes have a peculiar value from some specific cause, it could not apply to mere ready-made clothing which can be bought at any clothing house.

The value of stolen property is fixed by rates prevailing at the time and place of the theft, and not in some neighboring city. People *v.* Cole, 54 Mich. 238, 19 N. W. 968.

In determining whether the theft of a quantity of wheat constituted grand or petit larceny, testimony of the market value of the wheat at the time and place of the theft was competent to establish the value of the property stolen; but, as a thief is stealing the property from the time he takes it up until he lays it down, he has no cause to complain if the value of the property is measured by the market value at the place to which it was taken by him and sold. State *v.* Brown, 55 Kan. 611, 40 Pac. 1001.

62. In State *v.* Walker, 119 Mo. 467, 24 S. W. 1011, it was held that there was no error in proving the actual value of the property alleged to have been stolen, in the absence of a market price for property of that kind.

63. Filson *v.* Territory, 11 Okla. 351, 67 Pac. 473.

64. Moore *v.* Com., 2 Leigh (Va.) 701, a prosecution for the

although it is held in the case of bank notes that if their genuineness is questioned, and, being in the possession of the prosecuting witness, they are demanded for inspection and are withheld, that fact is a circumstance for the defendant to be weighed by the jury with other evidence impeaching their value.[65]

VII. IDENTITY OF ACCUSED.

1. Burden of Proof. — The mere name of the prisoner needs no proof unless it be put in issue by a proper plea. It is only necessary to show his identity with the person who committed the offense.[66]

Evidence of Non-Identity of the defendant with the real thief, or with the person seen in possession of the stolen property under such circumstances as to be presumptively the thief, is to be considered like any other evidence offered by the defendant for the purpose of showing that he did not commit the larceny.[67]

larceny of bank notes. In this case a witness had seen and owned them, and he not only believed them to be genuine, but the act of receiving and paying them out as things of value proved that his belief was real. Other witnesses had seen them, and the magistrate who redelivered them to their owner as things of value had also had opportunity of ascertaining their genuineness; and it was held competent for the prosecution to introduce such evidence, and that the non-production of the notes did not prevent its introduction.

65. Pyland *v.* State, 4 Sneed (Tenn.) 357.

66. In White *v.* State, 72 Ala. 195, where the defendant was indicted under the name of Dixie White, and he pleaded in abatement on account of an alleged misnomer, averring that his true name was Dixie Wyche, it was held competent for the prosecution to show that the defendant had been arraigned and tried in another court on another occasion by the name of Dixie White; that this, if true, was an admission by him of such name in the absence of objection to it, and tended to prove that he was as well known by one name as the other.

67. In State *v.* McCracken, 66 Iowa 569, 24 N. W. 43, the trial court regarded the "non-identity of the defendant with the real thief, or with the person seen in possession of the stolen property under such circumstances as to be presumptively the thief, to be a fact available to the defendant to some extent, if shown by a preponderance of evidence, and otherwise not; and that, if thus shown, it might be considered in connection with other facts and circumstances; and, if sufficient, when thus considered, to raise a reasonable doubt of guilt, the defendant should be acquitted." In holding this to be error the appellate court said that evidence of non-identity should be treated like any other evidence offered by the defendant for the purpose of showing that he did not commit the larceny; that it is merely evidence in rebuttal. "It might have the effect to raise a reasonable doubt of guilt, though not preponderating over that offered by the state. We may say also that, though preponderating, it might not have the effect to raise a reasonable doubt of guilt, if offered simply upon the question as to the identity of the defendant and the person seen in possession of the horse. The jury might believe that the defendant was not the person seen in possession, and still convict, if other evidence in the case warranted a conviction. It appears to us, therefore, that so far as the question of identity was concerned, the instruction in regard to a preponderance of evidence had

2. Mode of Proof. — A. Opinion Evidence. — A witness testifying to the identity of the defendant need not necessarily be positive in his statement.[68]

B. Photographs may be used to establish the identity of the defendant.[69]

C. Producing Property Upon Accusation. — It is proper to receive evidence that when the prosecuting witness directly charged the accused with the larceny and demanded the return of the property the accused produced the property and returned it to his accuser.[70]

D. General Disposition to Steal. — Upon a trial for larceny, evidence is not admissible to show that the defendant had a general disposition to commit theft.[71]

E. Ability, Facilities, Opportunity, Etc. — Evidence may be received tending to show that one accused of larceny had the ability to commit, or facilities for[72] or opportunity of[73] committing, the larceny charged, although it may not appear that defendant was the only one who had such opportunity.[74]

F. Change in Pecuniary Circumstances. — It is proper for the prosecution to show that prior to the larceny the defendant was

no proper place, and could serve only to confuse and mislead."

68. In Turpin *v.* Com., 25 Ky. L. Rep. 90, 74 S. W. 734, where a witness had stated that he bought the stolen property at a certain time and place, it was held proper to permit him to testify further that the defendant looked like the man from whom he had bought the horse, and that he thought he was, although not positive.

69. People *v.* Smith, 121 N. Y. 578, 24 N. E. 852. See also articles "Identity," Vol. VI; "Photographs."

70. Brown *v.* State, 43 Tex. Crim. 524, 67 S. W. 112, where such evidence was held proper although the act of the return was part of a confession by the accused which had been excluded.

71. Smith *v.* State, 10 Ind. 106.

72. In Gindrat *v.* People, 138 Ill. 103, 27 N. E. 1085, where the defendants were charged with stealing a diamond ring, while pretending to be customers, and substituting in its place an imitation, it appeared that soon afterward, upon a search of their rooms, similar imitation diamond rings were found, and it was held that the latter rings were properly admitted in evidence. The court said: "Their possession of other imitation diamond rings was a circumstance legitimately corroborative of the theory of guilt. It tended to show that they had the ability or facilities and means of committing the crime charged."

73. Smith *v.* State (Ala.), 31 So. 806. In Carreker *v.* State, 92 Ga. 471, 17 S. E. 671, it was held proper to charge the jury thus: "Was the defendant in the store of the prosecuting witness at the time in question? If so, did he start out with a box of tobacco under his arm? Was he called on by the storekeeper to stop, and did he stop?"

Slight circumstances such as constant and easy access to the place whence the goods were stolen, the defendant's presence thereabouts when the goods were missed, the fact that he drove a single dray there, and that such a dray was seen being unloaded where the stolen goods were found, may be weighed by the jury on the question whether the defendant was an accomplice. Roberts *v.* State, 55 Ga. 220.

74. If the only evidence of the defendant's guilt had consisted in proof that he had the opportunity, then it would have been incumbent upon the prosecution to show that

without means, and that after the larceny he had money.[75] But this rule does not permit evidence merely going to show the defendant's extravagant habits, or expenditures beyond his income before the larceny.[76] Nor is evidence that the defendant gambled relevant.[77]

G. DEFENSES. — The accused is entitled to the benefit of any circumstance tending to show that he was not concerned in the taking.[78]

the opportunity was sole and exclusive. Territory *v.* De Gutman, 8 N. M. 92, 42 Pac. 68.

75. People *v.* Kelly, 132 Cal. 430, 64 Pac. 563; Perrin *v.* State, 81 Wis. 135, 50 N. W. 516; State *v.* Grebe, 17 Kan. 458; State *v.* Wilson, 76 N. C. 120. See also Sims *v.* State (Tex. Crim.), 45 S. W. 705.

The possession of a large sum of money, with strong accompanying circumstances of guilt of an independent character, accompanied by evidence of entire destitution of money before the larceny, may properly be submitted to the jury to be considered with all the evidence in the case, even though the money so possessed is not identified as part of the money stolen. Its effect may be very slight, but the evidence is nevertheless competent. Com. *v.* Montgomery, 11 Metc. (Mass.) 534, 45 Am. Dec. 227.

In State *v.* Rutherford, 152 Mo. 124, 53 S. W. 417, a prosecution for the larceny of money, it was held competent for the prosecution to show that shortly before the alleged larceny the defendant was without means, and that immediately thereafter he was found in possession of an amount about equal to that stolen, and of the same general character of bills.

On the trial of a man and his wife for larceny of a large sum of money, evidence tending to show that shortly after the alleged larceny there was a marked change in the condition of defendant's family, in their mode of living, style of dressing, in spending more money than they had been accustomed to spend, and that they ceased to rent a house to live in and built them a dwelling is admissible. Martin *v.* State, 104 Ala. 71, 16 So. 82.

In People *v.* Herrick, 59 Mich. 563, 26 N. W. 767, a prosecution for the larceny of money, it was permitted to ask the witness what he knew about the defendant having money after the larceny, but objection was made to his answering what he knew about defendant having money on the day before the larceny, the witness testifying that he did not know whether he would know that the defen ant had money or not on that day. The court, in holding that the questions were not improper, said: "These parties were acquainted with [the defendant], and while ignorance of means does not prove that they do not exist, yet appearances are usually of some value in determining whether a person has any honest means of support."

Compare State *v.* Dishman, 74 N. C. 217, a prosecution for the larceny of United States treasury notes, where it was held error to admit evidence showing that shortly after the alleged larceny the defendant made various purchases at a store, and that the witness saw a number of bills in the pocket-book of the defendant, but of what denomination he was ignorant.

76. Snapp *v.* Com., 82 Ky. 173, 6 Ky. L. Rep. 34.

77. Martin *v.* State, 104 Ala. 71, 16 So. 82.

78. In People *v.* Myers, 70 Cal. 582, 12 Pac. 719, as a circumstance tending to show that the defendants were present at the larceny and were the persons who committed it, the prosecution gave evidence that certain boot-marks of peculiar characteristics were found the day after the larceny at the place and were traced from that point for several miles to a gate leading into the place of residence of one of the defendants. It was held error to re-

VIII. VENUE.

Proof of venue, like proof of any other fact necessary to be established, may arise from circumstances.[79]

IX. TIME.

The exact time when the larceny was committed need not be shown.[80]

fuse to permit the defendants to show that on the third day after the larceny at a place more distant than the defendant's residence, but within three days' foot travel, two men other than the defendants, of about the same stature and of similar complexion, were seen, and that a boot worn by one of them left marks precisely similar to those found on the trail.

In Pinkard *v.* State, 30 Ga. 757, it was held that one who was indicted with others for the commission of a larceny should have been permitted to show by cross-examination of the arresting officer that he himself had put the officer on the pursuit of the stolen property, thereby raising a presumption of his own innocence or want of participation in the larceny.

In Hinds *v.* State, 11 Tex. App. 238, the prosecuting witness testified that the defendant told him that he did not know, but that he believed, certain persons had taken the property, and that acting upon this information, the witness had followed to another county and arrested one of such persons and recovered the stolen property; and it was held error for the court to refuse to permit the defendant to show by the prosecuting witness that he, the defendant, loaned the witness the animal ridden in pursuit. The court stated that the testimony of the prosecuting witness on direct examination was evidently adduced for no other purpose than to show a guilty knowledge on the part of the defendant, and in this manner prove his participation in the theft of the property, and that, even conceding that such conduct might have this effect under the circumstances, certainly the defendant had the right to bring out all of the attending facts and circumstances.

79. Coon *v.* State, 13 Smed. & M. (Miss.) 246; State *v.* Jackson, 86 Mo. 18.

The venue must be proved as charged in the indictment, although direct and positive proof is not required. Filson *v.* Territory, 11 Okla. 351, 67 Pac. 473.

On a prosecution for larceny it is not necessary for the prosecution to prove in express terms that the offense charged was committed in the county where the indictment was found; it is sufficient if there is evidence from which the jury may so infer. Tinney *v.* State, 111 Ala. 74, 20 So. 597.

In Moore *v.* State, 55 Miss. 432, the proof showed that the defendant sold the property in another county and was seen in that county near the line of the county where he was indicted, but that when he was seen in the latter county he did not have the property with him. It was held that the proof of venue was not sufficient. The court said there are many cases in which venue may be inferred from circumstances, as where the stolen property is found in the county, but that the case at bar raised no such violent presumption.

In Williams *v.* State, 11 Tex. App. 275, a prosecution for horse theft, it was held error to charge the jury that if the horse, prior to the theft, was last seen in the county where the venue was laid the law presumed that it was stolen in that county, since there is no such legal presumption.

80. People *v.* Wright, 11 Utah 41, 39 Pac. 477; Com. *v.* Sego, 125 Mass. 210.

In a prosecution for larceny, proof

X. ALIBI.

Evidence of an alibi is competent; and clearly it is error to exclude such evidence from the consideration of the jury.[81] But it is proper for the prosecution to show the falsity of the statement of accused as to his whereabouts at the time of the larceny.[82]

that the offense was committed on the precise day charged in the indictment is not necessary. It is sufficient if it be shown to have been committed at any time within a year previous to the finding of the indictment. State *v.* Charlot, 8 Rob. (La.) 529; State *v.* Clark, 8 Rob. (La.) 533.

81. Wilson *v.* State, 41 Tex. Crim. 115, 51 S. W. 916; State *v.* Sidney, 74 Mo. 390; State *v.* Bruin, 34 Mo. 537.

On a prosecution for larceny from the person, alleged to have been committed in the presence of others, the fact that no one saw the accused near the person of the complaining witness is proper to be considered by the jury on the question of the defendant's guilt. Hall *v.* People, 39 Mich. 717.

82. Where the defense in a larceny prosecution is that the defendant was not in the vicinity of the larceny at the time it was committed, to which fact he has testified, it is proper for the prosecution to show the falsity of his statement by showing that he was seen in the vicinity of the larceny on the night when it was committed. State *v.* Young, 67 Vt. 450, 32 Atl. 251.

LASCIVIOUS COHABITATION. — See Adultery; Fornication.

LATENT AMBIGUITY.—See Ambiguity.

LATERAL SUPPORT.—See Adjoining Land Owners.

LAW.—See Foreign Law; Judicial Notice.

LAW OF NATIONS.—See Judicial Notice.

LAW REPORTS.—See Books; Foreign Law.

LEADING QUESTIONS.

CROSS-REFERENCE:

Direct Examination.

I. DEFINITION.

The "Leading Questions" term is defined elsewhere in this work, where there is also a general discussion of the topic.[1]

II. WHAT ARE LEADING QUESTIONS.

1. In the Alternative. — A question propounded in the alternative is not generally leading,[2] but may, nevertheless, in some cases

1. See article "DIRECT EXAMINATION," Vol. IV, p. 654, *et seq.*

2. *Iowa.* — Pelamourges *v.* Clark, 9 Iowa 18; State *v.* Moelchen, 53 Iowa 310, 5 N. W. 186; State *v.* Wickliff, 95 Iowa 386, 64 N. W. 282. *New Hampshire.* — Bartlett *v.* Hoyt, 33 N. H. 151.

be objectionable on that ground.[3] For such a question to be leading it is necessary that it be framed in a manner that will suggest to the mind of the witness the answer desired, through its connection

Texas. — Coates *v.* State, 2 Tex. App. 16; Melcik *v.* State, 33 Tex. Crim. 14, 24 S. W. 417.

West Virginia. — State *v.* Henderson, 29 W. Va. 147, 1 S. E. 225.

In Robinson *v.* Craver, 88 Iowa 381, 55 N. W. 493, plaintiff was asked: "Do you know whether or not he [the defendant] bought his father's homestead?" The question was objected to as leading, suggestive, incompetent, and calling for the conclusion of the witness. She answered: "Yes, sir; he told me he had bought his father's place the first time I saw him after he was married." The question so framed was not necessarily leading. It is sometimes permissible to direct the attention of the witness to the particular fact about which information is sought.

3. *United States.* — United States *v.* Angell, 11 Fed. 34.

Georgia. — Hicks *v.* Sharp, 89 Ga. 311, 15 S. E. 314.

Iowa. — Pelamourges *v.* Clark, 9 Iowa 18; State *v.* Moelchen, 53 Iowa 310, 5 N. W. 186.

Louisiana. — State *v.* Johnson, 29 La. Ann. 717.

New Hampshire. — Willis *v.* Quimby, 31 N. H. 485.

New York. — People *v.* Mather, 4 Wend. 229, 21 Am. Dec. 122.

Defendant was on trial for the murder of his wife. Witness testified that he heard the voice of a woman at appellant's house on the evening before the body of deceased was found. Counsel for the state asked witness: "Was the sound you heard a sound of distress?" Defendant objected to the question as leading and suggestive, whereupon the presiding judge prepared proper questions in writing and handed them to the interpreter to ask the witness. Defendant objected to these questions also as leading and suggestive of the answers. These questions were: "Did the noise sound as if the person was in joy or in distress? Was it as if she was laughing or crying, or if she was suffering pain or enjoying pleasure? Or was she making a mere idle noise as if nothing was the matter with her?" *Held*, the matter sought to be elicited from the witness was important testimony, requiring caution in the questions propounded to him to prevent suggesting to him the answer, and that the questions so written by the judge accomplished this purpose without being subject to the objection of being leading. Melcik *v.* State, 33 Tex. Crim. 14, 24 S. W. 417.

Plaintiff's counsel proposed to G. Nute, a witness, introduced on the part of the plaintiff, the following interrogatory, viz.: "State whether or not the hay you saw Demeritt's team hauling to the Durham depot was a part of the lot you have described as sent by plaintiff to your brother, E. Nute, in Boston." The defendant's counsel objected that the question was leading. The court overruled the objection, and allowed the question to be put in that form. The appellate court held: "The objection to the form of the question proposed to G. Nute as being leading was not well taken. A question in the form 'whether or not' may, nevertheless, in some cases be objectionable as leading. The nature of the question and its subject-matter may be such that, framed in a particular way, it will suggest to the mind of the witness the answer desired, as well if commenced in the alternative form 'whether or not,' as without it. The question objected to, however, does not so clearly and distinctly suggest the answer desired as to render it liable to the objection. It would be difficult, perhaps, to propose the question in terms better adapted to avoid leading the mind of the witness to the answer, without making it so general as to fail to direct his attention to the particular matter in relation to which his information was sought." Bartlett *v.* Hoyt, 33 N. H. 165.

with its subject-matter.[4] The better practice is not to permit questions to be put in the alternative unless it is quite apparent that the truth cannot otherwise be obtained from the witness.[5] An objection to a question is not necessarily obviated by putting the question in the alternative.[6]

2. Admit of Affirmative or Negative Answer. — A question otherwise proper is not rendered improper or objectionable because it can be answered in the affirmative or negative.[7] Its susceptibility to answer in that manner is a rough test; it must indicate the answer desired.[8]

3. Assuming Unproved Facts. — Interrogatories, in proceedings before the court, that assume unproved facts are leading.[9] But it is otherwise where they are asked on the taking of a deposition.[10]

4. Assuming Proved or Admitted Facts. — It is not prejudicial error to permit leading questions where they relate to facts not controverted,[11] or where the point sought to be established is already

4. Pelamourges *v.* Clark, 9 Iowa 18; Bartlett *v.* Hoyt, 33 N. H. 165.

5. Webster *v.* Clark, 30 N. H. 245.

6. Clark *v.* Moss, 11 Ark. 736; State *v.* Johnson, 29 La. Ann. 717; Willis *v.* Quimby, 31 N. H. 485; People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

7. State *v.* Black, 42 La. Ann. 861, 8 So. 594; Springfellow *v.* State, 26 Miss. 157, 59 Am. Dec. 247; Spear *v.* Richardson, 37 N. H. 23; United States *v.* Angell, 11 Fed. 34; People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

8. Sivell *v.* Hogan, 115 Ga. 667, 42 S. E. 151; Spear *v.* Richardson, 37 N. H. 23; Able *v.* Sparks, 6 Tex. 349; Mathis *v.* Buford, 17 Tex. 152.

Two Propositions. — A question which embraces two propositions and can be answered by a single negative or affirmative is leading. International & C. N. G. Co. *v.* Dalwigh, 92 Tex. 655, 51 S. W. 501. A question is not leading if it calls for a direct affirmative or negative answer and is no more suggestive of one than the other. Spear *v.* Richardson, 37 N. H. 23.

9. Turney *v.* State, 8 Smed. & M. (Miss.) 104, 47 Am. Dec. 74; Baltimore R. Co. *v.* Thompson, 10 Md. 76; Carpenter *v.* Ambroson, 20 Ill. 170.

Where the question assumes any fact which is in controversy, so that the answer may really or apparently admit the fact, it is leading. Such as the forked question habitually put by some counsel, if unchecked, as, "what was the plaintiff doing when defendant struck him?" the controversy being whether the defendant did strike. A dull or forward witness may answer the first part of the question and neglect the last. Steer *v.* Little, 44 N. H. 613.

"State what Mrs. S. said as to holding, by virtue of your deed, all but fifty acres of said lot," is leading because the words "all but fifty acres of said lot," assume that the claim made related to that. Steer *v.* Little, 44 N. H. 613.

10. Shields *v.* Guffey, 9 Iowa 323.

11. Cannon *v.* People, 141 Ill. 270, 30 N. E. 1027.

In a prosecution for murder a witness for the state was asked: "Was he [Ryan] killed in this county and state?" and he answered "He was." This was the only testimony proving the venue. The question was objected to as leading, and the appellate court held it to be clearly so, and not justified on the ground that the witness was an unwilling one, or upon any other grounds apparent; but further held that the evidence was on a point practically conceded and about which there could be no controversy, consequently no prejudicial error. San Antonio Traction Co. *v.* Bryant, 30 Tex. Civ. App. 437, 70 S. W. 1015.

proved.[12] And in these questions the facts established may be recapitulated.[13] Questions assuming notorious facts are not objectionable as leading.[14]

5. Assuming Answers Given. — Questions assuming matters as true, to which the witness has already testified, are not leading.[15] But a question asking if the answer to a previous interrogatory is true is leading.[16]

6. Must Be on Material Point. — A question, to be objectionable on the ground that it is leading, must be on a material point.[17]

III. WHEN ALLOWED.

1. Hostile Witness. — Leading questions may be put to hostile witnesses unwilling to give evidence.[18]

12. State *v.* Walsh, 44 La. Ann. 1122, 11 So. 811; State *v.* Fontenot, 48 La. Ann. 220, 19 So. 112; Fox *v.* Steever, 156 Ill. 622, 40 N. E. 942; Crawleigh *v.* Galveston H. & S. A. R. Co., 28 Tex. Civ. App. 260, 67 S. W. 140.

13. State *v.* Walsh, 44 La. Ann. 1122, 11 So. 811.

14. Bergen *v.* Producers Marble Yard, 72 Tex. 53, 11 S. W. 1027. "The first assignment of error questions the action of the court in overruling the objections of defendant Bergen to the seventh interrogatory and answer thereto of the witness Church. The question objected to as leading is: 'State whether J. F. Smith left Cleburne in September, 1884, and who did he leave in charge of his business to run it until he returned?' Answer: 'He left Cleburne on or about September 22, 1884, and left me in charge of his business.' By 'leading questions' are meant 'questions which suggest to the witness the answer desired.' Questions are also objectionable which embody a material fact and admit of an answer by a simple affirmation or negative. 1 Greenleaf Ev., § 434. In the application of the rule much is left to the discretion of the trial judge. In this case the witness had been in the employ of J. T. Smith for years. Smith's departure in September, 1884, was notorious. Under the circumstances it was not error to allow the question as leading the witness at once to the facts desired, viz., that he had been left in charge of the business, and the precise day of Smith's departure. Neither of these facts is implied or suggested in the question. The court did not err in refusing to exclude the testimony."

15. Tift *v.* Jones, 77 Ga. 181, 3 S. E. 399; Brice *v.* Miller, 35 S. C. 537, 15 S. E. 272; Spencer Optical Co. *v.* Johnson, 53 S. C. 533, 31 S. E. 392; Freeman *v.* City of Huron, 10 S. D. 368, 73 N. W. 260; San Antonio Traction Co. *v.* Bryant, 30 Tex. Civ. App. 437, 70 S. W. 1015 Crawleigh *v.* Galveston H. & S. A. R. Co., 28 Tex. Civ. App. 260, 67 S. W. 140.

16. Question: "'Your deposition was taken in this case on the 17th day of August, 1855, before W. W. Briggs, notary public of Cherokee county, a certified copy of which deposition, interrogatories and answers, and certificates of the officer, is as follows, viz.,' [giving a copy of the interrogatories and answers of the witness on his first examination], and requests the witness to examine the same and state whether the facts therein stated were true, according to the recollection of the witness, at the time of giving his first deposition." *Held,* "it is difficult to conceive of a more objectionable form of question than is presented in this case. . . . The deposition was properly excluded." Trammell *v.* McDade, 29 Tex. 360.

17. Tredway *v.* Antisdel, 86 Mich. 82, 48 N. W. 956. See Mathis *v.* Buford, 17 Tex. 152; Stringfellow *v.* State, 26 Miss. 157, 59 Am. Dec. 247.

18. *Alabama.* — Herring *v.* Skaggs, 73 Ala. 446.

2. In Aid of Recollection. — For the purpose of refreshing the witness' memory it is not improper to ask leading questions if the purposes of justice require such a course to be taken.[19] Such is the rule where numerous items or dates are necessary to be proved.[20]

Florida. — Sylvester *v.* State, 35 So. 142.

Indiana. — Adams *v.* Harrold, 29 Ind. 198.

Massachusetts. — Com. *v.* Melley, 14 Gray 39.

Michigan. — Stone *v.* Standard L. & Acc. Ins. Co., 71 Mich. 81, 38 N. W. 710.

Mississippi. — Turney *v.* State, 8 Smed. & M. 104.

New York. — O'Hagan *v.* Dillon, 76 N. Y. 170.

Wisconsin. — Born *v.* Rosenow, 84 Wis. 620, 50 N. W. 1089.

In Huckins *v.* People's Mut. F. Ins. Co., 31 N. H. 239, which was an action on assumpsit for the recovery of $1500 insured by defendants on plaintiff's stock of goods in his store, plaintiff's son testified that he had been employed in a grocery store in Boston five months previous to December, 1852, and that he helped his father sell goods from the first of December, 1852, to the 11th of January, 1853, the date of the fire; that sundry goods were added to the stock after the date of the policy. He testified concerning the amount of the daily sales; that about the 1st of December he assisted his father in taking an invoice of his stock of goods, which invoice, with all the bills of goods purchased, and all the books of accounts except the ledger, burnt. The plaintiff offered this witness to prove the purchase at different times of part of the goods alleged to have been burnt, and the court allowed the plaintiff's counsel to suggest to the witness the names of certain articles alleged to have been purchased, and to inquire of the witness concerning the same, he having first exhausted his memory. To this defendant excepted. *Held,* it is within the discretion of the court to permit leading questions to be put to the witness or to have suggested to him names, dates and items which cannot be significantly pointed out by a general interrogatory, if the witness has exhausted his memory, and the purposes of justice require such a course to be taken.

Gulf C. & S. F. R. Co. *v* Hall (Tex. Civ. App.), 80 S. W. 133. Defendants objected to several questions asked a witness for the state by the state's counsel on the ground that they were leading. *Held,* that while the questions were leading, there was no abuse of discretion of the trial court in this instance, since it appeared that the witness had, in reply to general questions, failed to recollect or to recall the circumstances inquired about, and the questions were then allowed by the judge in order to refresh the witness' mind. The manner of conducting the examination of witnesses is largely in the discretion of the court trying the case.

19. Huckins *v.* People's Mut. F. Ins. Co., 31 N. H. 239. *Contra,* St. Louis S. W. R. Co. *v.* Crabb (Tex. Civ. App.), 80 S. W. 408.

20. Suit was brought by appellee to recover damages for personal injuries. After testifying as to sickness plaintiff was asked by her counsel: "Where were you suffering? Was it in any way connected with your menstruation?" to which question defendant objected because it was leading, which objection was overruled, and the plaintiff answered "Yes, sir." A number of questions had been asked which the witness failed to answer because of her modesty, and the question was permitted to relieve the witness from using the language. *Held,* no error. Missouri, K. & T. R. Co. *v.* McCutcheon (Tex. Civ. App.), 77 S. W. 232; State *v.* Watson, 81 Iowa 380, 46 N. W. 868; State *v.* Bauerkemper, 95 Iowa 562, 64 N. W. 609; State *v.* Wickliff, 95 Iowa 386, 64 N. W. 282; State *v.* Burns, 119 Iowa 663, 94 N. W. 238; Dinsmore *v.* State, 61 Neb. 418, 85 N. W. 445; Campion *v.* Lattimer (Neb.), 97 N.

3. Necessary From Nature of Case. — A. Modest Persons. — A leading question is permissible to arrive at facts where modesty or delicacy prevents a correct or full answer to a general interrogatory.[21]

B. Confused or Agitated Persons. — Such questions are proper where the witness is confused or agitated.[22] But an effort must first be made to get at the facts by questions that are not leading.[23]

4. To Contradict Another. — Where one litigant has sworn to facts, the adverse party may be asked leading questions to contradict him.[24]

5. To Ignorant Person. — Leading questions may be asked of an ignorant person where he is slow to understand or his vocabulary is limited.[25]

6. To Child. — It is not error to permit leading questions to be put to a child, and there will be no reversal on that ground unless there is a clear abuse of discretion by the trial court.[26] It is a

W. 290; Welsh *v.* State, 60 Neb. 101, 82 N. W. 368.

21. State *v.* Peterson, 110 Iowa 647, 82 N. W. 329.

22. Turney *v.* State, 8 Smed. & M. (Miss.) 104, 47 Am. Dec. 79.

23. In an action to recover a bill for thrashing wheat, where a counter-claim was set up for the breach of agreement to thrash oats, plaintiff was asked by his counsel: "Did you agree at any time, or promise to thrash Mr. Jensen's [defendant's] oats last fall?" Answer: "No, sir; I did not." *Held,* "While the question was leading in form, yet its object was to contradict the evidence of defendant, who had testified to the alleged agreement of plaintiffs to thrash his oats. . . . We see no prejudice or error in the action of the trial court in permitting the answers to these questions to stand. They were merely asked for the purpose of contradicting the testimony given by the defendant in chief." Jensen *v.* Steiber (Neb.), 93 N. W. 697. See Vol. IV, p. 664.

24. In People *v.* Harlan, 133 Cal. 16, 65 Pac. 9, a prosecution for rape, prosecutrix was asked leading questions in the field of inquiry pertinent to the main fact to be established by the prosecution with permission of the court, which was, by defendant, assigned as error. The vocabulary of the witness seemed to be limited, and it was uncertain as to what she meant by her answers, but a leading question removed the uncertainty and was held perfectly proper. Doran *v.* Mullen, 78 Ill. 342; Kruse *v.* Seiffert & Weise Lumb. Co., 108 Iowa 352, 79 N. W. 118; Campion *v.* Lattimer (Neb.), 97 N. W. 290; Ham *v.* State (Tex. Crim.), 78 S. W. 929.

25. In Ham *v.* State (Tex. Crim.), 78 S. W. 929, prosecutrix was eleven years of age, the action being on the charge of rape, and counsel for state directed leading questions to witness under objection by defendant. *Held,* questions to one of her age permissible. People *v.* Harlan, 133 Cal. 16, 65 Pac. 9; Turney *v.* State, 8 Smed. & M. (Miss.) 104, 47 Am. Dec. 74; Carlson *v.* Holm (Neb.), 95 N. W. 1125.

26. An alleged rape was upon one Elsie Young, then about eleven years of age. On the trial the county attorney asked her: "You may state to the jury whether or not there was any blood on your drawers. You may state to the jury whether or not he did hurt you. While you were on the bags you can tell the jury whether or not George was right over you." Objected to as leading. These questions were answered in the affirmative. The first and last questions might, in general, be regarded as technically faulty. The second question was entirely proper. As applied to this case there could be no complaint as to any of the questions. The wit-

proper exercise of the court's discretion to permit such questions.[27]

7. Person Not Understanding Language. — Where it appears that witness' command of the English language is quite imperfect, direct and leading questions are not only permissible, but necessary.[28] And where a witness is deaf or mute, such questions are allowable.[29]

8. To Correct Mistake or Explain, Etc. — It is not objectionable, after a witness has given an ambiguous answer, to inquire by leading questions as to any fact or circumstance tending to enable him to explain more clearly or certainly.[30] Such questions are sometimes allowed for the purpose of bringing out details surrounding a main fact already testified to.[31]

9. Adverse Party. — The adverse party, while on the stand, may be asked leading questions.[32]

ness was of tender years, was before the court and jury, and the subject was of exceeding delicacy to her. The discretion of the court was properly exercised. State *v.* Watson (Iowa), 46 N. W. 868.

27. People *v.* Harlan, 133 Cal. 16, 65 Pac. 9; Christensen *v.* Thompson, 123 Iowa 717, 99 N. W. 591; Kruse *v.* Seiffert & Weise Lumb. Co., 108 Iowa 352, 79 N. W. 118; Olfermann *v.* Union Depot R. Co., 125 Mo. 408, 28 S. W. 742, 46 Am. St. Rep. 483; State *v.* Chee Gong, 17 Or. 635, 21 Pac. 882; Rodriguez *v.* State, 23 Tex. App. 503, 5 S. W. 255.

28. Reason for Rule. — State *v.* Burns (Iowa), 78 N. W. 681. In such cases there is always more or less difficulty in eliciting testimony, and hence there is vested in the trial court a discretion in such cases.

29. People *v.* Harlan, 133 Cal. 16, 65 Pac. 9; Sylvester *v.* State (Fla.), 35 So. 142; O'Hagan *v.* Dillon, 76 N. Y. 170.

30. In State *v.* Fontenot, 48 La. Ann. 220, 19 So. 112, the defendant was indicted for murder. "The district attorney asked one of the witnesses the following questions: 'Did you see the end of the blade? Is that the blade that was pulled out? Did the blade break off when the blow was struck? Did you hear any noise when the blow was struck? Was there any part of the blade projecting from the head, and, if so, how much? Was it easy or hard to pull out the knife?' The questions were objected to as being leading and suggesting the answer. In his statement to the bill the trial judge says it was necessary to answer such questions in order to arrive at the facts, the witness being asked such questions in order to be made to understand the matter being inquired into. He further states that defendant had admitted the killing by means of a knife blade being driven into the head of the deceased, stating, however, that he did so in self-defense." *Held,* "it does not appear whether the witness had first made the statement, but the inference is that he testified to the fact, and these questions were to elicit mere matters of detail thereto, and were essential, according to the judge's statement, to arrive at the facts. We see no objection to the questions. They were not leading so as to suggest a fact to be established the first time, but of details of the inflicting of the wound, which had been proven."

31. Sloan *v.* Courtenay, 54 S. C. 314, 32 S. E. 431.

32. *England.* — Lincoln *v.* Wright, 4 Beav. 116.

Alabama. — Strawbridge *v.* Spann, 8 Ala. 820.

Georgia. — Travelers Ins. Co. *v.* Sheppard, 85 Ga. 75, 12 S. E. 18.

Illinois. — Williams *v.* Jarrot, 6 Ill. 120.

Indiana. — DeHaven *v.* DeHaven, 77 Ind. 236; Harvey *v.* Osborn, 55 Ind. 535.

Iowa. — Graves *v.* Merchants & Bankers Ins. Co., 82 Iowa 637, 49 N. W. 65, 31 Am. St. Rep. 507;

10. To Direct Attention of Witness. — A question which merely mentions a subject, thereby directing the mind of the witness to the point of interrogation, is not necessarily leading, and, if leading, is not necessarily objectionable.[33] It is improper to direct attention by leading questions to a point or subject which is very obvious, or to which the mind would naturally advert.[34]

11. Embodying Statements of Witness. — Questions embodying statements of witness, asking if such statements are true, or if such statements were made by him, are objectionable as leading, unless there be some other ground for their admission; but where

Lowe *v.* Lowe, 40 Iowa 220; Shields *v.* Guffey, 9 Iowa 322; Fitch *v.* Mason City & C. L. Traction Co., 116 Iowa 716, 89 N. W. 33.

Mississippi. — Turney *v.* State, 8 Smed. & M. 104, 47 Am. Dec. 74.

New York. — People *v.* Mather, 4 Wend. 229, 21 Am. Dec. 122.

In Stringfellow *v.* State, 26 Miss. 157, 59 Am. Dec. 247, there was an indictment and conviction for murder. During the examination in chief of a witness called on the part of the prosecution the following question was propounded: "Did you ever receive a letter purporting to be from Decatur Whitley? And if so, at what place was it written and dated, where post-marked and when did you receive it?" Objected to. The witness answered that he had received a letter purporting to have been written by Whitley. It was post-marked at Ashton, but he could not remember the date, etc. It was insisted that the question was a leading one. *Held,* that in the examination of a witness, if the object be to direct his mind with the more expedition to what is material, it should not be objected to though in form leading. See also Sexton *v.* Brock, 15 Ark. 345; Greenup *v.* Stoker, 8 Ill. 202; Lee *v.* Tinges, 7 Md. 215; Steer *v.* Little, 44 N. H. 613; Long *v.* Steiger, 8 Tex. 460.

33. Vanderbilt *v.* Central R. Co. (N. J.), 58 Atl. 91.

34. *Florida.* — Sylvester *v.* State, 35 So. 142.

Idaho. — State *v.* Lyons, 7 Idaho 530, 64 Pac. 236.

Iowa. — State *v.* Wright, 112 Iowa 436, 84 N. W. 541; Fitch *v.* Mason City & C. L. Traction Co., 116 Iowa 716, 89 N. W. 33.

Michigan. — People *v.* Roat, 117 Mich. 578, 76 N. W. 91.

Missouri. — State *v.* Deustrow, 137 Mo. 44, 38 S. W. 554.

South Carolina. — Spencer Optical Mfg. Co. *v.* Johnson, 53 S. C. 533, 31 S. E. 392.

Wilson *v.* New York, N. H. & H. R. Co., 18 R. I. 598, 29 Atl. 300, was an action to recover damages for personal injuries. Because the court permitted plaintiff's counsel to read to a witness from his testimony at the trial of another case involving the same subject-matter, by which it is alleged the witness was led to give an answer desired by plaintiff, defendants excepted. Plaintiff's counsel apparently desired to show that the train ran a considerable distance after colliding with the sleigh before it could be stopped. The witness being asked, "How far past the crossing did the engine and cars go after striking the sleigh?" replied, "It was beyond the depot, I can't tell." Plaintiff's counsel then asked: "Do you recollect testifying as follows in one of the cases: 'As far as I could judge, it brought us under the archway that comes upon the Lonsdale road.'" The witness replied, "I believe at that time I was asked if I could judge whereabouts the train had stopped, and I think I said somewhere about the archway." Plaintiff's counsel then read a question, touching this point, put to him on a previous trial, which witness answered. *Held,* permitting the reading of testimony to the witness was equivalent to asking him a leading question. While it is true that, as a general rule, leading questions are inadmissible, the rule has its ex-

the witness is hostile, dull or cannot remember, after being asked proper questions, or if there are other good grounds, the court may, in its discretion, permit such questions.[35]

12. Opinions. — A. NON-EXPERT. — If the opinion is one which is admissible, though given by a non-expert, the question may be leading without being objectionable.[36]

B. EXPERT OPINION. — Leading questions calling for the opinion of an expert may be asked.[37]

13. Calling for Narrative Statement. — A question calling for a narrative statement is not objectionable, but effectually precludes the objection that it is leading.[38]

ceptions, resting on the sound discretion of the court. Thus they are admissible when the witness appears to be hostile to the party producing him, or in the interest of the opposite party, or unwilling to testify, or where an omission in his testimony is evidently caused by a want of recollection, which a suggestion may assist.

35. Fraser *v.* Jennison, 42 Mich. 206, 3 N. W. 882; Galveston H. & S. A. R. Co. *v.* Duelin, 86 Tex. 450, 25 S. W. 406; Combs *v.* Com., 90 Va. 88, 17 S. E. 881.

In McKeown *v.* Harvey, 40 Mich. 226, the court said: "We do not think it can be regarded as an error to allow a witness to answer a question concerning the conformity of work to specifications which called for an affirmative or negative answer. It could not very easily have been put in any other way which would not have been open to the same criticism. It was not strictly a leading question, because that points to the particular answer desired, and not to an affirmative or negative. Some discretion must be used on this subject, and overnicety is not conducive to convenience or justice."

Reason for Rule.—In Morrissey *v.* People, 11 Mich. 328, defendant was being prosecuted for larceny of cloth. A clerk in the store from which it was stolen was shown samples taken from the cloth seen in the prisoner's possession, and, as a witness, was asked if they were off the pieces stolen. *Held*, the objection — that the question was leading — was not well taken. The question was not leading "in the sense that renders such questions objectionable. In what way could the opinion of the witness be obtained unless he was asked for it? Was he to volunteer it, and to be dogged with questions until he did? Or if he could not be put on scent of the answer he was expected to give by questions leading from it, instead of to it, must justice be sacrificed and the truth be excluded by the means used to elicit it? Such a course of procedure in the administration of justice would bring the judiciary of the state into contempt, and not without cause."

36. Morrissey *v.* People, 11 Mich. 328; Johnson *v.* Broadway & S. A. R. Co., 53 Hun 633, 6 N. Y. Supp. 113.

37. "The interrogatory was the usual general question with which interrogatories addressed to a witness examined by commission very generally, if not invariably, conclude, and this is the first time we have ever known of any exception being taken thereto. The form of the question, 'If you know anything else that will benefit the plaintiff or defendant (as the case may be) state the same fully,' etc., effectually precludes the objection that it is a leading question, for nothing could be more general, and it certainly does not suggest the answer." Hill *v.* Georgia C. & N. R. Co., 43 S. C. 461, 21 S. E. 337. But see Rehm *v.* Weiss, 8 Miss. 514, 28 N. Y. Supp. 772.

38. Stringfellow *v.* State, 26 Miss. 157, 59 Am. Dec. 247; Steer *v.* Little, 44 N. H. 613; Long *v.* Steiger, 8 Tex. 460.

State *v.* Sheppard, 49 W. Va. 582,

14. Preliminary or to Abridge Proceedings. — If, in the examination of a witness, the object be to direct his mind with more expedition to what is material, and if the question propounded relates merely to introductory matter, it should not be objected to, although in form it be leading.[39]

15. By the Court. — As it is in the discretion of the court, it may of its own motion ask questions in a leading form, and a clear abuse of such discretion must be shown in order to make out reversible error.[40]

16. Conversations and Statements. — A question asking for conversations between other parties, or with the witness, is not, for that reason, open to the objection that it is leading.[41] But such a question, suggestive of the answer sought, stands on the same footing as other leading questions.[42]

39 S. E. 676. Defendant was charged with murder. Witness was asked whether he was one of the coroner's jury, and where the jury sat. The court permitted him to answer the last question over the objection of the defendant, and an exception was taken. *Held,* it was merely a preliminary question in the introduction of the witness to testify as to certain things he had observed about the premises, and, therefore, permissible.

39. People *v.* Bowers (Cal.), 18 Pac. 660.

In Huffman *v.* Cauble, 86 Ind. 591, error was assigned on the part of the court in taking the defendant, John Huffman, from the hands of the plaintiff's attorneys and examining him before the jury, and putting improper questions to him that were leading. *Held,* "A circuit judge presiding at a trial is not a mere moderator between contending parties; he is a sworn officer, charged with grave public duties. In order to establish justice and maintain truth and prevent wrong, he has a large discretion in the application of rules of practice, and his action in this respect will not be reversed by this court, unless it exhibits an abuse of discretion resulting in injustice. Ferguson *v.* Hirsch, 54 Ind. 337; Blizzard *v.* Applegate, 77 Ind. 516. In Lefever *v.* Johnson, 79 Ind. 554, this court said: 'There is nothing wrong in the court's asking the witness any question the answer to which would likely throw any light upon his testimony.'" Driscoll *v.* People, 47 Mich. 413, 11 N. W. 221.

40. Swartout *v.* Evans, 41 Ill. 376; Willis *v.* Quimby, 31 N. H. 485; Kemmerer *v.* Edelman, 23 Pa. St. 143; Hays *v.* State (Tex. Crim.), 20 S. W. 361; Davidson *v.* Wallingford (Tex. Civ. App.), 30 S. W. 827; Carlyle *v.* Plumer, 11 Wis. 99.

41. Yoch *v.* Home Mut. Ins. Co., 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857. This was an attempt to avoid a policy on the ground that the insured represented to the insurance agent that the building contained less than fifteen rooms. The question asked was whether Brooks stated to him that there were less than fifteen rooms in the building. *Held,* clearly leading. State *v.* Brown, 86 Iowa 121, 53 N. W. 92; Turney *v.* State, 8 Smed. & M. (Miss.) 104, 47 Am. Dec. 74; Mattice *v.* Wilcox, 71 Hun 485, 24 N. Y. Supp. 1060.

42. Sylvester *v.* State (Fla.), 35 So. 142; Adams *v.* Harrold, 29 Ind. 198.

Turney *v.* State, 8 Smed. & M. (Miss.) 104, 47 Am. Dec. 74. In note to this case, where it was desired to identify the prisoner, the prisoner was pointed out to the witness, and the witness was then asked whether that was the person. Rex *v.* Watson, 2 Stark Cas. (Eng.) 128. In such cases the proper question undoubtedly is to ask the witness: "Is the person in question

17. For Identification of Persons or Things. — It is permissible to put questions in this form for the purpose of identifying persons or things.[43]

IV. ON CROSS-EXAMINATION.

1. General Rule. — Upon cross-examination a much greater latitude is allowed in putting leading questions than is permitted upon the examination in chief, and it is the well-settled rule that on such examination they are admissible.[44]

2. Exceptions. — A. New Matter Brought Out. — But such questions cannot be asked in respect to new matter brought out on cross-examination.[45]

B. To Party or Favorable Witness. — The fact that a party to an action is called by the adverse party does not authorize his own counsel to put leading questions to him on cross-examination.[46] And whenever a witness has, or upon interrogation shows, a bias in favor of the examining party, a court should prohibit leading questions, even upon cross-examination.[47]

V. OBJECTIONS.

1. Who Can Make. — A leading question can be objected to only by a party whom it prejudices, and when prejudicial to party asking it, it cannot be objected to as leading.[48]

2. How Taken. — The objection that a question is leading must be taken specially to be available on appeal.[49]

3. When Must Be Taken. — Objections that questions are leading should be made at the trial. They come too late if made for the first time on appeal.[50]

now in the court-room? If so, point him out."

43. Dawes *v.* Corcoran, 1 Cranch C. C. 137, 7 Fed. Cas. No. 3664; Harrison *v.* Rowan, 3 Wash. C. C. 580, 11 Fed. Cas. No. 6141; Vawter *v.* Ohio & M. R. Co., 14 Ind. 174; Lowe *v.* Young, 59 Iowa 364, 13 N. W. 329; Boles *v.* State, 2 Cushm. (Miss.) 445; Smith *v.* Watson, 82 Va. 712, 1 S. E. 96.

44. Harrison *v.* Rowan, 3 Wash. C. C. 580, 11 Fed. Cas. No. 6141; People *v.* Court of Oyer, 83 N. Y. 436.

45. Gerrish *v.* Gerrish, 63 N. H. 128.

46. Turney *v.* State, 8 Smed. & M. 104, 47 Am. Dec. 74.

47. Cochran *v.* Miller, 13 Iowa 129.

48. Kemmerer *v.* Edelman, 23 Pa. St. 143. No objection can be taken on appeal unless it appears by the record that the specific objection was made at the time, so that the examining party might have an opportunity to change the form of his interrogatory. Teegarden *v.* Caledonia, 50 Wis. 292, 6 N. W. 875.

49. Bryan *v.* State (Fla.), 34 So. 243; State *v.* Maher, 74 Iowa 82, 37 N. W. 5; Kemmerer *v.* Edelman, 23 Pa. St. 143.

50. *California.* — Casey *v.* Leggett, 125 Cal. 664, 58 Pac. 264; Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791; White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799.

Georgia. — Ewing *v.* Moses, 51 Ga. 410.

Illinois. — Funk *v.* Babbitt, 156 Ill. 408, 41 N. E. 116.

Indiana. — Hunsinger *v.* Hofer, 110 Ind. 390, 11 N. E. 463; Gondy *v.*

VI. EFFECT OF ADMITTING.

1. When Reversible Error. — There must have been a manifest abuse of discretion by the trial court in permitting a party to ask leading questions of a witness before a case will be reversed on that ground.[51]

2. Answer and Resultant Injury. — It must have influenced the answer, and injury must have resulted.[52]

Werbe, 117 Ind. 154, 19 N. E. 764, 3 L. R. A. 114.

Michigan. — Smith *v.* Sherwood Twp., 62 Mich. 159, 28 N. W. 806; Badder *v.* Keefer, 91 Mich. 611, 52 N. W. 60.

Minnesota. — Tapley *v.* Tapley, 10 Minn. 448, 88 Am. Dec. 76.

Missouri. — Reber *v.* Tower, 11 Mo. App. 199.

Nebraska. — Bank *v.* Leonard, 40 Neb. 676, 59 N. W. 107; Schmelling *v.* State, 57 Neb. 562, 78 N. W. 279.

New Hampshire. — Severance *v.* Carr, 43 N. H. 65; Kendall *v.* Brownson, 47 N. H. 186.

New York. — Seymour *v.* Bradfield, 35 Barb. 49; O'Neill *v.* Howe, 16 Daly 181, 9 N. Y. Supp. 746.

South Carolina. — Manufacturing Co. *v.* Johnson, 53 S. C. 533, 31 S. E. 392.

Wisconsin. — Coggswell *v.* Davis, 65 Wis. 191, 26 N. W. 557; Whiting *v.* Insurance Co., 76 Wis. 592, 45 N. W. 672.

Under Statute. — Under Hill's Ann. Laws (Or.), § 835, by which the court is authorized in its sound discretion to permit leading questions, an arbitrary power is not given to allow leading questions in a criminal case, but there must be some special circumstances such as unwillingness, youth, infirmity, lack of memory, or ignorance on the part of the witness. State *v.* Ogden, 39 Or. 195, 65 Pac. 449.

51. Reddin *v.* Gates, 52 Iowa 210, 2 N. W. 1079.

52. Hilton *v.* Mason, 92 Ind. 157.

LEASE.—See Landlord and Tenant.

LEGAL HOLIDAYS.—See Judicial Notice.

LEGITIMACY.

CROSS-REFERENCE:

Bastardy.

I. PRESUMPTIONS AND BURDEN OF PROOF.

1. Presumption of Legitimacy From Birth in Wedlock. — A. In General. — A child born in lawful wedlock is presumed legitimate.[1]

1. *England.* — Banbury Peerage Case, 1 Sim. & S. 153.
United States. — Adger *v.* Ackerman, 52 C. C. A. 568, 115 Fed. 124; Stegall *v.* Stegall, 2 Brock. 256, 22 Fed. Cas. No. 13,351.
Alabama. — Bullock *v.* Knox, 96 Ala. 195, 11 So. 339.
Georgia. — Wright *v.* Hicks, 12 Ga. 155, 56 Am. Dec. 451; Sullivan *v.* Hugly, 32 Ga. 316.
Illinois. — Smith *v.* Henline, 174 Ill. 184, 51 N. E. 227; Robinson *v.* Ruprecht, 191 Ill. 424, 61 N. E. 631; Metheny *v.* Bohn, 160 Ill. 263, 43 N. E. 380; Orthwein *v.* Thomas, 127 Ill. 554, 21 N. E. 430, 11 Am. St. Rep. 159, 4 L. R. A. 434; Drennan *v.* Douglas, 102 Ill. 341, 40 Am. Rep. 595; Illinois Land & Loan Co. *v.* Bonner, 75 Ill. 315; Vetten *v.* Wallace, 39 Ill. App. 390, 397; Zachmann *v.* Zachmann, 201 Ill. 380, 66 N. E. 256.
Iowa. — Niles *v.* Sprague, 13 Iowa 198.
Kansas. — Bethany Hospital Co. *v.* Hale, 64 Kan. 367, 67 Pac. 848.
Kentucky. — Swinney *v.* Klippert, 20 Ky. L. Rep. 2014, 50 S. W. 841; Lewis *v.* Sizemore, 25 Ky. L. Rep. 1354, 78 S. W. 122; Remmington *v.* Lewis, 8 B. Mon. 606; Goss *v.* Froman, 89 Ky. 318, 12 S. W. 387, 8 L. R. A. 102.

Louisiana. — Dejol *v.* Johnson, 12 La. Ann. 853; Vernon *v.* Vernon, 6 La. Ann. 242; Eloi *v.* Mader, 1 Rob. 581, 38 Am. Dec. 192.

Maine. — Grant *v.* Mitchell, 83 Me. 23, 21 Atl. 178.

Maryland. — Scanlon *v.* Walshe, 81 Md. 118, 31 Atl. 498, 48 Am. St. Rep. 488.

Massachusetts. — Hemmenway *v.* Towner, 1 Allen 209; Phillips *v.* Allen, 2 Allen 453.

Minnesota. — Fox *v.* Burke, 31 Minn. 319, 17 N. W. 861.

Mississippi. — Herring *v.* Goodson, 43 Miss. 392.

Missouri. — Johnson *v.* Johnson, 30 Mo. 72, 77 Am. Dec. 598.

New York. — Tracy *v.* Frey, 95 App. Div. 579, 88 N. Y. Supp. 874.

North Carolina. — Erwin *v.* Bailey, 123 N. C. 628, 31 S. E. 844; State *v.* McDowell, 101 N. C. 734, 7 S. E. 785; State *v.* Rose, 75 N. C. 239; Johnson *v.* Chapman, 45 N. C. 213; Gurvin *v.* Cromartie, 33 N. C. 174, 53 Am. Dec. 406.

Ohio. — Miller *v.* Anderson, 43 Ohio St. 473, 3 N. E. 605, 54 Am. Rep. 823.

Pennsylvania. — Janes' Estate, 147 Pa. St. 527, 23 Atl. 892; Tioga Co. *v.* South Creek Twp., 75 Pa. St. 433; Page *v.* Dennison, 1 Grant Cas. 377.

South Carolina. — Wilson *v.* Babb, 18 S. C. 59; Kennington *v.* Catoe, 68 S. C. 470, 47 S. E. 719; Shuler *v.* Bull, 15 S. C. 421; Robb's Estate, 37 S. C. 19, 16 S. E. 241; State *v.* Shumpert, 1 S. C. 85.

Tennessee. — Cannon *v.* Cannon, 7 Humph. 410.

Virginia. — Bowles *v.* Bingham, 2 Munf. 442, 5 Am. Dec. 497.

"While the question of legitimacy has most frequently arisen where marriage was claimed or proved, and the non-access of the husband or the validity of the marriage was at issue, still it is manifest that the presumption of legitimacy is not limited to cases involving those questions. It has a wider application and applies to every case where the question is at issue. It is based upon broad principles of natural justice and the supposed virtue of the mother. It is a branch of that general rule of equity and justice which assumes the innocence of a person until there is proof of actual guilt, and whenever it is not inconsistent with the facts proved this presumption is controlling. If a former marriage is necessary to sustain the presumption it will be assumed until contrary proof is given." *In re* Matthews' Estate, 153 N. Y. 443, 47 N. E. 901. This was a proceeding for the distribution of a decedent's estate. It was shown that the decedent and the deceased mother of certain claimants were half sisters, being children of the same mother by different fathers, and that the grandmother had married the decedent's father after the birth of the claimant's mother, and there was no evidence showing that she had not been married previously to the latter's birth. The trial court held that the claimant's mother was presumed to be a legitimate child, and that the burden of establishing her illegitimacy was upon those who asserted it. It was held that the presumption of legitimacy was properly applied.

In Banbury Peerage Case, 1 Sim. & S. (Eng.) 153, the court said: "That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when, by such intercourse, the husband could, according to the laws of nature, be the father of such child."

The presumption of legitimacy "results from the principles of natural justice; it rests simply on the virtuous conduct of the mother; a branch of that equitable rule which assumes the innocence of a party until proof be brought of actual guilt." Cannon *v.* Cannon, 7 Humph. (Tenn.) 410.

Compare Remmington *v.* Lewis, 8 B. Mon. (Ky.) 606. In this case the plaintiff sought to recover land as heir to her husband, who was illegitimate and survived his mother, but died without issue and intestate. The defendant claimed the

Proof of Marriage. — In controversies involving the question of legitimacy, direct evidence of marriage is not necessary; it may be inferred from circumstances, and ordinarily, when not inconsistent with other facts in evidence, proof of cohabitation and reputation is sufficient.[2] But, as in other cases where it is material to prove marriage, proof of cohabitation without reputation is not sufficient to establish it.[3]

Effect of Lapse of Time. — After a long lapse of time, the parties being dead, the legitimacy of a child shown to have been born of a certain man and woman is presumed, although there is no evidence of marriage.[4]

Acknowledged Child. — The law does not require an acknowledged and conceded child to prove an act of marriage to maintain his legitimacy.[5]

land also as heir by reason of his being the son of the same mother as the intestate. Under the law in force in Kentucky at that time, if the defendant was legitimate he was not an heir, and the plaintiff was entitled to recover unless there was some other illegitimate issue of the same mother. It was held that the plaintiff was bound to make out a title by showing that there was no other heir of her husband, and it appearing that there was a person who might be heir, and whose being heir or not depended upon his status, it was incumbent upon the plaintiff to prove his (defendant's) legitimacy.

If a man and a woman cohabit and a child is born who does not bear the surname of the father, the inference is that the child is illegitimate. Abel *v.* Brewster, 58 Hun 402, 12 N. Y. Supp. 331.

2. *United States.* — Adger *v.* Ackerman, 52 C. C. A. 568, 115 Fed. 124.

District of Columbia. — Jennings *v.* Webb, 8 App. D. C. 43.

Maryland. — Barnum *v.* Barnum, 42 Md. 251, 296; Fornshill *v.* Murray, 1 Bland Ch. 479, 18 Am. Dec. 346.

New York. — Fenton *v.* Reed, 4 Johns. 52; Hynes *v.* McDermott, 91 N. Y. 451; Jackson *v.* Claw, 18 Johns. 346; Starr *v.* Peck, 1 Hill 270.

The presumption is conclusive where there are no adverse facts. Bothick *v.* Bothick, 45 La. Ann. 1382, 14 So. 293.

Foreign Marriage. — The establishment of a foreign marriage by cohabitation is not permitted in cases where it would annul a marriage celebrated here according to the law of the country. Smith *v.* Smith, 1 Tex. 621.

Subsequent Ceremonial Marriage. A subsequent ceremonial marriage is not inconsistent with a prior common-law marriage, and it does not necessarily overcome the presumption thereof which arises from the matrimonial cohabitation, the declarations and conduct of the parties, and their reputation. Adger *v.* Ackerman, 52 C. C. A. 568, 115 Fed. 124.

3. Pickens' Estate, 163 Pa. St. 14, 29 Atl. 875, 25 L. R. A. 477; Castagnie *v.* Bouliris, 43 La. Ann. 943, 10 So. 1.

4. Dinkins *v.* Samuel, 10 Rich. L. (S. C.) 66; Johnson *v.* Johnson, 30 Mo. 72, 88; *In re* Pickens' Estate, 163 Pa. St. 14, 29 Atl. 875, 25 L. R. A. 477; Kelly *v.* McGuire, 15 Ark. 555; Johnson *v.* Johnson, 1 Desaus. (S. C.) 595. See also Rogers *v.* Park, 4 Humph. (Tenn.) 480.

After the Lapse of Seventy Years and Over, where proof is given that a person is the child of a certain man and woman, and was so recognized and treated by the parents and other members of the family, legitimacy will be presumed even though there is no evidence of the marriage of the father and mother. *In re* Robb's Estate, 37 S. C. 19, 16 S. E. 241.

5. Orthwein *v.* Thomas (Ill.), 13 N. E. 564.

B. Effect of Ante-Nuptial Conception. — Ante-nuptial conception does not weaken the presumption of legitimacy arising from post-nuptial birth.[6]

C. Effect of Separation and Divorce of Parents. — Every child born in wedlock is presumed to be legitimate, even though the parties are living apart by mutual consent.[7]

All Children Begotten Before the Commencement of a Suit for Divorce are presumed to be legitimate until the contrary is shown.[8]

Access of Husband. — Where the husband and wife have had opportunity for sexual intercourse, a very strong presumption arises that it must have taken place, and that the child in question is the fruit.[9]

D. Conclusiveness of Presumption of Legitimacy. — a. *In General.* — Formerly the law conclusively presumed the issue of every married woman to be legitimate, except in the two special cases of the impotency of the husband and his absence from the realm. The rule was first relaxed by permitting the conclusion of illegitimacy to be drawn in certain other special classes of cases in which legitimacy was impossible. Finally the simple rule was recognized that the presumption of legitimacy from the birth of a child during marriage may be rebutted by evidence which clearly and conclusively shows that the procreation by the husband was impossible.[10]

6. Dennison *v.* Page, 29 Pa. St. 420, 72 Am. Dec. 644; Page *v.* Dennison, 1 Grant Cas. (Pa.) 377; Wilson *v.* Babb, 18 S. C. 59; State *v.* Herman, 35 N. C. 502; Zachmann *v.* Zachmann, 201 Ill. 380, 66 N. E. 256.

7. Morris *v.* Davies, 5 Cl. & F. (Eng.) 163; Drennan *v.* Douglas, 102 Ill. 341, 40 Am. Rep. 595; Hemmenway *v.* Towner, 1 Allen (Mass.) 209, where the child's parents lived together as husband and wife until six months before his birth, when his mother deserted his father.

Voluntary Separation. — Where husband and wife lived separately without sentence passed, the child is presumed legitimate because access is presumed. Tate *v.* Penne, 7 Mart. (La.) (N. S.) 548.

8. Cross *v.* Cross, 3 Paige (N. Y.) 139, 23 Am. Dec. 778; Rhyne *v.* Hoffman, 59 N. C. 335.

Under the Louisiana Code a birth three hundred days after separation from bed and board is not enough to stamp the child with illegitimacy. McNeely *v.* McNeely, 47 La. Ann. 1321, 17 So. 928.

9. Wright *v.* Hicks, 12 Ga. 155, 162, 56 Am. Dec. 451; Goss *v.* Froman, 89 Ky. 318, 12 S. W. 387, 8 L. R. A. 102; Cross *v.* Cross, 3 Paige (N. Y.) 139, 23 Am. Dec. 778; Mink *v.* State, 60 Wis. 583, 19 N. W. 445.

10. *England.* — Morris *v.* Davies, 5 Cl. & F. 163; Pendrell *v.* Pendrell, 2 Strange 925; Shelley *v.* ———, 13 Ves. Jr. 56; Rex *v.* Maidstone, 12 East 550.

United States. — Stegall *v.* Stegall, 2 Brock. 256, 22 Fed. Cas. No. 13,351; Adger *v.* Ackerman, 52 C. C. A. 568, 115 Fed. 124.

Alabama. — Bullock *v.* Knox, 96 Ala. 195, 11 So. 339.

Georgia. — Wright *v.* Hicks, 12 Ga. 155, 56 Am. Dec. 451; Wright *v.* Hicks, 15 Ga. 160, 60 Am. Dec. 687.

Illinois. — Robinson *v.* Ruprecht, 191 Ill. 424, 61 N. E. 631.

Indiana. — Dean *v.* State, 29 Ind. 483.

Iowa. — State *v.* Romaine, 58 Iowa 46, 11 N. W. 721.

Mississippi. — Herring *v.* Goodson, 43 Miss. 392.

New York. — Cross *v.* Cross, 3 Paige 139, 23 Am. Dec. 778.

North Carolina. — Mebane *v.* Capehart, 127 N. C. 44, 37 S. E. 84;

Bastardy Proceeding by Married Woman. — Where a man marries a woman known by him to be *enciente*, the law regards him as having adopted the child into his family at its birth, thereby establishing the relation of *loco parentis;* and when this relation is established, the law raises a conclusive presumption that the husband is the father of his wife's child, so far at least as to bar a subsequent bastardy proceeding by the mother against the real father of the child.[11]

State *v.* Rose, 75 N. C. 239; State *v.* McDowell, 101 N. C. 734, 7 S. E. 785; Erwin *v.* Bailey, 123 N. C. 628, 31 S. E. 844; Woodward *v.* Blue, 107 N. C. 407, 12 S. E. 453, 22 Am. St. Rep. 897, 10 L. R. A. 662.

Pennsylvania. — Page *v.* Dennison, 1 Grant Cas. 377.

South Carolina. — Schuler *v.* Bull, 15 S. C. 421; State *v.* Shumpert, 1 S. C. 85; Wilson *v.* Babb, 18 S. C. 59.

Tennessee. — Cannon *v.* Cannon, 7 Humph. 410.

Vermont. — Pittsford *v.* Chittenden, 58 Vt. 49, 3 Atl. 323.

See also Hemmenway *v.* Towner, 1 Allen (Mass.) 209.

In Sullivan *v.* Hugly, 32 Ga. 316, the court said: "No question that has been before this court has been more carefully considered and better settled than that involved in this record — adulterine bastardy; and the rule, as settled, is, 'that although the birth of a child in wedlock raises a presumption that such child is legitimate, yet that this presumption may be rebutted, both by direct and presumptive evidence; and in arriving at a conclusion upon this subject the jury may not only take into their consideration proof tending to show the physical impossibility of the child born in wedlock being legitimate, but they may decide the question of paternity by attending to the relative situation of the parties, their habits of life, the evidence of conduct and declarations connected with conduct, and to any inductions which reason suggests.' In other words, that the jury are not limited in their inquiries to the '*non-access*,' or physical impotency of the husband, but that they must act upon any evidence that will show the *absolute impossibility* of the husband's being the father of the wife's child, *from whatever cause that impossibility might arise.*"

"The principle expressed in the maxim *pater est quem nuptiae demonstrant* should have full influence, but the question of the paternity of a child born in wedlock is one of fact to be determined upon competent evidence, and such evidence is not limited to the proof of impossibility of access." Shuler *v.* Bull, 15 S. C. 421.

Mulatto Child. — To rebut the presumption of legitimacy, evidence that it is contrary to the laws of nature for a mulatto to be the child of white parents is admissible. Bullock *v.* Knox, 96 Ala. 195, 11 So. 339; Watkins *v.* Carlton, 10 Leigh (Va.) 560. See also Goss *v.* Froman, 89 Ky. 318, 12 S. W. 387, 8 L. R. A. 102.

Compare Scanlon *v.* Walshe, 81 Md. 118, 31 Atl. 498, 48 Am. St. Rep. 488, where it was held that where opportunities occurred for intercourse between husband and wife, and there was no proof of his impotency, no evidence could be admitted to show that any man other than the husband may have been or probably was the father of the wife's child. See also Com. *v.* Shepherd, 6 Binn. (Pa.) 283, 6 Am. Dec. 449.

Under the California Code of Civil Procedure (§ 1962) the "issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate." *In re* Mills' Estate, 137 Cal. 298, 70 Pac. 91.

11. State *v.* Shoemaker, 62 Iowa 343, 17 N. W. 589, 49 Am. Rep. 146, where the court said: "We must not be understood to hold that this rule prevails in cases involving questions of heirship and inheritance. In these cases the rights of others besides the husband and bastard arise. In this

b. *Non-Access.* — Non-access of the husband at the time the child was begotten may be shown for the purpose of rebutting the presumption of legitimacy arising from birth in wedlock.[12] Non-access of the husband during the whole period of the wife's pregnancy need not be proved; it is sufficient if the circumstances of the case show a natural impossibility that the husband could be the

case the rights and liabilities of the husband and child are alone involved; they rest upon the relations which impose upon the husband the duty of maintaining the child. Our conclusion is supported by public policy, and considerations which work for the peace and well being of families. A husband who, in the manner we have indicated, has put himself in *loco parentis* of a bastard child of his wife, ought not to be permitted to disturb the family relation, and bring scandal upon his wife and her child, by establishing its bastardy, after he has condoned the wife's offense by taking her in marriage." See also State *v.* Romaine, 58 Iowa 46, 11 N. W. 721; Brock *v.* State, 85 Ind. 397. *Compare* Parker *v.* Way, 15 N. H. 45; State *v.* Allison, 61 N. C. 346; State *v.* Overseer of the Poor, 24 N. J. L. 533, where the wife had been living separate and apart from the husband.

"If a man marries a woman in such an advanced state of pregnancy that the situation of his wife must have been known to him, it must be considered as a recognition of the child, afterward born, as his own; any conduct of the husband after the birth indicating a belief that the child is his is decisive. But where the marriage takes place where the pregnancy is probably unknown; where the acquaintance between the parties most probably commenced too late for the husband, according to the law of gestation, to be the father of the child afterward born; where the common opinion of the neighborhood assigns the child to another man; where the boy grows up, not in the house of the husband of the woman, nor looking on him as a father, nor being considered as a son, and the reputation of the woman is not good; these are all circumstances which go strongly to repel the presumption of legitimacy."

Stegall *v.* Stegall, 2 Brock. 256, 22 Fed. Cas. No. 13,351.

12. *England.* — Morris *v.* Davies, 5 Cl. & F. 163; Hawes *v.* Draeger, L. R. 23 Ch. Div. 173.

United States. — Stegall *v.* Stegall, 2 Brock. 256, 22 Fed. Cas. No. 13,351.

Illinois. — Robinson *v.* Ruprecht, 191 Ill. 424, 61 N. E. 631.

Iowa. — State *v.* Romaine, 58 Iowa 46, 11 N. W. 721; State *v.* Lavin, 80 Iowa 555, 46 N. W. 553.

Kentucky. — Goss *v.* Froman, 89 Ky. 318, 12 S. W. 387, 8 L. R. A. 102.

Massachusetts. — Hemmenway *v.* Towner, 1 Allen 209; Phillips *v.* Allen, 2 Allen 453.

New York. — Van Aernam *v.* Van Aernam, 1 Barb. Ch. 375.

North Carolina. — Erwin *v.* Bailey, 123 N. C. 628, 31 S. E. 844; Mebane *v.* Capehart, 127 N. C. 44, 37 S. E. 84.

Oklahoma. — Bell *v.* Territory, 8 Okla. 75, 56 Pac. 853.

Pennsylvania. — Com. *v.* Shepherd, 6 Binn. 283, 6 Am. Dec. 449; Dennison *v.* Page, 29 Pa. St. 420, 72 Am. Dec. 644; Page *v.* Dennison, 1 Grant Cas. 377.

South Carolina. — Shuler *v.* Bull, 15 S. C. 421, 428; State *v.* Shumpert, 1 S. C. 85.

In Banbury Peerage Case, 1 Sim. & S. (Eng.) 153, the court said: "The non-existence of sexual intercourse is generally expressed by the words 'non-access of the husband to the wife,' and we understand those expressions as applied to the present question as meaning the same thing, because in one sense of the word 'access' the husband may be said to have access to his wife as being in the same place or the same house; and yet, under such circumstances, as instead of proving, tend to disprove, that any sexual intercourse took place between them."

father; as where he had access only a fortnight before the birth.[13]

c. *Impotency.* — The husband's impotency may be shown,[14] even where the husband and wife lived in the same house.[15]

d. *Adultery of Wife.* — The presumption of legitimacy arising from birth in wedlock cannot be rebutted by proof of the wife's adultery while cohabiting with her husband.[16] Otherwise, however, where non-access of the husband is proved.[17]

13. King *v.* Luffe, 8 East (Eng.) 193.

14. Bullock *v.* Knox, 96 Ala. 195, 11 So. 339; State *v.* Lavin, 80 Iowa 555, 46 N. W. 553; Patterson *v.* Gaines, 6 How. (U. S.) 550; Com. *v.* Shepherd, 6 Binn. (Pa.) 283, 6 Am. Dec. 449.

15. Goss *v.* Froman, 89 Ky. 318, 12 S. W. 387, 8 L. R. A. 102.

16. Stegall *v.* Stegall, 2 Brock. 256, 22 Fed. Cas. No. 13,351; Goss *v.* Froman, 89 Ky. 318, 12 S. W. 387, 8 L. R. A. 102; Hemmenway *v.* Towner, 1 Allen (Mass.) 209; Van Aernam *v.* Van Aernam, 1 Barb. Ch. (N. Y.) 375. *Compare* Cannon *v.* Cannon, 7 Humph. (Tenn.) 410; Mebane *v.* Capehart, 127 N. C. 44, 37 S. E. 84.

Where access is expressly or impliedly admitted, proof of the wife's adultery is ordinarily inadmissible, unless it is such proof as unquestionably establishes the fact of illegitimacy, as that of the adulterous intercourse of a white woman, having a white husband, with a negro, and the birth of a negro child in the usual course of time thereafter; but where the proof shows that the husband was not capable of performing the sexual act, or that the parties abstained from doing so, then it is competent to prove adultery on the part of the wife as corroborating the main fact. Goss *v.* Froman, 89 Ky. 318, 12 S. W. 387, 8 L. R. A. 102.

The presumption of legitimacy is so strong that it cannot be overcome by proof of the wife's adultery while cohabiting with her husband, much less by the mere admission of the adulterer. Grant *v.* Mitchell, 83 Me. 23, 21 Atl. 178.

On an issue as to the legitimacy of a child born in wedlock, evidence as to unchastity of the wife before marriage or after the birth of the child is not competent. Kennington *v.* Catoe, 68 S. C. 470, 47 S. E. 719.

17. Goss *v.* Froman, 89 Ky. 318, 12 S. W. 387, 8 L. R. A. 102. In Morris *v.* Davies, 5 Cl. & F. (Eng.) 163, husband and wife after living together for ten years, and having one child, agreed to separate. They accordingly afterward lived apart, but within such distance as afforded them opportunities for sexual intercourse, the husband not being impotent. *Held,* that the presumption of law in favor of the legitimacy of a child begotten and born of the wife during the separation may be rebutted, not only by evidence showing that the husband had no sexual intercourse with her, but also by evidence of their conduct, such as that the wife was living in adultery, that she concealed the birth of the child from the husband, and declared to him that she never had such child; that the husband disclaimed all knowledge of the child, and acted, up to his death, as if no such child was in existence; and also that the wife's paramour aided in concealing the child, reared and educated it as his own, and left it all his property by his will.

"This presumption can only be rebutted by circumstances; and what more potent could there be than the conduct of the wife in living separate from the husband, with a paramour, and the latter's treatment of the offspring? For, though there was opportunity of access by the husband, it is not conclusive of legitimacy." Woodward *v.* Blue, 107 N. C. 407, 12 S. E. 453, 22 Am. St. Rep. 897, 10 L. R. A. 662.

New York Code Exception. — The statute allows the husband, in an action for divorce on the ground of adultery, to question the legitimacy of a child born after the alleged adultery. Eisenlord *v.* Clum, 49 Hun 343, 2 N. Y. Supp. 125. In a divorce suit the court cannot declare the child illegitimate if it was be-

Reputation of the Mother. — Bad reputation of the mother at the time of her marriage and before cannot affect the presumption of law that her husband, who had access, is the father of a child born within a time when it might have been conceived after marriage.[18]

2. Burden and Degree of Proof to Establish Illegitimacy. — A. In General. — The burden of proof is on the party alleging illegitimacy.[19] It has been held, however, that there must be sufficient proof to establish filiation, thus raising the presumption of legitimacy before the burden of proving illegitimacy will be imposed upon those who assert that fact.[20]

B. Evidence Must Be Satisfactory, Conclusive, Etc. — The evidence against the legitimacy of a child born in wedlock must be strong, distinct, satisfactory and conclusive;[21] mere preponderance

gotten before the first act of adultery proved, although proof of the non-access of the husband is given. Van Aernam *v.* Van Aernam, 1 Barb. Ch. (N. Y.) 375.

18. Phillips *v.* Allen, 2 Allen (Mass.) 453. See also Morris *v.* Swaney, 7 Heisk. (Tenn.) 591; Kennington *v.* Catoe, 68 S. C. 470, 47 S. E. 719. *Compare* Pendrell *v.* Pendrell, 2 Strange (Eng.) 925, where the court permitted evidence showing that the mother was a woman of ill-fame.

19. *England.* — Banbury Peerage Case, 1 Sim. & S. 153; Plowes *v.* Bossey, 2 Drew & S. 145.

United States. — Patterson *v.* Gaines, 6 How. 550.

Illinois. — Zachmann *v.* Zachmann, 201 Ill. 380, 66 N. E. 256; Metheny *v.* Bohn, 160 Ill. 263, 43 N. E. 380; Orthwein *v.* Thomas, 13 N. E. 564.

Kentucky. — Dannelli *v.* Dannelli, 4 Bush. 51, 60; Lewis *v.* Sizemore, 25 Ky. L. Rep. 1354, 78 S. W. 122.

New York. — Caujolle *v.* Ferrie, 23 N. Y. 90; Cross *v.* Cross, 3 Paige 139, 23 Am. Dec. 778.

Pennsylvania. — *In re* Pickens' Estate, 163 Pa. St. 14, 29 Atl. 875, 25 L. R. A. 477.

South Carolina. — Wilson *v.* Babb, 18 S. C. 59.

Acknowledgment in Will. — Acknowledgment in a will that the child of the testator is legitimate requires full proof to the contrary. Gaines *v.* Hennen, 24 How. (U. S.) 553.

20. Weatherford *v.* Weatherford, 20 Ala. 548, 56 Am. Dec. 206, where it was held that the "proof of filiation was not sufficient, or rather was of that character which, while it proved filiation, disproved legitimacy, and hence was not sufficient to shift the burden of proof by raising a presumption of legitimacy."

21. *Alabama.* — Bullock *v.* Knox, 96 Ala. 195, 11 So. 339.

Illinois. — Orthwein *v.* Thomas, 127 Ill. 554, 21 N. E. 430, 11 Am. St. Rep. 159, 4 L. R. A. 434.

Iowa. — State *v.* Romaine, 58 Iowa 46, 11 N. W. 721.

Kansas. — Bethany Hospital Co. *v.* Hale, 64 Kan. 367, 67 Pac. 848.

Louisiana. — Vernon *v.* Vernon, 6 La. Ann. 242; Bothick *v.* Bothick, 45 La. Ann. 1382, 14 So. 293.

Massachusetts. — Phillips *v.* Allen, 2 Allen 453.

Minnesota. — Fox *v.* Burke, 31 Minn. 319, 17 N. W. 861.

New York. — Mace *v.* Mace, 24 App. Div. 291, 48 N. Y. Supp. 831; Matter of Seabury, 1 App. Div. 231, 37 N. Y. Supp. 308; Lavelle *v.* Corrignio, 67 N. Y. St. 122, 33 N. Y. Supp. 376.

Oklahoma. — Bell *v.* Territory, 8 Okla. 75, 56 Pac. 853.

Pennsylvania. — *In re* Pickens' Estate, 163 Pa. St. 14, 29 Atl. 875, 25 L. R. A. 477; Page *v.* Dennison, 1 Grant Cas. 377.

South Carolina. — Wilson *v.* Babb, 18 S. C. 59.

See also Orthwein *v.* Thomas (Ill.), 13 N. E. 564, where the court said that "the presumption of law is not lightly to be repelled; it is not to be lightly broken in upon or shaken by a mere balance of probability."

is not enough,[22] nor mere improbability of procreation by the husband.[23] Mere rumor is not enough.[24]

When Non-Access Is Relied On that fact must be shown beyond a reasonable doubt.[25]

Ante-Nuptial Conception. — Slighter evidence rebuts the presumption of legitimacy from birth in wedlock in case of ante-nuptial conception than in the case of post-nuptial conception.[26]

3. Statutory Acknowledgment of Paternity. — To entitle one to claim under an acknowledgment of paternity, as provided by statute, the evidence adduced must be so clear as to exclude all but one interpretation, the statute being in derogation of the common law.[27]

22. Sergent *v.* North Cumberland Mfg. Co., 112 Ky. 888, 66 S. W. 1036.

23. Lomax *v.* Holmden, 2 Strange (Eng.) 940.

The presumption of legitimacy cannot be overcome by evidence which creates merely a doubt or suspicion. Scanlon *v.* Walshe, 81 Md. 118, 31 Atl. 498, 48 Am. St. Rep. 488.

24. Strode *v.* Magowan, 2 Bush. (Ky.) 621; Lewis *v.* Sizemore, 25 Ky. L. Rep. 1354, 78 S. W. 122; Vaughan *v.* Rhodes, 2 McC. (S. C.) 227, 13 Am. Dec. 713; Cooley *v.* Cooley, 58 S. C. 168, 36 S. E. 563, 58 S. C. 582, 37 S. E. 226.

"Idle speculations of those whose curiosity may be aroused as to the possible paternity of a child cannot make an issue as to legitimacy or heirship, nor furnish a basis of an evidentiary fact that requires disproval or affects the question of the burden of proof." Metheny *v.* Bohn, 160 Ill. 263, 43 N. E. 380.

25. Cross *v.* Cross, 3 Paige (N. Y.) 139, 23 Am. Dec. 778; Van Aernam *v.* Van Aernam, 1 Barb. Ch. (N. Y.) 375; Bell *v.* Territory, 8 Okla. 75, 56 Pac. 853; Stegall *v.* Stegall, 2 Brock. 256, 22 Fed. Cas. No. 13,351.

26. Wright *v.* Hicks, 15 Ga. 160, 60 Am. Dec. 687.

A child born in lawful wedlock is presumed to be legitimate until the contrary is shown, even where born so soon after marriage that it could not have been lawfully begotten; but in such case the evidence of illegitimacy is not required to be so strong as in other cases. This rule should be applied by the courts with a cautious regard to the peace of society and the happiness and reputation of families. Wilson *v.* Babb, 18 S. C. 59.

27. Estate of Sandford, 4 Cal. 12. Blythe *v.* Ayres, 96 Cal. 532, 31 Pac. 915, where the evidence was held sufficient to establish statutory public acknowledgment of paternity.

In re Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, where the evidence was held insufficient to establish statutory public acknowledgment of paternity.

Under the Iowa Code, § 3385, providing that illegitimate children may inherit from the father when they have been recognized by him as his children, "but such recognition must have been general and notorious or else in writing," the burden of proof to establish the paternity and recognition required rests upon the child claiming the right to inherit. Watson *v.* Richardson, 110 Iowa 673, 80 N. W. 407, holding further that evidence showing that a putative father recognized an illegitimate child as his own in the home of its foster parents during the first years of its life and occasionally thereafter, after their removal to another state, was not sufficient to establish such "general and notorious recognition" by the father as would entitle the child to inherit under the statute referred to.

The recognition of an illegitimate child required by the Iowa statute is not satisfied by evidence that the child was reared at the home of the father of the decedent in Ireland when not elsewhere at work until he

II. MODE OF PROOF.

1. Opinion Evidence. — A. In General. — A witness cannot give his opinion as to the paternity of a child.[28]

B. Impotency. — The testimony of a physician is admissible to show the husband's impotency.[29]

C. Resemblance. — In England and Canada it has been held that upon an issue as to legitimacy, evidence that the child bore a resemblance, not to its supposed father, but to a man with whom the mother had been on terms of great intimacy, is relevant.[30] In the United States, however, such evidence is generally regarded as inadmissible.[31]

2. Adulterer's Testimony. — The testimony of an adulterer, when offered to prove a child illegitimate, is properly excluded.[32]

3. Testimony of Parents. — The general rule is that on a question of legitimacy neither husband nor wife is a competent witness to testify directly to the fact of non-access while they lived together,[33]

neared the age of twenty, when he came to America at the expense of the decedent and went to the home of the latter in Illinois, where he remained for some two years; that the decedent furnished him with clothing and money, collecting his wages and introducing him as his son to some fifteen persons, five of whom testified to that fact. Markey *v.* Markey, 108 Iowa 373, 79 N. W. 258.

A mere reference by the alleged father in casual conversation one time to the child as his is not that proof of acknowledgment which makes of her what the law describes as a natural child under the Louisiana statute. "If calling a child his offspring be relied on to establish legal acknowledgment, the proof should be that the father was in the habit of so calling the child when speaking of it, or did so in habitual conversation with others. The French text of the code uses the phrase *dans ses discours*, which means more, is more comprehensive than the English translation 'has called him so in conversation.'" Succession of Vance, 110 La. 760, 34 So. 767.

28. Metheny *v.* Bohn, 160 Ill. 263, 43 N. E. 380. And see Sullivan *v.* Hugly, 32 Ga. 316.

29. Goss *v.* Froman, 89 Ky. 318, 12 S. W. 387, 8 L. R. A. 102.

30. Morris *v.* Davies, 5 Cl. & F. (Eng.) 163, 3 Car. & P. 215; Marr *v.* Marr, 3 U. C. C. P. 36.

31. Jones *v.* Jones, 45 Md. 144; *In re* Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028; Matter of Turnbull, 21 N. Y. St. 980, 4 N. Y. Supp. 607; Shorten *v.* Judd, 56 Kan. 43, 42 Pac. 337. *Compare* Sheehan's Estate, 139 Pa. St. 168, 20 Atl. 1003, in which case, although such evidence was received, the court said the resemblance, though a circumstance, was of very little weight, and that even granting the fact of the resemblance it might result from the merest chance. *Contra.* — State *v.* Britt, 78 N. C. 439, where such evidence was permitted; Cannon *v.* Cannon, 7 Humph. (Tenn.) 410.

32. Scanlon *v.* Walshe, 81 Md. 118, 31 Atl. 498, 48 Am. St. Rep. 488.

33. *England.* — Cope *v.* Cope, 15 Moody & R. 269; Goodright *v.* Moss, 2 Cowp. 591.

California. — *In re* Mills' Estate, 137 Cal. 298, 70 Pac. 91.

Maryland. — Scanlon *v.* Walshe, 81 Md. 118, 31 Atl. 498, 48 Am. St. Rep. 488.

North Carolina. — Rhyne *v.* Hoffman, 59 N. C. 335; Johnson *v.* Chapman, 45 N. C. 213.

Pennsylvania. — Dennison *v.* Page, 29 Pa. St. 420, 72 Am. Dec. 644; Page *v.* Dennison, 1 Grant Cas. 377.

Wisconsin. — Mink *v.* State, 60 Wis. 583, 19 N. W. 445; Shuman *v.*

except in conjunction with proof of the husband's impotency.[34] Nor is their incompetency in this respect affected by a statute making all persons competent witnesses, notwithstanding their interest in the event of the issue; nor by a statute providing that "the presumption of legitimacy can be disputed only by the husband or wife or the descendants of one or both of them;" and that legitimacy in such case may be proved like any other fact.[35] While neither a husband nor wife is a competent witness to prove the fact of non-access while they lived together, they are competent to testify in cases between third parties as to the time of their own marriage, the time of a child's birth, and any other independent facts affecting the question of legitimacy.[36]

The Wife Is a Competent Witness Against One Charged as the Father of Her Bastard Child to prove, not only the fact of the unlawful sexual

Shuman, 83 Wis. 250, 53 N. W. 455. "This presumption of the legitimacy of offspring is founded not alone upon the coincidence of probabilities, but as well upon that policy of the law that forbids either husband or wife testifying to occurrences between them during marriage; also upon its supreme regard for those privileges of the married state that all men instinctively withhold from the public knowledge. If the question of legitimacy were open to such attack, to be sustained or defeated by a mere preponderance of evidence, based largely and most frequently upon circumstances alone, the right of inheritance, the integrity of blood, the pride of ancestry, and its just sense of honor, all would depend upon the most dubious of titles. From the very nature of the case, positive evidence in support of the legitimacy must be the most difficult to be adduced." Sergent *v.* North Cumberland Mfg. Co., 112 Ky. 888, 66 S. W. 1036, 23 Ky. L. Rep. 2226.

In a libel for divorce the husband is not a competent witness to prove non-access. Corson *v.* Corson, 44 N. H. 587. *Compare* Cuppy *v.* State *ex rel.* Grantham, 24 Ind. 389, holding under the Indiana statute in force at that time that the testimony of a married woman is admissible to prove non-access by the husband, and that the child, though begotten and born during the marriage, is a bastard.

Upon an indictment for fornication and bastardy a married woman is a competent witness to prove the criminal connection with her. Com. *v.* Shepherd, 6 Binn. (Pa.) 283, 6 Am. Dec. 449.

34. Goss *v.* Froman, 89 Ky. 318, 12 S. W. 387, 8 L. R. A. 102.

A father coming to bastardize his own issue is, though a legal, a very suspicious witness. Standen *v.* Edwards, 1 Ves. Jr. (Eng.) 133.

35. *In re* Mills' Estate, 137 Cal. 298, 70 Pac. 91, where the court said: "We do not think the expression 'proved like any other fact' was intended to do away with the well-known rules of evidence and allow all kinds of evidence, whether incompetent, secondary or hearsay. Any fact in controversy pertinent to the issue may be proved by competent evidence and subject to the rules as to presumptions. Where the law makes a certain fact a 'conclusive presumption' evidence cannot be received to the contrary. The proof of any fact must be made by legal evidence subject to the rules as to presumptions and as to incompetency. Illegitimacy may be proved; but it cannot be proved by the evidence of a husband or wife that while living together they did not have sexual intercourse. It would require a very plain and express statute to convince us that the legislature intended to do away with a rule founded upon good morals and public policy, and to allow evidence which shocks every sense of decency and propriety."

36. Janes' Estate, 147 Pa. St. 527, 23 Atl. 892.

connection, but the fact that it was impossible for her husband to have had access to her within the period of gestation.[37]

4. Admissions and Declarations of Parents. — A. To Establish Legitimacy. — Declarations of a deceased person that a certain child is his or her legitimate child are admissible to establish legitimacy.[38] So, too, the recognition of paternity of an illegitimate child, made necessary in some states by statute, in order to render the child capable of inheriting from the father, may be shown by the deceased father's declarations.[39]

Will. — A will, although not admitted to probate, is admissible as evidence of acknowledgment of the father that the claimants as heirs at law are his natural children.[40]

B. To Establish Illegitimacy. — But declarations of neither husband nor wife can be received for the purpose of assailing the legitimacy of a child born to the wife during wedlock.[41] Nor can

37. State *v.* McDowell, 101 N. C. 734, 7 S. E. 785, where the court said: "It was held in State *v.* Pettaway, 3 Hawks (N. C.) 623, and State *v.* Wilson, 10 Ired. (N. C.) 131, that, while the married woman was not a competent witness to prove impotency or non-access, she was a competent witness to prove the criminal intercourse of which the child was the offspring; and now, as she is not testifying 'for or against' her husband, she is a competent witness under sec. 588 of the code to testify in any 'suit, action or proceeding,' except as stated in the said section, and there is nothing in sec. 1353 of the code to exclude the testimony of the wife in a case like the present."

38. Metheny *v.* Bohn, 160 Ill. 263, 43 N. E. 380; Warlick *v.* White, 76 N. C. 175; Caujolle *v.* Ferrie, 23 N. Y. 90.

The declarations of the testator that he had made a will in favor of his daughter are evidence on the question of her legitimacy. Kenyon *v.* Ashbridge, 35 Pa. St. 157.

39. Britt *v.* Hall, 116 Iowa 564, 90 N. W. 340, an action by a child against her father's executor to be allowed to inherit under the Iowa statute authorizing an illegitimate child to inherit from the father if recognized either publicly and notoriously or in writing, wherein it was held that declarations by the decedent recognizing the plaintiff as his illegitimate child were admissible as declarations against interest, but that declarations denying paternity were not admissible, and in Alston *v.* Alston, 114 Iowa 29, 86 N. W. 55, it was held that evidence of acts and conversations of the alleged father tending to show recognition was admissible, although such acts and conversations occurred prior to the adoption of the statute.

40. Remy *v.* Municipality No. 2, 8 La. Ann. 27.

41. *England.* — Cope *v.* Cope, 5 Car. & P. 604, 24 E. C. L. 475; Goodright *v.* Moss, 2 Cowp. 594.

United States. — Patterson *v.* Gaines, 6 How. 550, 589; Stegall *v.* Stegall, 2 Brock. 256, 22 Fed. Cas. No. 13,351.

Illinois. — Vetten *v.* Wallace, 39 Ill. App. 390, 397.

Iowa. — Niles *v.* Sprague, 13 Iowa 198.

Kansas. — Bethany Hospital Co. *v.* Hale, 64 Kan. 367, 67 Pac. 848.

Louisiana. — Vernon *v.* Vernon, 6 La. Ann. 242; Tate *v.* Penne, 7 Mart. (N. S.) 548; Dejol *v.* Johnson, 12 La. Ann. 853.

Maryland. — Craufurd *v.* Blackburn, 17 Md. 49, 56, 77 Am. Dec. 323; Scanlon *v.* Walshe, 81 Md. 118, 31 Atl. 498, 48 Am. St. Rep. 488.

Massachusetts. — Hemmenway *v.* Towner, 1 Allen 209.

Michigan. — Egbert *v.* Greenwalt, 44 Mich. 245, 6 N. W. 654.

New York. — People *v.* Ontario Co. Ct., 45 Hun 54.

North Carolina. — Rhyne *v.* Hoff-

the declarations of the man claimed to be the father of the child be received for such purpose.[42]

C. To Disprove Marriage. — The declarations of a mother and a putative father are admissible for the purpose of showing that they were never lawfully married.[43]

5. Reputation in the Family. — Reputation in the family of the child's father and mother as to his legitimacy is admissible.[44] But before such evidence can be received there must be proof that the declarations sought to be shown were made by a person related,[45]

man, 59 N. C. 335; Johnson *v.* Chapman, 45 N. C. 213; Boykin *v.* Boykin, 70 N. C. 262, 16 Am. Rep. 776; State *v.* Herman, 35 N. C. 502; State *v.* Wilson, 32 N. C. 131.

Ohio. — Miller *v.* Anderson, 43 Ohio St. 473, 3 N. E. 605, 54 Am. Rep. 823.

Oklahoma. — Bell *v.* Terry, 8 Okla. 75, 56 Pac. 853.

Pennsylvania. — Tioga Co. *v.* South Creek Twp., 75 Pa. St. 433; Dennison *v.* Page, 29 Pa. St. 420, 72 Am. Dec. 644; Page *v.* Dennison, 1 Grant's Cas. 377.

Texas. — Simon *v.* State, 31 Tex. Crim. 186, 20 S. W. 399, 37 Am. St. Rep. 802.

Virginia. — Bowles *v.* Bingham, 2 Munf. 442, 5 Am. Dec. 497.

Wisconsin. — Mink *v.* State, 60 Wis. 583, 19 N. W. 445; Shuman *v.* Shuman, 83 Wis. 250, 53 N. W. 455.

In Pendrell *v.* Pendrell, 2 Strange (Eng.) 925, the court would not permit the mother's declarations to be given in evidence until she had been called and denied them on cross-examination.

Compare In re Heaton's Estate, 139 Cal. 237, 73 Pac. 186, where it was held that from evidence of declarations by the deceased father that the child in question was his daughter, and the admitted fact that he was never married until seven or eight years after the child's birth, the illegitimacy of the child was to be inferred.

42. Stegall *v.* Stegall, 2 Brock. 256, 22 Fed. Cas. No. 13,751. See also Bethany Hospital Co. *v.* Hale, 64 Kan. 367, 67 Pac. 848.

43. Niles *v.* Sprague, 13 Iowa 198. See also Barnum *v.* Barnum, 42 Md. 251; Craufurd *v.* Blackburn, 17 Md. 49, 77 Am. Dec. 323, *reversed* on other grounds 3 Wall. (U. S.) 175.

44. Wright *v.* Hicks, 15 Ga. 160, 60 Am. Dec. 687; Metheny *v.* Bohn, 160 Ill. 263, 43 N. E. 380; Strode *v.* Magowan, 2 Bush (Ky.) 621; Viall *v.* Smith, 6 R. I. 417; Eisenlord *v.* Clum, 126 N. Y. 552, 27 N. E. 1024; Gaines *v.* Green Pond Iron Min. Co., 32 N. J. Eq. 86.

Statement of One Person. — A hearsay statement of a single member of the family as to the illegitimacy of a child is not admissible as general repute. Orthwein *v.* Thomas (Ill.), 13 N. E. 564.

Declarations of a Deceased Mother that her child was born before her marriage, and corroborating statements by her of the circumstances and history of her life, are competent evidence to prove that the child was illegitimate; but evidence of a general reputation that the child was illegitimate is not competent. Haddock *v.* Boston & M. R. R., 3 Allen (Mass.) 298.

Statements of decedent as to the relations which a female sustained to him are competent evidence on the trial of the question whether decedent died without lawful issue. Sale *v.* Crutchfield, 8 Bush. (Ky.) 636.

45. Craufurd *v.* Blackburn, 17 Md. 49, 77 Am. Dec. 323; Childress *v.* Cutter, 16 Mo. 24, 47; Sitler *v.* Gehr, 105 Pa. St. 577, 592; Robb's Estate, 37 S. C. 19, 16 S. E. 241.

Where there is other evidence of membership in the family of the deceased declarant, evidence of declarations by him is admissible on the question of legitimacy. *In re* Heaton's Estate, 135 Cal. 385, 67 Pac. 321.

In Green *v.* Norment, 5 Mack. (D.

and that the declarant is dead, and that the declarations were made *ante litem motam*.[46]

6. Neighborhood Reputation. — General reputation in the neighborhood that a certain person is illegitimate is not admissible.[47]

7. Register of Births. — A register of births is competent to prove filiation, but not the legitimacy of the filiation, although a declaration of legitimacy is made thereon by the father.[48]

C.) 80, where it was shown that the alleged parents of the person in question had admitted him to be their son, it was held that this was *prima facie* evidence that they were of the same family, and that accordingly their declarations as to his legitimacy were admissible.

"Though on a question of marriage and legitimacy it is competent, in order to prove an heirship asserted, to give in evidence the declarations of any deceased member of *that* family to which the person from whom the estate descends belonged, yet it is not competent to give the declarations of a person belonging to another family, such person being connected with the person from whom the estate descends only by an asserted intermarriage of a member of each family." Blackburn *v.* Crawfords, 3 Wall. (U. S.) 175.

46. *United States.* — Blackburn *v.* Crawfords, 3 Wall. 175.

Kansas. — Shorten *v.* Judd, 56 Kan. 43, 42 Pac. 337.

Maryland. — Cope *v.* Pearce, 7 Gill. 247; Craufurd *v.* Blackburn, 17 Md. 49, 77 Am. Dec. 323; Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752; Barnum *v.* Barnum, 42 Md. 251, 304.

New York. — Matter of Seabury, 1 App. Div. 231, 37 N. Y. Supp. 308.

Pennsylvania. — Sitler *v.* Gehr, 105 Pa. St. 577, 592.

South Carolina. — *In re* Robb's Estate, 37 S. C. 19, 16 S. E. 241.

47. *California.* — *In re* Heaton's Estate, 135 Cal. 385, 67 Pac. 321.

Georgia. — Wright *v.* Hicks, 15 Ga. 160, 60 Am. Dec. 687.

Illinois. — Metheny *v.* Bohn, 160 Ill. 263, 43 N. E. 380.

Kentucky. — Sneed *v.* Ewing, 5 J. J. Marsh. 460, 22 Am. Dec. 41.

Maryland. — Boone *v.* Purnell, 28 Md. 607, 92 Am. Dec. 713.

Massachusetts. — Haddock *v.* Boston & M. R. R., 3 Allen 298.

North Carolina. — Erwin *v.* Bailey, 123 N. C. 628, 31 S. E. 844.

South Carolina. — Cooley *v.* Cooley, 58 S. C. 168, 36 S. E. 563.

Compare Stegall *v.* Stegall, 2 Brock. 256, 22 Fed. Cas. No. 13,351, where the court said: "The general report of the neighborhood cannot be entirely disregarded; but the weight to which this and all other hearsay testimony is entitled depends on the circumstances of the case."

48. Succession of Hubee, 20 La. Ann. 97.

Under the Wisconsin Revised Statute (§ 4160) it is held that where the laws of a foreign country require a record of the birth of all children, "illegitimate as well as legitimate," and authorize certain officials to provide formulas for books which may be considered necessary regarding births, etc., the fact that a public officer did, in the performance of his duty, enter upon such record the marital status of the mother, and thereby inferentially the legitimacy of the child, warrants the inference that the laws of that country require such entry. Under such inference, the marital status of the mother and the legitimacy of the child become material facts in the birth record, and are within the meaning of the phrase "other material facts" in said § 4160, which such record is declared *prima facie* to establish. The evidentiary effect of such record being declared by said § 4160, the record of the birth of a child to one declared therein to be a spinster, in the absence of evidence leaning to the conclusion of legitimacy, is sufficient to overcome the *prima facie* presumption of legitimacy which exists in favor of all children, and to support a finding that such child was illegitimate. Sandberg *v.* State, 113 Wis. 578, 89 N. W. 504.

8. Marriage Certificate. — On a question of legitimacy a marriage certificate proved to be genuine, and produced by, and from the custody of, the mother of the person whose legitimacy is in question, is competent and strong corroborative evidence of the alleged marriage.[49]

9. Circumstantial Evidence. — A. To Prove Non-Access. Where non-access is relied upon to establish the illegitimacy of a child born in wedlock, it is permissible to show circumstances from which non-access may be inferred.[50] Thus evidence of the conduct of husband and wife toward each other is admissible to show non-access.[51]

B. Child Not Provided for in Will. — The fact that a son is not provided for in his father's will is no evidence that he is illegitimate.[52]

49. Gaines *v.* Green Pond Iron Min. Co., 32 N. J. Eq. 86. See article "Marriage."

50. Hawes *v.* Draeger, L. R. 23 Ch. Div. 173.

Wife Pregnant After Absence of Husband. — The fact that the husband left his wife because she was heavy with child when he returned after a long absence tends to show that the child is illegitimate. Mebane *v.* Capehart, 127 N. C. 44, 37 S. E. 84.

51. Goss *v.* Froman, 89 Ky. 318, 12 S. W. 387, 8 L. R. A. 102; Wright *v.* Hicks, 12 Ga. 155, 56 Am. Dec. 451.

Acts and Declarations at Birth of Child. — If there is competent evidence to prove that the husband had no sexual intercourse with his wife, their acts and declarations at the birth of the child and subsequent thereto may be received as corroborative of that fact. McDonald's Appeal, 147 Pa. St. 527, 23 Atl. 892.

Quarrels. — Quarrels between husband and wife about the illegitimacy of the child should be admitted to prove illegitimacy. Erwin *v.* Bailey, 123 N. C. 628, 31 S. E. 844; Mebane *v.* Capehart, 127 N. C. 44, 37 S. E. 84.

Treatment of the Child by the Mother. — "There being evidence tending to show non-access by the husband, the jury should not have been cut off from a knowledge of how the mother treated the child." Woodward *v.* Blue, 107 N. C. 407, 12 S. E. 453, 10 L. R. A. 662, 22 Am. St. Rep. 897.

52. Strode *v.* Magowan, 2 Bush (Ky.) 621.

LETTER BOOKS.— See Copies.

LETTERS.— See Documentary Evidence; Private Writings.

LETTERS ROGATORY.— See Depositions.

LEVEES.— See Waters and Watercourses.

LEWDNESS.— See Adultery; Fornication.

LIBEL AND SLANDER.

CROSS-REFERENCES:

Malice;

Privileged Communications.

I. BURDEN OF PROOF GENERALLY.

Unless the publication is actionable *per se*, the burden is upon the plaintiff to prove facts showing its libelous or slanderous character.[1] The burden of proof on particular issues will be found discussed elsewhere in this article under appropriate heads.[2]

II. PUBLICATION.

1. Fact Of. — A. GENERALLY. — Actual publication must be shown,[3] but this may be established by either direct or indirect evidence.[4]

B. MAILED LIBELS. — Proof of the mailing of a libelous letter to a third person is evidence of a publication, because a properly posted letter is presumed to have reached its destination.[5]

1. Nicholson *v.* Merritt, 23 Ky. L. Rep. 2281, 67 S. W. 5; Nidever *v.* Hall, 67 Cal. 79, 7 Pac. 136; Illinois Cent. R. Co. *v.* Ely, 83 Miss. 519, 35 So. 873; Cameron *v.* Corkran, 2 Marv. (Del.) 166, 42 Atl. 454; Wallace *v.* Bennett, 1 Abb. N. C. (N. Y.) 478; Kinney *v.* Nash, 3 N. Y. 177.

Where the libelous statement consisted of a publication attacking the plaintiff's business of magnetic healing it was held that the burden was upon the plaintiff to show a rational basis for such business. Weltmer *v.* Bishop, 171 Mo. 110, 71 S. W. 167, *citing* Richards *v.* Judd, 15 Abb. Pr. (N. S.) (N. Y.) 184.

2. See *infra* IV, 1; V, 2; VII, 1; VIII, 1; VIII, 6, B.

3. McGeever *v.* Kennedy, 19 Ky. L. Rep. 845, 42 S. W. 114.

The Burden Is on the Plaintiff To Prove That the Slander Was Heard and Understood, but where the words were spoken in the presence of another person in a voice sufficiently loud to be heard, and are slanderous *per se*, the evidence of publication is sufficient. It is the defendant's duty to show that the hearer was deaf or did not understand the language, or that any other peculiar circumstance existed to prevent what would be the ordinary result. Sesler *v.* Montgomery (Cal.), 19 Pac. 686.

Where the Libel Appeared in a Newspaper it was held that the plaintiff must show by evidence that some one read the libel in one of the papers published by the defendant. There is no presumption of law that every newspaper and every part thereof is read. Prescott *v.* Tousey, 18 Jones & S. (N. Y.) 12. But see Johnson *v.* Synett, 89 Hun 192, 35 N. Y. Supp. 79; Giles *v.* State, 6 Ga. 276. And where the libelous article was published in a Dutch newspaper with a considerable circulation it was held that proof that it had been read was unnecessary. Steketee *v.* Kimm, 48 Mich. 322, 12 N. W. 177.

4. Bent *v.* Mink, 46 Iowa 576; M'Coombs *v.* Tuttle, 5 Blackf. (Ind.) 431.

5. Warren *v.* Warren, 1 M. C. & R. (Eng.) 250. See also Shipley *v.* Todhunter, 7 Car. & P. (Eng.) 680.

In Callan *v.* Gaylord, 3 Watts (Pa.) 321, evidence that the libelous letter, an anonymous one, was put into the postoffice directed to a person who at the time of the trial was living out of the city, coupled with the fact that it was produced by the plaintiff on the trial, was held to sufficiently show publication.

Where the Letter Was Written in German, evidence that it was mailed was held insufficient proof of publication. Mielenz *v.* Quasdorf, 68 Iowa 726, 28 N. W. 41, *distinguishing* an apparently contrary statement in Starkie, Sland. & Lib., § 532, on the ground that it was applicable only to a case where the letter was written in English, and *citing* Kiene *v.* Ruff, 1 Iowa 482.

2. Defendant's Participation Therein. — A. GENERALLY. — The defendant's guilty participation in the publication must be proved. For this purpose any relevant facts and circumstances tending to connect him therewith may be shown.[6]

B. PUBLICATION IN NEWSPAPER. — The proprietor of a newspaper is presumed to have knowledge of its contents,[7] even on a prosecution for criminal libel,[8] until the contrary is shown. While it must be shown that the defendant participated in[9] or authorized[10]

Merely Sending a Libelous Writing in an Unsealed Envelope through the mails to the party libeled is not sufficient evidence to constitute a publication in a civil action. Fry *v.* McCord, 95 Tenn. 678, 33 S. W. 568.

6. Haney Mfg. Co. *v.* Perkins, 78 Mich. 1, 43 N. W. 1073.

The Defendant's Previous Ill-Feeling and His Threats and Abusive Language toward the plaintiff may be competent to show the authorship of the libel. "It was proper to show the relations of the parties and their feelings toward each other, so far as the same tended to throw light upon the authorship of the alleged libel and the person intended to be libeled." People *v.* Ritchie, 12 Utah 180, 42 Pac. 209.

Payment by the Defendant to the Printer or Publisher of a newspaper for the insertion of libelous matter is proper evidence of his authorship or adoption of the libel. Schenck *v.* Schenck, 20 N. J. L. 208. Evidence that the defendant accounted for and paid the stamp duties on the paper containing the libel is sufficient proof of its publication by him. Cook *v.* Ward, 6 Bing. 409, 19 E. C. L. 117.

A Threat by the defendant to publish a libel is evidence that he did publish it. Bent *v.* Mink, 46 Iowa 576.

Privilege of Defendant. — As to the defendant's right to refuse to give testimony showing his participation in the publication, see article "PRIVILEGE."

7. Fry *v.* Bennett, 28 N. Y. 324.

8. Where a libel is published in a newspaper, such fact alone is sufficient evidence *prima facie* to charge the manager or proprietor with the guilt of its publication in a criminal prosecution therefor. State *v.* Mason, 26 Or. 273, 38 Pac. 130, 46 Am. St. Rep. 629, 26 L. R. A. 779.

When a libel is sold in a bookseller's shop by a servant of the bookseller in the ordinary course of his employment, or is published in a newspaper, the presumption is, in a criminal prosecution, that it was published by the bookseller or proprietor of the newspaper, and the presumption is not rebutted by evidence that he never saw the libel and was not aware of its publication until it was pointed out to him, and that an apology and retraction were afterward published in the same newspaper. Com. *v.* Morgan, 107 Mass. 199.

9. So much of the paper must be introduced in evidence as with other evidence shows that it was a paper published by the defendant. State *v.* Heacock, 106 Iowa 191, 76 N. W. 654.

Presumption of Continued Ownership. — Where it is shown that at a particular time the defendant was the proprietor of the paper in which the libel appeared, the presumption is that he continued to be the owner down to the date of publication. Fry *v.* Bennett, 28 N. Y. 324. But an admission by the defendant that at a particular date he was the editor of the paper in which the libel was published is no evidence that he continued to be the publisher after that date. Macleod *v.* Wakley, 3 Car. & P. 311, 14 E. C. L. 322.

10. Evidence that the libel was composed by another person from oral and written information furnished him by the defendant does not sufficiently show that the publication was procured by the defendant, in

the alleged newspaper publication, this may sufficiently appear from circumstantial evidence.[11] If there is any evidence on this question sufficient to go to the jury, the paper containing the libel must be admitted in evidence.[12]

C. Libel in Defendant's Handwriting. — When a published libel is shown to be in the defendant's handwriting, it is presumed to have been published by him.[13]

D. Libel Bought in Defendant's Shop. — Evidence that the libelous publication was bought in the defendant's shop is sufficient *prima facie* evidence to show a publication by him.[14]

E. Admissions by Defendant. — a. *Generally.* — Evidence of admissions of the defendant or his agent is competent and sufficient to show a publication by him.[15]

the absence of evidence that he supposed his information would be used for such purpose. Cochran *v.* Butterfield, 18 N. H. 115, 45 Am. Dec. 363. But see Reg. *v.* Lovett, 9 Car. & P. 462, 38 E. C. L. 183.

The defendant's connection with the publication in the newspaper must be shown before a copy of such paper is admissible. Simmons *v.* Holster, 13 Minn. 249.

11. Respublica *v.* Davis, 3 Yeates (Pa.) 128, 2 Am. Dec. 366.

Evidence of Defendant's Ownership of Paper Held Sufficient. Marx *v.* Press Pub. Co., 58 Hun 608, 12 N. Y. Supp. 162, *affirmed* 134 N. Y. 561, 31 N. E. 918; Witcher *v.* Jones, 43 N. Y. St. 151, 17 N. Y. Supp. 491.

Where it was shown that the defendant had a printing office and that a paper of the same name as that in which the libel appeared was printed there, and a printer testified that the paper produced was of the type of that office, which paper was printed in the name of the defendant, it was held that there was sufficient proof of a publication by the defendant. Southwick *v.* Stevens, 10 Johns. (N. Y.) 442.

Sufficient Evidence of Authorization. — Where the person who furnished information to a newspaper saw the article written therefrom set up in type and read the proof sheets, saying that it was a little rough, but true, it was held that he should be regarded as having authorized its publication, since he knew it was in type for the purpose of being published in the paper. Clay *v.* People, 86 Ill. 147.

12. The defendant's letter stating that he was writing up the matter for the paper in which it was soon after published was held a sufficient *prima facie* showing to warrant the submission of the question to the jury of whether he was responsible for its publication, and therefore sufficient to justify the admission of the publication in evidence. Bent *v.* Mink, 46 Iowa 576. But see dissenting opinion.

13. Rex *v.* Beare, 1 Ld. Raym. (Eng.) 414; Giles *v.* State, 6 Ga. 276. See also Reg. *v.* Lovett, 9 Car. & P. 462, 38 E. C. L. 183; Lewis *v.* Few, 5 Johns. (N. Y.) 1.

14. Rex *v.* Almon, 5 Burr. (Eng.) 2686; Com. *v.* Morgan, 107 Mass. 199. See also Lewis *v.* Few, 5 Johns. (N. Y.) 1.

15. Willey *v.* Carpenter, 65 Vt. 168, 26 Atl. 488; Adams *v.* Lawson, 17 Gratt. (Va.) 250; Johnson *v.* Synett, 89 Hun 192, 35 N. Y. Supp. 79; Binford *v.* Young, 115 Ind. 174, 16 N. E. 142; Rex *v.* Burdett, 4 B. & A. (Eng.) 314. See Rice *v.* Withers, 9 Wend. (N. Y.) 138; Witcher *v.* Richmond, 8 Humph. (Tenn.) 473.

An admission by the defendant that she supposed she had repeated the slanderous story tends to prove a publication by her. Burt *v.* McBain, 29 Mich. 260.

The Defendant's Plea of Guilty in a Criminal Proceeding in the warrant in which the slanderous words were, in substance and meaning,

b. *A Plea of Justification* is not competent to show a publication on the issue joined under a plea of the general issue.[16]

3. Place Of. — In the absence of contrary evidence the place of publication is presumed to be within the state where the action is brought.[17]

4. Language Used. — The publication is presumed to have been made in the English language.[18]

5. Best and Secondary Evidence. — A. GENERALLY. — The libelous publication is of course the best evidence of its contents,[19] and secondary evidence thereof is not admissible until a proper foundation has been laid.[20] The original writing must be identified,[21] and the sufficiency of the identification to warrant the admission of the writing is a question for the court.[22] After a proper preliminary showing any competent secondary evidence is admissible.[23]

though not literally, set forth as the basis of the criminal charge, is competent. Wischstadt *v.* Wischstadt, 47 Minn. 358, 50 N. W. 225.

But the Testimony Given by the Defendant in a previous action in which he acknowledged the uttering of certain words alleged to be slanderous cannot be proved as an admission in an action against him for the alleged slander. His testimony in such other action would be so far privileged as to preclude the plaintiff from using it as an admission of the uttering of the slander imputed. Osborn *v.* Forshee, 22 Mich. 209.

The Conduct of an Agent in taking charge of the libelous advertisement, in ordering a change to be made therein and in promising to pay therefor when he received funds of the company charged with publishing the libel, though such conduct transpired after the original publication and the commencement of the suit, is admissible in evidence as an admission by a duly authorized agent for the company in the course of his business that it authorized the publication. Henderson *v.* Fox, 80 Ga. 479, 6 S. E. 164. See articles "PRINCIPAL AND AGENT" and "ADMISSIONS."

16. Farnan *v.* Childs, 66 Ill. 544; Wheeler *v.* Robb, 1 Blackf. (Ind.) 330, 12 Am. Dec. 245; Ricket *v.* Stanley, 6 Blackf. (Ind.) 169; Whitaker *v.* Freeman, 12 N. C. 271; Doss *v.* Jones, 5 How. (Miss.) 158. *Contra.* — Alderman *v.* French, 1 Pick. (Mass.) 1, 11 Am. Dec. 114.

17. Worth *v.* Butler, 7 Blackf. (Ind.) 251.

18. Heeney *v.* Kilbane, 59 Ohio 499, 53 N. E. 262.

19. Schulze *v.* Jalonick, 18 Tex. Civ. App. 296, 44 S. W. 580; Winter *v.* Donovan, 8 Gill (Md.) 370; Aspenwall *v.* Whitemore, 1 Root (Conn.) 408. See Simpson *v.* Wiley, 4 Port. (Ala.) 215.

20. See article "BEST AND SECONDARY EVIDENCE." and Simpson *v.* Wiley, 4 Port. (Ala.) 215; Aspenwall *v.* Whitemore, 1 Root (Conn.) 408.

21. Where the libel was published in a pamphlet, and a witness testified that the defendant gave her a pamphlet when it was first published; that she had subsequently loaned it to several persons; that it was returned to her; that the pamphlet produced at the trial was the one returned to her, and she believed it to be the one she had received from the defendant, although she could not state positively that it was, but that if it was not it was an exact copy, it was held that the pamphlet offered was properly admitted, although objected to on the ground that there was no evidence that it was the one given to the witness by the defendant. Fryer *v.* Gathercole, 4 Ex. (Eng.) 262. But see Rex *v.* Rosentein, 2 Car. & P. 414, 12 E. C. L. 196.

22. Boyle *v.* Wiseman, 11 Ex. (Eng.) 360.

23. *England.* — Johnson *v.* Hud-

B. Of Slander. — The slanderous publication charged may be proved by any person who heard it, though not alleged to have been made in the hearing of the witness.[24]

C. Newspaper Publication. — a. *Generally.* — Where the publication was by means of a newspaper or similar periodical all of the copies of the edition containing the libel are originals, and admissible as such.[25]

b. *From Information Furnished by Defendant.* — Where the publication in a newspaper is based on a manuscript furnished by the defendant, the manuscript itself is the primary evidence of the publication,[26] unless the defendant has admitted that he was the author of the article.[27]

son, 7 Ad. & El. 233*n*; Rainy *v.* Bravo, L. R., 4 P. C. 287; Gathercole *v.* Miall, 15 M. & W. 318; Boyle *v.* Wiseman, 10 Ex. 647; Bruce *v.* Nicolopulo, 11 Ex. 133.

Alabama. — Weir *v.* Hoss, 6 Ala. 881.

Iowa. — Prewitt *v.* Wilson, 103 N. W. 365.

New Hampshire. — Carpenter *v.* Bailey, 56 N. H. 283.

Texas. — Behee *v.* Pacific R. Co., 71 Tex. 424, 9 S. W. 449.

Vermont. — Gates *v.* Bowker, 18 Vt. 23.

If defendant after publication of a libel takes possession of it and retains it, he must have notice to produce it and refuse before parol evidence can be given of its contents. Winter *v.* Donovan, 8 Gill (Md.) 370.

An immaterial variance of the newspaper publication from the manuscript written by the defendant will not serve to exclude a copy of the newspaper. McLaughlin *v.* Russell, 17 Ohio 475.

Where a Libel Is Written on a Wall, secondary evidence is of course admissible. Mortimer *v.* McCallan, 6 M. & W. (Eng.) 58, 68.

24. Bradshaw *v.* Perdue, 12 Ga. 510; Downs *v.* Hawley, 112 Mass. 237; Perry *v.* Porter, 124 Mass. 338.

25. State *v.* Jeandell, 5 Har. (Del.) 475; Cranfill *v.* Hayden, 22 Tex. Civ. App. 656, 55 S. W. 805. See Huff *v.* Bennett, 4 Sandf. (N. Y.) 120; Rex *v.* Watson, 2 T. R. 199.

"To prove the publication of a newspaper it is not necessary to produce a copy which has been actually published, but upon the production of a copy not actually published the witness may swear that papers of the same kind were published." Simmons *v.* Holster, 13 Minn. 249.

Where the publication consists in reading from an article in a newspaper, any one of the papers of the same impression as that containing the libel is primary evidence, and the one actually read from need not be produced or accounted for. McLaughlin *v.* Russell, 17 Ohio 475.

26. Where the libelous article published in a newspaper purported to be a communication signed by the defendants, but it appeared that they were in no way connected with the newspaper, and had prepared a manuscript from which the article had been published, with some changes in the phraseology, but with no change in the sense, it was held that the best evidence was the original manuscript, and that the newspaper publication was secondary evidence. Strader *v.* Snyder, 67 Ill. 404.

Where it appeared that the defendant had stated the facts of the libel to a reporter for the purpose of publication, and the latter embodied them in a written instrument which he submitted to the editor, and which was published in the newspaper, it was held that the newspaper itself could not be read in evidence, being secondary evidence, the original being the writing submitted by the reporter to the editor. Adams *v.* Kelly, R. & M. 157, 21 E. C. L. 403.

27. Where it is contended that the libel was printed in a newspaper from manuscript furnished by the

D. Privileged State Documents. — Where the alleged libel was made in a state document, the disclosure of which would be injurious to the public service, the production of the original document cannot be compelled,[28] nor can secondary evidence of its contents be adduced.[29]

E. Substance of Words Cannot Be Proved. — Owing to the rule requiring the defamatory words to be proved precisely as alleged, a witness cannot state the substance or effect of the words,[30] even as secondary evidence,[31] but must give the exact language used, to the best of his recollection.

III. MALICE, MOTIVE AND INTENT.

1. Generally. — While it is generally said that malice in the publication is an essential element of libel or slander, the courts quite generally, as in the case of crimes, distinguish between legal or implied malice and actual or express malice, the former being merely a legal presumption from the nature of the defamatory publication, and the latter a question of fact.[32] It has been said, however, that these terms do not denote different kinds or classes of malice, but only a difference in the method of proof.[33]

defendant it is not necessary to produce such manuscript if the defendant has admitted that he was the author of the article and caused its publication in the newspaper. Woodburn *v.* Miller, Cheves (S. C.) 194.

28. Beatson *v.* Skene, 5 H. & N. (Eng.) 838; M'Elveney *v.* Connellan, 17 Ir. Com. L. 55; Home *v.* Bentinck, 2 Brod. & B. 130, 6 E. C. L. 46.

29. See Howard *v.* Thompson, 21 Wend. (N. Y.) 319; Oliver *v.* Bentinck, 3 Taunt. (Eng.) 456; Home *v.* Bentinck, 2 Brod. & B. 130, 6 E. C. L. 46.

Secondary evidence cannot be given of the contents of a libelous deposition sent to the governor, containing charges against an officer of his appointment, though the court has refused a subpoena *duces tecum*. Gray *v.* Pentland, 2 Serg. & R. (Pa.) 23.

30. Teague *v.* Williams, 7 Ala. 844. See Alley *v.* Neely, 5 Blackf. (Ind.) 200. But see Hawks *v.* Patton, 18 Ga. 52.

The defamatory statement must be proved as charged. "Evidence of the speaking of equivalent words, although having the same import and meaning, is not admissible, and words spoken interrogatively are not admissible to sustain an allegation of words spoken affirmatively." Ransom *v.* McCurley, 140 Ill. 626, 31 N. E. 119.

31. Rainy *v.* Bravo, L. R. 4 P. C. 287.

32. See cases and discussion following. Legal malice, or malice in law, is merely a presumption from certain facts, whereas actual malice, or malice in fact, is a question of fact for the jury. Jellison *v.* Goodwin, 43 Me. 287, 69 Am. Dec. 62.

Malice does not mean ill-will or personal malice in its legal sense. It is an imputation of law from the false and injurious nature of the charge, and differs from actual malice or ill-will, which latter may be proved to enhance the damages. Staub *v.* Van Benthuysen, 36 La. Ann. 467.

33. "Malice is essential to every action for libel. It has been sometimes divided into legal malice, or malice in law, and actual malice, or malice in fact. These terms might seem to imply that the two kinds of malice are different in their nature. The true distinction, however, is not in the malice itself, but simply in

2. Presumption. — A. GENERALLY. — The almost universal rule is that the malice required to support an action for libel or slander is presumed from publication of words which are actionable *per se*.[34]

the evidence by which it is established. In all ordinary cases, if the charge or imputation complained of is injurious, and no justifiable motive for making it is apparent, malice is inferred from the falsity of the charge. The law in such cases does not impute malice not existing in fact, but presumes a malicious motive for making a charge which is both false and injurious when no other motive appears. Where, however, the circumstances show that the defendant may reasonably be supposed to have had a just and worthy motive for making the charge, then the law ceases to infer malice from the mere falsity of the charge, and requires from the plaintiff other proof of its existence. It is actual malice in either case; the proof only is different." Lewis *v.* Chapman, 16 N. Y. 369. See also Bush *v.* Prosser, 11 N. Y. 347, 358, *per* Selden, J.; Huson *v.* Dale, 19 Mich. 17.

34. *England.* — Bromage *v.* Prosser, 4 B. & C. 247, 10 E. C. L. 321.

United States. — Spooner *v.* Daniels, 22 Fed. Cas. No. 13,244*a*; Broughton *v.* McGrew, 39 Fed. 672; McDonald *v.* Woodruff, 2 Dill. 244, 16 Fed. Cas. No. 8770; White *v.* Nicholls, 3 How. 266.

Alabama. — Shelton *v.* Simmons, 12 Ala. 466.

California. — Dixon *v.* Allen, 69 Cal. 527, 11 Pac. 179.

Delaware. — Nailor *v.* Ponder, 1 Marv. 408, 41 Atl. 88; Donahoe *v.* Star. Pub. Co., 4 Pen. 166, 55 Atl. 337.

Georgia. — Holmes *v.* Clisby, 48 S. E. 934; Ransom *v.* Christian, 56 Ga. 351.

Illinois. — Mitchell *v.* Milholland, 106 Ill. 175; Rearick *v.* Wilcox, 81 Ill. 77; Gilmer *v.* Eubank, 13 Ill. 271; McDavitt *v.* Boyer, 169 Ill. 475, 48 N. E. 317; McKee *v.* Ingalls, 5 Ill. 30.

Indiana. — Gabe *v.* McGinnis, 68 Ind. 538; Gaul *v.* Fleming, 10 Ind. 253; Abrams *v.* Smith, 8 Blackf. 95.

Iowa. — Hulbert *v.* New Nonpareil Co., 82 N. W. 928; Morse *v.* Times-Republican Print. Co., 124 Iowa 707, 100 N. W. 867; Parker *v.* Lewis, 2 Greene 311; Prewitt *v.* Wilson, 111 Iowa 490, 103 N. W. 365.

Kentucky. — McIntyre *v.* Bransford, 13 Ky. L. Rep. 454, 17 S. W. 359; Stewart *v.* Hall, 83 Ky. 375; Evening Post Co. *v.* Richardson, 113 Ky. 641, 68 S. W. 665; Blackwell *v.* Johnston, 21 Ky. L. Rep. 1720, 56 S. W. 12.

Louisiana. — Cass *v.* New Orleans Times, 27 La. Ann. 214; Mequet *v.* Silverman, 52 La. Ann. 1369, 27 So. 885; McClure *v.* McMartin, 104 La. 496, 29 So. 227; Savoie *v.* Scanlan, 43 La. Ann. 967, 9 So. 916, 26 Am. St. Rep. 200.

Maine. — Usher *v.* Severance, 20 Me. 9, 37 Am. Dec. 33; True *v.* Plumley, 36 Me. 466.

Maryland. — Negley *v.* Farrow, 60 Md. 158, 45 Am. Rep. 715; McBee *v.* Fulton, 47 Md. 403, 427; Hagan *v.* Hendry, 18 Md. 177.

Michigan. — Bell *v.* Fernald, 71 Mich. 267, 38 N. W. 910; Owen *v.* Dewey, 107 Mich. 67, 65 N. W. 8; Davis *v.* Marxhausen, 103 Mich. 315, 61 N. W. 504.

Minnesota. — Gribble *v.* Pioneer Press Co., 34 Minn. 342, 25 N. W. 710; Simmons *v.* Holster, 13 Minn. 249.

Mississippi. — See Binns *v.* Stokes, 27 Miss. 239.

Missouri. — Weaver *v.* Hendrick, 30 Mo. 502; Pennington *v.* Meeks, 46 Mo. 217; Buckley *v.* Knapp, 48 Mo. 152; Israel *v.* Israel (Mo. App.), 84 S. W. 453; Farley *v.* Evening Chronicle Pub. Co. (Mo. App.), 87 S. W. 565; Carpenter *v.* Hamilton, 84 S. W. 863; Barbee *v.* Hereford, 48 Mo. 323; Estes *v.* Antrobus, 1 Mo. 197, 13 Am. Dec. 496; Browning *v.* Powers, 38 S. W. 943.

Nebraska. — Pokrok Zapadu Pub. Co. *v.* Zizkovsky, 42 Neb. 64, 60 N. W. 358; Williams *v.* Fuller, 94 N. W. 118.

This presumption arises as well from oral as from written defamation.[35]

B. Conclusiveness of Presumption. — Unless the occasion were privileged, this presumption of legal malice is conclusive in so far as such malice is necessary to support the action, and evidence of the defendant's good motives and intention is not competent to defeat a recovery, but only to mitigate exemplary damages by negativing actual malice, or in support of a claim of privilege.[36]

Nevada. — Thompson *v.* Powning, 15 Nev. 195.

New Hampshire. — Symonds *v.* Carter, 32 N. H. 458.

New York. — Youmans *v.* Paine, 86 Hun 479, 35 N. Y. Supp. 50.

North Carolina. — State *v.* Hinson, 103 N. C. 374, 9 S. E. 552; Ramsey *v.* Cheek, 109 N. C. 270, 13 S. E. 775.

Oregon. — Thomas *v.* Bowen, 29 Or. 258, 45 Pac. 768; Upton *v.* Hume, 24 Or. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493.

Pennsylvania. — Clark *v.* North American Co., 203 Pa. St. 346, 53 Atl. 237.

Tennessee. — Mattson *v.* Albert, 97 Tenn. 232, 36 S. W. 1090.

Texas. — Cranfill *v.* Hayden, 80 S. W. 609; Ledgerwood *v.* Elliott (Tex. Civ. App.), 51 S. W. 872.

Vermont. — Nott *v.* Stoddard, 38 Vt. 25, 88 Am. Dec. 633.

Virginia. — Strode *v.* Clement, 90 Va. 553, 19 S. E. 177; Dillard *v.* Collins, 25 Gratt. 343; Chaffin *v.* Lynch, 83 Va. 106, 1 S. E. 803.

Wisconsin. — Candrian *v.* Miller, 98 Wis. 164, 73 N. W. 1004; Delaney *v.* Kaetel, 81 Wis. 353, 51 N. W. 559; Brueshaber *v.* Hertling, 78 Wis. 498, 47 N. W. 725; Wilson *v.* Noonan, 35 Wis. 321.

Words Made Actionable by Statute. — This rule applies to the speaking of words made actionable by statute. Colby *v.* McGee, 48 Ill. App. 294.

From Falsity. — In some cases it is said that malice is presumed from the falsity of the libelous charge. Evening Post Co. *v.* Richardson, 113 Ky. 641, 68 S. W. 665; Blackwell *v.* Johnston, 21 Ky. L. Rep. 1720, 56 S. W. 12; Perret *v.* New Orleans Times Newspaper Co., 25 La. Ann. 170; Staub *v.* Van Benthuysen, 36 La. Ann. 467; Holt *v.* Parsons, 23 Tex. 9, 76 Am. Dec. 49; Knott *v.* Burwell, 96 N. C. 272, 2 S. E. 588. See Humphries *v.* Parker, 52 Me. 502; Powers *v.* Cary, 64 Me. 9; Mowry *v.* Raabe, 89 Cal. 606, 27 Pac. 157.

35. Byam *v.* Collins, 111 N. Y. 143, 19 N. E. 75, 7 Am. St. Rep. 726, 2 L. R. A. 129.

36. *United States.* — McDonald *v.* Woodruff, 2 Dill. 244, 16 Fed. Cas. No. 8770; Times Pub. Co. *v.* Carlisle Journal Co., 94 Fed. 762.

Arkansas. — Stallings *v.* Whittaker, 55 Ark. 494, 18 S. W. 829.

California. — Dixon *v.* Allen, 69 Cal. 527, 11 Pac. 179; Mowry *v.* Raabe, 89 Cal. 606, 27 Pac. 157; Lick *v.* Owen, 47 Cal. 252.

Florida. — Jones *v.* Greeley, 25 Fla. 629, 642, 6 So. 448.

Georgia. — Cox *v.* Strickland, 101 Ga. 482, 28 S. E. 655. But see Jones *v.* Forehand, 89 Ga. 520, 16 S. E. 262, 30 Am. St. Rep. 81.

Illinois. — Gilmer *v.* Eubank, 13 Ill. 271; Hosley *v.* Brooks, 20 Ill. 115, 71 Am. Dec. 252. But see Zuckerman *v.* Sonnenschien, 62 Ill. 115; Welker *v.* Butler, 15 Ill. App. 209.

Louisiana. — Bigney *v.* Van Benthuysen, 36 La. Ann. 38; Fitzpatrick *v.* Daily States Pub. Co., 48 La Ann. 1116, 20 So. 173.

Missouri. — Trimble *v.* Foster, 87 Mo. 49, 56 Am. Rep. 440, *distinguishing* Hall *v.* Adkins, 59 Mo. 144.

Nebraska. — Mertens *v.* Bee Pub. Co., 99 N. W. 847.

New Jersey. — King *v.* Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622.

New York. — Fry *v.* Bennett, 5 Sandf. 54; Witcher *v.* Jones, 43 N. Y. St. 151, 17 N. Y. Supp. 491. See Harwood *v.* Keech, 4 Hun 389.

North Dakota. — Wrege *v.* Jones, 100 N. W. 705.

Defendant may introduce evidence

C. Criminal Prosecution. — This presumption of malice applies to prosecutions for criminal libel or slander.[37]

D. Additional Evidence. — a. *Generally.* — Even though sufficient malice to support the action may be presumed from the character of the words, and no claim of privilege is made, the plaintiff is entitled to offer evidence of actual malice to aggravate the damages,[38] except in those jurisdictions where exemplary damages are not allowed.[39]

b. *Of Falsity.* — It has been held that notwithstanding the presumption of the falsity of the charge arising when it is actionable *per se,* the plaintiff may offer evidence to prove that it was false, for the purpose showing express malice.[40]

to rebut the presumption or inference of malice for the purpose of mitigating the damages. Holmes *v.* Clisby (Ga.), 48 S. E. 934.

Not Conclusive. — See Jarnigan *v.* Fleming, 43 Miss. 710, 5 Am. Rep. 514; Smith *v.* Rodecap, 5 Ind. App. 78, 31 N. E. 479; Williams *v.* Gordon, 11 Bush (Ky.) 693. (The words "may have been spoken in jest, or upon an occasion or in a manner which would rebut the presumption of malice arising from the fact that they were false.")

37. State *v.* Mason, 26 Or. 273, 38 Pac. 130, 46 Am. St. Rep. 629, 26 L. R. A. 779; State *v.* Brady, 44 Kan. 435, 24 Pac. 948, 21 Am. St. Rep. 296, 9 L. R. A. 606; State *v.* Wait, 44 Kan. 310, 24 Pac. 354. See Root *v.* King, 7 Cow. (N. Y.) 613.

Where Truth and Good Faith Are a Defense. — In those states in which proof of the truth of the statement and that it was made in good faith and for justifiable ends is a defense to the prosecution, the defendant, after evidence of the truth, may of course show the absence of malice. See *infra* V, 13.

38. *United States.* — Palmer *v.* Mahin, 120 Fed. 737.

Indiana. — Burton *v.* Beasley, 88 Ind. 401.

Maryland. — Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500.

Massachusetts. — Watson *v.* Moore, 2 Cush. 133.

Michigan. — Huson *v.* Dale, 19 Mich. 17.

Missouri. — Friedman *v.* Pulitzer Pub. Co., 102 Mo. App. 683, 77 S. W. 340.

New Hampshire. — Symonds *v.* Carter, 32 N. H. 458.

New York. — Fry *v.* Bennett, 28 N. Y. 324; Fry *v.* Bennett, 3 Bosw. 200.

North Dakota. — Wrege *v.* Jones, 100 N. W. 705.

Wisconsin. — Wilson *v.* Noonan, 35 Wis. 321.

The mere fact that the words charged are actionable *per se* and that malice is therefore implied does not preclude the plaintiff from showing a repetition of the slander as evidence of malice. True *v.* Plumley, 36 Me. 466. But see *contra.* Under a plea of not guilty where the words used are actionable *per se,* the plaintiff cannot show the defendant's knowledge of the falsity of the words as evidence of malice, since the falsity is admitted by the plea and malice is implied. Such evidence is competent only where the defendant claims privilege. Hartranft *v.* Hesser, 34 Pa. St. 117. See also Mielenz *v.* Quasdorf, 68 Iowa 726, 28 N. W. 41.

39. Bee Pub. Co. *v.* World Pub. Co., 59 Neb. 713, 82 N. W. 28.

40. While it is not necessary for the plaintiff to prove the falsity of libelous charges when there is no plea of justification, it is always competent for him to do so to enhance the damages. Palmer *v.* Mahin, 120 Fed. 737; Malloy *v.* Bennett, 15 Fed. 371. See *infra* this article the section "Privilege."

For a Criticism of the Absurdity of Proving the Falsity of the defamatory statement when it is legally presumed, see the opinion of

E. Express Malice. — Express malice or malice in fact is never presumed.[41] It may, however, be inferred from the circumstances and character of the publication.[42]

3. Relations of Parties. — A. General Malice or Ill-Will. It has been held that defendant's general malice or ill-will cannot be shown to enhance the damages.[43]

B. Previous Ill-Feeling. — Previous ill-feeling by the defendant toward the plaintiff may be shown in proof of express malice.[44]

C. Grounds for Ill-Feeling. — For the same purpose it is competent to show previous grounds for ill-feeling[45] of the defendant

Gayner, J., in Hume *v.* Kusche, 42 Misc. 414, 87 N. Y. Supp. 109.

41. Trabue *v.* Mays, 3 Dana (Ky.) 138, 28 Am. Dec. 61; Donahoe *v.* Star Pub. Co. 4 Pen. (Del.) 166, 55 Atl. 337; Nailor *v.* Ponder, 1 Marv. (Del.) 408, 41 Atl. 88.

42. Nailor *v.* Ponder, 1 Marv. (Del.) 408, 41 Atl. 88. See also *infra* this article "Privilege."

The improper motive of defendant may sufficiently appear from the publication itself and the surrounding circumstances, and in such case it is not necessary for the plaintiff to prove any actual hostile motives. Hotchkiss *v.* Porter, 30 Conn. 414.

Malice may be inferred from the circumstances under which the publication takes place, as that it was made in the presence of third persons when no necessity existed for so public an accusation. Howard *v.* Dickie, 120 Mich. 238, 79 N. W. 191, *citing* Garn *v.* Lockard, 108 Mich. 196, 65 N. W. 764.

Express malice may be inferred from a reckless charge of criminal or disreputable conduct, and defendant's testimony that he had no malice does not conclusively disprove the inference. Smedley *v.* Soule, 125 Mich. 192, 84 N. W. 63.

43. Barr *v.* Hack, 46 Iowa 308; Howard *v.* Sexton, 4 N. Y. 157. See also Lauder *v.* Jones (N. D.), 101 N. W. 907. But see Com. *v.* Damon, 136 Mass. 441, and the discussion following.

44. Zurawski *v.* Reichmann, 117 Iowa 388, 90 N. W. 69; Wharton *v.* Wright, 30 Ill. App. 343. But see Justice *v.* Kirlin, 17 Ind. 588.

Actual malice may be shown by proof of previous ill-feeling or personal hostility between the parties, enmity, rivalry, squabbles and other acts, or the violence of the defendant's language, the mode and extent of his publication, etc. Cranfill *v.* Hayden (Tex. Civ. App.), 75 S. W. 573.

Express malice of the defendant may be shown by words and conduct in respect of other matters indicating a long and settled enmity toward the plaintiff. Coloney *v.* Farrow, 5 App. Div. 607, 39 N. Y. Supp. 460 (*citing* Decker *v.* Gaylord, 35 Hun [N. Y.] 584; Fowles *v.* Bowen, 30 N. Y. 20.)

"The rule as to the admission of evidence to show malice is very broad and liberal." Wharton *v.* Wright, 30 Ill. App. 343.

45. Where the defense is privilege and lack of malice, and the defendant has testified that he was not actuated by malice in stating that the plaintiff had burned his store for the insurance, he may be asked on cross-examination whether the plaintiff's business has not injured his own. Hubbard *v.* Rutledge, 57 Miss. 7.

Where the alleged criminal libel charged a candidate for office with agreeing to sell his patronage, it was held competent to ask the defendant upon cross-examination whether he had not formerly supported the person who was the subject of the libel, and also whether he had not solicited such person's support in his own efforts to obtain a particular office. Such evidence might tend to show malice due to disappointment. State *v.* Conable, 81 Iowa 60, 46 N. W. 759.

It is competent under the general

toward the plaintiff; and previous difficulties between the parties may be shown.[46]

D. Hostile Conduct. — It is competent to show the hostile acts and conduct of the defendant toward the plaintiff.[47] Such acts and conduct must, however, either relate to the same subject-matter as

issue in mitigation of damages to show that there was a legal controversy between the parties involving the matter contained in the slander, which had engendered much ill-feeling and passion on the part of both. Stees *v.* Kemble, 27 Pa. St. 112.

46. Wharton *v.* Wright, 30 Ill. App. 343.

Where the communication is *prima facie* privileged, as evidence of malice the plaintiff may show a former dispute between himself and the defendant. "For this purpose anything that showed that the plaintiff and defendant lived on bad terms may bear upon the issue of malice." Simpson *v.* Robinson, 12 Q. B. 511, 64 E. C. L. 509; Briggs *v.* Byrd, 34 N. C. 377.

47. Symonds *v.* Carter, 32 N. H. 458.

The degree of the defendant's malice may properly be shown by any words or acts, whether spoken or done before or after the action brought. Brittain *v.* Allen, 13 N. C. 120. See Fry *v.* Bennett, 28 N. Y. 324; Stearns *v.* Cox, 17 Ohio 590.

Insults offered by the defendant to the plaintiff's brother and disorderly conduct toward the plaintiff are not admissible in proof of malice. Dexter *v.* Harrison, 146 Ill. 169, 34 N. E. 46.

Efforts To Have Plaintiff Indicted. Efforts which the defendant may have made to have the plaintiff indicted for the alleged crime with which the defendant has charged the plaintiff are admissible in aggravation of damages. Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935.

Bills of indictment against the plaintiff preferred by the defendant as prosecutor, and ignored by the grand jury, are admissible. Tolleson *v.* Posey, 32 Ga. 372.

Assault on Plaintiff. — In proof of actual malice, evidence of an assault by the defendant upon the plaintiff half an hour after the slanderous words were spoken in another place was held properly admitted. "Any act clearly indicating ill-will toward the plaintiff which was committed so soon after the publication as to show that the feeling may have existed at the time is competent on this question. The mere fact that the act may be satisfactorily explained can make no difference with the competency of the evidence." It appeared, however, that immediately after the speaking of the words the defendant left the presence of the plaintiff, and when he again entered his presence without any further altercation he made the assault. Jurawski *v.* Reichmann, 116 Iowa 388, 90 N. W. 69.

Where the alleged libel attacked the plaintiff as a candidate for office, evidence that the defendant had tried to induce the witness to vote against the plaintiff was held properly admitted to show malice. Byrd *v.* Hudson, 113 N. C. 203, 18 S. E. 209.

Evidence that the defendant procured depositions before the trial to prove the truth of the charges, and then failed to plead a justification, was held proper on the question of malice, but not to increase the damages. Bodwell *v.* Osgood, 3 Pick. (Mass.) 379, 15 Am. Dec. 228.

Subsequent Conduct. — Where the alleged libel was a defamatory statement concerning plaintiff's professional character as a school teacher, as evidence of malice it was held competent to show defendant's subsequent attempt to have the plaintiff's certificate revoked. Paxton *v.* Woodward (Mont.), 78 Pac. 215.

Evidence that an affidavit containing the libel complained of was sent to a witness with the request that the plaintiff be removed from the position in which he was employed was held to be material in proof of the fact of publication and the hostile purpose of the defendant. Halley *v.* Gregg, 82 Iowa 622, 48 N. W. 974.

the defamatory charge or otherwise tend to show the defendant's state of mind at the time the publication was made.[48]

4. Absence of Malice. — A. GENERALLY. — Absence of malice on the part of the defendant may be shown in mitigation of exemplary damages,[49] but not to reduce the actual or compensatory damages.[50] In mitigation of exemplary damages the defendant may introduce in evidence any relevant facts or circumstances tending to throw light upon his intent and motive, and to show that he was not actuated by malice.[51]

B. DEFENDANT'S KINDLY FEELING TOWARD PLAINTIFF. — The defendant, as evidence of his lack of malice, cannot show his friendly feeling for the plaintiff.[52]

C. MISTAKE OR CIRCUMSTANCES. — The defendant may show that the publication was made through mistake,[53] or may show the circumstances under which the article was published.[54]

48. Garrett *v.* Dickerson, 19 Md. 418, 450; Simmons *v.* Carter, 32 N. H. 458; Severance *v.* Hilton, 32 N. H. 289.

49. Shipp *v.* Storey, 68 Ga. 47; Knott *v.* Burwell, 96 N. C. 272, 2 S. E. 588; Friedman *v.* Pulitzer Pub. Co., 102 Mo. App. 683, 77 S. W. 340.

Facts Not Pleaded. — When the plaintiff in an action for libel or slander introduces in evidence facts not pleaded by him to create an inference of express malice, and to lay a foundation for punitive damages, the defendant may rebut such inference by proof of facts not pleaded which have a tendency to rebut it. Kansas City Star Co. *v.* Carlisle, 108 Fed. 344, *citing* Reiley *v.* Timme, 53 Wis. 63, 10 N. W. 5.

50. Candrian *v.* Miller, 98 Wis. 164, 73 N. W. 1004; Buckstaff *v.* Hicks, 94 Wis. 34, 68 N. W. 403; Pellardis *v.* Journal Print. Co., 99 Wis. 156, 74 N. W. 99; Rearick *v.* Wilcox, 81 Ill. 77.

Evidence of the defendant's good faith or lack of actual malice is competent only in mitigation of exemplary damages, and must be accompanied by an instruction limiting it to such purpose. Jones *v.* Murray, 167 Mo. 25, 66 S. W. 981. See also Marker *v.* Dunn, 68 Iowa 720, 28 N. W. 38.

51. Thompson *v.* Powning, 15 Nev. 195; Witcher *v.* Jones, 43 N. Y. St. 151, 17 N. Y. Supp. 491; Orth *v.* Featherly, 87 Mich. 315, 49 N. W. 640; Sharpe *v.* Larson, 74 Minn. 323, 77 N. W. 233; Lewis *v.* Humphries, 64 Mo. App. 466.

52. The defendant, in mitigation, cannot show that his feelings toward the plaintiff at the time were kindly. This rule is analogous to the one excluding evidence of the defendant's general ill-will toward the plaintiff. Barr *v.* Hack, 46 Iowa 308. But see Henn *v.* Horn (Ohio), 47 N. E. 248.

In rebuttal of the inference of malice defendant cannot show that he had always directed his children to treat the plaintiff kindly. "Conceding, without deciding, that evidence of such friendly feeling would be competent for such purpose, still it ought to be confined to a period near the publication." Downey *v.* Dillon, 52 Ind. 442, *citing* Porter *v.* Henderson, 11 Mich. 20.

53. Davis *v.* Marxhausen, 103 Mich. 315, 61 N. W. 504; Palmer *v.* Mahin, 120 Fed. 737. See Dunlevy *v.* Wolferman, 106 Mo. App. 46, 79 S. W. 1165; Arnott *v.* Standard Ass'n, 57 Conn. 86, 17 Atl. 361, 3 L. R. A. 69.

54. *California.* — Hearne *v.* De Young, 119 Cal. 670, 52 Pac. 150, 499; Wilson *v.* Fitch, 41 Cal. 363 (defendant should be allowed the fullest opportunity to show the circumstances under which the publication was made); Lick *v.* Owen, 47 Cal. 252.

Delaware. — Parke *v.* Blackiston, 3 Har. 373 (the defendant's manner and other circumstances accompanying the slander may be shown).

D. Occasion of the Publication. — The facts or circumstances which occasioned the publication may be admissible to show the absence of malice.[55]

E. Precautions To Prevent Error. — The defendant may show the precautions which he took before making the publication.[56]

F. Precautions To Prevent Resulting Damage. — The defendant may show that all proper precautions were observed to prevent or reduce the damage which might flow from a libelous publication made through mistake.[57]

5. Defendant's Belief in Truth of Statement. — A. Generally. As evidence of his good faith the defendant may testify that when he made the defamatory statement he believed it to be true.[58] And

Illinois. — Rearick *v.* Wilcox, 81 Ill. 77.

Michigan. — Orth *v.* Featherly, 87 Mich. 315, 49 N. W. 640.

Missouri. — Callahan *v.* Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583 (all the circumstances under which the words were uttered).

Nevada. — Thompson *v.* Powning, 15 Nev. 195.

Rhode Island. — Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6.

While the defendant, in disproof of malice, may show that his statement was made before a tribunal of a religious society of which both he and plaintiff were members, the verdict or judgment of such tribunal is not competent. Whitaker *v.* Carter, 26 N. C. 461.

55. Bradley *v.* Heath, 12 Pick. (Mass.) 163; Provost *v.* Brueck, 110 Mich. 136, 67 N. W. 1114.

In an action for slander on the question of malice and to mitigate damages, defendant may show the occasion, the sense of wrong and other circumstances attending and prompting the expressions alleged to be slanderous. Simons *v.* Lewis, 51 La. Ann. 327, 25 So. 406, *citing* Gilbert *v.* Palmer, 8 La. Ann. 130; Artieta *v.* Artieta, 15 La. Ann. 48.

"When the origin, occasion and circumstances of the slanderous charge have a tendency to countervail the presumption of malice or the affirmative evidence of it, evidence is admissible to show such origin, occasion and circumstances; but not otherwise." Bond *v.* Kendall, 36 Vt. 741.

Where the defamatory words were spoken immediately after the trial of a suit between plaintiff and defendant, and it appeared they were occasioned by such trial, it was held proper for the defendant, in mitigation of damages, to show the facts and circumstances attending, and the conduct of the parties during, that trial. Powers *v.* Presgroves, 38 Miss. 227.

56. Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6; Hearne *v.* De Young, 119 Cal. 670, 52 Pac. 150, 499.

57. Davis *v.* Marxhausen, 103 Mich. 315, 61 N. W. 504.

In an action against a husband and wife for slander, the efforts of the husband to prevent the circulation of the slander published by his wife are not admissible in mitigation of damages. Yeates *v.* Reed, 4 Blackf. (Ind.) 463, 32 Am. Dec. 43.

58. *United States.* — Palmer *v.* Mahin, 120 Fed. 737; Scullin *v.* Harper, 78 Fed. 460.

Florida. — Jones *v.* Townsend, 21 Fla. 431, 58 Am. Dec. 676.

Kentucky. — Campbell *v.* Bannister, 79 Ky. 205. See Evening Post Co. *v.* Hunter, 18 Ky. L. Rep. 726, 38 S. W. 487.

Maryland. — Negley *v.* Farrow, 60 Md. 158, 45 Am. Rep. 715.

Michigan. — Orth *v.* Featherly, 87 Mich. 315, 49 N. W. 640. See Bronson *v.* Bruce, 59 Mich. 467, 26 N. W. 671.

Minnesota. — Hewitt *v.* Pioneer Press Co., 23 Minn. 178, 23 Am. Rep. 680.

Missouri. — Nelson *v.* Wallace, 48 Mo. App. 193.

evidence is admissible which tends to show his belief in the truth of the charge.[59] The plaintiff may on the other hand introduce evidence to show that the defendant did not believe the charge when he made it.[60] But the defendant's belief is no evidence of the truth of the charge.[61]

B. Grounds of Belief. — Defendant may also show that he had good reason to believe the truth of the charge.[62]

C. Where Exemplary Damages Not Allowed. — In those jurisdictions where punitive or exemplary damages are not allowed, evidence of the defendant's good faith and belief in the truth of the charge is immaterial unless a claim of privilege is made.[63]

6. Mental Condition of Defendant. — A. Generally. — The defendant may show that he was intoxicated at the time he uttered the slanderous words,[64] or that he was in great mental distress because of the plaintiff's supposed conduct.[65]

New York. — Hatfield *v.* Lasher, 81 N. Y. 246.

In support of his defense of privilege the defendant may testify as to his belief in the truth of a certain report referred to in the defamatory publication, and on which it purported to be based, and also as to his purpose in publishing such statement, and in case of a failure to establish the defense of privilege such evidence is admissible in reduction of punitive damages. Sands *v.* Robison, 12 Smed. & M. (Miss.) 704, 51 Am. Dec. 132.

Where the Occasion of the Publication Was Privileged, upon the issue of malice the defendant may show that at the time of the publication he in good faith believed the facts stated to be true. Fairman *v.* Ives, 5 B. & A. 642, 7 E. C. L. 220.

59. McCloskey *v.* Pulitzer Pub. Co., 152 Mo. 339, 53 S. W. 1087; Hewitt *v.* Pioneer Press Co., 23 Minn. 178, 23 Am. Rep. 680.

A Third Person Cannot Testify that he thought the defendant really believed the truth of the charge. Whitehead *v.* State, 39 Tex. Crim. 89, 45 S. W. 10.

60. Where the defamatory statement charged the plaintiff with being a thief, evidence that the defendant, after the time when the theft was alleged to have been committed, continued to associate on friendly terms with the plaintiff was held competent to show the defendant's disbelief in the truth of the charge. Burton *v.* March, 51 N. C. 409.

61. Campbell *v.* Bannister, 79 Ky. 205.

62. Hatfield *v.* Lasher, 81 N. Y. 246; Jones *v.* Townsend, 21 Fla. 431, 58 Am. Dec. 676; Scripps *v.* Foster, 41 Mich. 742, 3 N. W. 216; Weed *v.* Bibbins, 32 Barb. (N. Y.) 315; Shattuc *v.* McArthur, 25 Fed. 133; Cranfill *v.* Hayden, 22 Tex. Civ. App. 656, 55 S. W. 805.

The absence of malice may be shown by proving that the defendant believed and had reason to believe the charge to be true when made. This can be done either by proving that he received such information from others as induced him to believe the charge to be true or by proving the existence of facts within his knowledge calculated to produce such belief. Lewis *v.* Humphries, 64 Mo. App. 466.

63. Buckstaff *v.* Hicks, 94 Wis. 34, 68 N. W. 403; Williams *v.* Fuller (Neb.), 94 N. W. 118; Republican Pub. Co. *v.* Miner, 12 Colo. 77, 20 Pac. 345; Republican Pub. Co. *v.* Mosman, 15 Colo. 399, 24 Pac. 1051.

64. Evidence that the defendant was drunk when he uttered the words may go in mitigation of damages and to rebut malice, unless it appears that he repeated the charge when sober. Howell *v.* Howell, 32 N. C. 84. *Contra,* Mix *v.* McCoy, 22 Mo. App. 488.

65. Where the slanderous statement charged the plaintiff with illicit relations with defendant's son,

B. Excitement and Passion of Defendant. — The fact that the slanderous words were spoken while the defendant was angry and excited has been held admissible to negative malice,[66] but it would seem that such mental state can be shown only when due to provoking conduct of the plaintiff.[67]

7. Circumstances Showing Good Faith and Grounds for Suspicion. Evidence of facts and circumstances which tend to show the defendant's good faith because furnishing him grounds for suspecting the plaintiff's guilt of the defamatory charges is competent in mitigation of exemplary damages, though it may be otherwise hearsay and of *res inter alios acta.*[68]

The Transaction or Circumstances out of which the alleged defamatory statement grew may be competent to show the defendant's good faith.[69]

it was held competent for the defendant, in mitigation of damages, and to show absence of malice, to show his mental distress at the time of the publication, due to his belief that the plaintiff had exercised an evil influence over his son. McDougald *v.* Coward, 95 N. C. 368.

66. Hackett *v.* Brown, 2 Heisk. (Tenn.) 264; Zurawski *v.* Reichmann, 117 Iowa 388, 90 N. W. 69; Israel *v.* Israel (Mo. App.), 84 S. W. 453; De Pew *v.* Robinson, 95 Ind. 109. (But in this case it also appeared that the plaintiff had made an exasperating statement immediately before.)

67. See *infra* this article "Provocation."

68. Shilling *v.* Carson, 27 Md. 175, 92 Am. Dec. 632; Beehler *v.* Steever, 2 Whart. (Pa.) 313; Scripps *v.* Foster, 41 Mich. 742, 3 N. W. 216 (holding competent evidence of the public discussion and official action of the city council and board of health relating to the subject-matter of the libel). See Negley *v.* Farrow, 60 Md. 158, 45 Am. Rep. 715; Newsom *v.* Carr, 2 Stark. 69, 3 E. C. L. 249. *Contra.* — Sickra *v.* Small, 87 Me. 493, 33 Atl. 9, 47 Am. St. Rep. 344; Pallet *v.* Sargent, 36 N. H. 496.

Where the alleged libel charged the plaintiff with burning his building to defraud the insurers, evidence that the claim for insurance was contested, which fact was referred to in the libel itself, was held properly admitted to show lack of malice. Peoples *v.* Evening News Ass'n, 51 Mich. 11, 16 N. W. 185, 691.

The defendant may show facts and circumstances known to and relied upon by him tending to show the absence of actual malice, and that he acted upon probable cause. Wrege *v.* Jones (N. D.), 100 N. W. 705.

Where the alleged libel charges the plaintiff with extorting money as the price of his hushing up a complaint of a criminal nature preferred by him, it is competent for the defendant to show that the person accused did in fact make a complaint before a magistrate charging the plaintiff with extorting money from him by means of a criminal charge. And the affidavit made by such person is always admissible, such evidence tending to show the defendant's good faith and lack of malice. Stanley *v.* Webb, 21 Barb. (N. Y.) 148.

Where the defendant charged the plaintiff with a murder it was held that the affidavit of a person who claimed to have assisted the plaintiff in the murder, though not competent to show the truth of the charge, might be admissible to prove the defendant's good faith. Peoples *v.* Detroit Post & Tribune Co., 54 Mich. 457, 20 N. W. 528.

69. The transaction and circumstances out of which the alleged slander grew, and which might well have caused the defendant to suspect that the facts of his statement were true, may be shown in dis-

8. Nature and Source of Defendant's Information. — In disproof of express malice the defendant may show the nature and source of the information upon which the publication was based.[70] Where, however, the libel was written by the defendant's agent without defendant's knowledge, evidence as to the information upon which such agent acted is not admissible, the malice of the writer being immaterial.[71] The defendant may show what he had been previously told by third persons regarding the subject-matter of the defamatory charge, or the declarations of such persons relating thereto known to him previous to the publication,[72] and that the defamatory statement

proof of malice, although considerable time has intervened between such circumstances and the speaking of the words, such evidence not being offered to show provocation, and therefore not subject to the rules governing that class of testimony. Beehler *v.* Steever, 2 Whart. (Pa.) 313, 326, *distinguishing* Beardsley *v.* Maynard, 4 Wend. (N. Y.) 336.

70. Beehler *v.* Steever, 2 Whart. (Pa.) 313; Leister *v.* Smith, 2 Root (Conn.) 24; Bailey *v.* Kalamazoo Pub. Co., 40 Mich. 251; Hearne *v.* De Young, 119 Cal. 670, 52 Pac. 150, 499; Hearne *v.* De Young, 132 Cal. 357, 64 Pac. 576; Schulze *v.* Jalonick, 18 Tex. Civ. App. 296, 44 S. W. 580; Mayo *v.* Sample, 18 Iowa 306; Paxton *v.* Woodward (Mont.), 78 Pac. 215; Arnott *v.* Standard Ass'n, 57 Conn. 86, 17 Atl. 361, 3 L. R. A. 69. See Smith *v.* Sun Print. & Pub. Co., 55 Fed. 240.

Where the libel consists of a newspaper publication the defendant may show that he published the same as a matter of current news upon information obtained from the police authorities, and that he believed it to be true. Evening Post Co. *v.* Hunter, 18 Ky. L. Rep. 726, 38 S. W. 487.

An alleged interview with the plaintiff published in a newspaper, which was the basis of the libel charged, is admissible to disprove malice, but not to show the truth of the libel. Owen *v.* Dewey, 107 Mich. 67, 65 N. W. 8.

Where the defendant's statement was based upon a published report of a committee of the United States senate, it was held that to disprove actual malice the defendant could introduce in evidence such report. Hawkins *v.* New Orleans Print. & Pub. Co., 29 La. Ann. 134.

In mitigation of damages on the general issue in support of the plea of justification it was held proper for the defendant to show that the charge was taken from the journals of congress. Romayne *v.* Duane, 3 Wash. C. C. 246, 20 Fed. Cas. No. 12,028.

Result of His Own Investigations. The defendant may show that a statement which is conditionally privileged was made as the result of his own investigations, such evidence being competent to show good faith. Howland *v.* Flood, 160 Mass. 509, 36 N. E. 482.

Under a Plea of the Truth the defendant cannot show the sources of his information, and that they were of a character reasonably warranting a belief in the truth of the charge, until he has also offered evidence tending to establish the truth of the charge. Com. *v.* Snelling, 15 Pick. (Mass.) 337.

71. Powers *v.* Cary, 64 Me. 9.

72. Fowler *v.* Fowler, 113 Mich. 575, 71 N. W. 1084; Lally *v.* Emery, 79 Hun 560, 29 N. Y. Supp. 888; Kellogg *v.* Cary, 3 Pen. & W. (Pa.) 102; Orth *v.* Featherly, 87 Mich. 315, 49 N. W. 640; Callahan *v.* Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583; Galloway *v.* Courtney, 10 Rich. L. (S. C.) 414. *Contra.* — Thompson *v.* Bowers, 1 Doug. (Mich.) 321; Inman *v.* Foster, 8 Wend. (N. Y.) 602; Treat *v.* Browning, 4 Conn. 408 (*disapproving* Leister *v.* Smith, 2 Root [Conn.] 24); Morris *v.* Duane, 1 Binn. (Pa.) 90 (*distinguishing* Maybee *v.* Avery, 18 Johns. [N. Y.] 352); Austin *v.*

was merely a repetition of what he had heard or been told.[73] The defendant may also show that as part of the publication he gave the source of his information[74] or stated his disbelief in the truth of the statement.[75] Where, however, the defendant makes the publication

Hanchet, 2 Root (Conn.) 148; Case *v.* Marks, 20 Conn. 248.

For the purpose of showing that the owner of a building which was set on fire had reason to believe that the defendant was the incendiary, and in good faith made statements charging him with the crime, evidence that he was informed by third persons of declarations and acts of the defendant tending to show the latter's guilt is competent. "Where one's belief or state of mind is to be proved, evidence of communications made to him a considerable time beforehand is competent." Lawler *v.* Earle, 5 Allen (Mass.) 22.

Not Competent Under a Plea of Justification. — Maeske *v.* Smith, 59 Hun 615, 12 N. Y. Supp. 423.

Details of Conversation Inadmissible. — In Hlasatel *v.* Hoffman (Ill.), 68 N. E. 400, while the defendant was permitted to show the information upon which the libel was based, the details of the conversation in which the information was obtained were held properly excluded, because the jury might have regarded them as tending to prove the truth of the charge.

In mitigation of damages the defendant can show that he had heard such charges made against the plaintiff. Brewer *v.* Chase, 121 Mich. 526, 80 N. W. 575.

The defendant, in mitigation of damages, may show that he received the communication from others under circumstances naturally inducing a belief that the charges were true. Hawkins *v.* Globe Print. Co., 10 Mo. App. 174.

Common Gossip. — The defendant may show that he did not originate the defamatory statement, but received it from other persons in the way of common gossip. Hoboken Print. & Pub. Co. *v.* Kahn, 58 N. J. L. 359, 33 Atl. 382, 55 Am. St. Rep. 609, *following* Cook *v.* Barkley, 2 N. J. L. 169, 2 Am. Dec. 343; Sayre *v.* Sayre, 25 N. J. L. 235.

Distinguished From Rumors. Where the alleged slander charged the plaintiff with drunkenness, hearsay statements of third persons to the defendant to the effect that they had seen the plaintiff drunk were held properly admitted to negative malice, although general rumors and reports would not be admissible for such purpose. "These statements . . . were not matters of general rumor and report, but were statements of parties claiming to be eyewitnesses to the occurrence." Swan *v.* Thompson, 124 Cal. 193, 56 Pac. 878.

Where the publication is one of qualified privilege, the defendant, in support of his good faith, may show that the libelous statement was made to him previously by other persons in whose honesty he had good reason to believe, and under circumstances which justified him in relying and acting upon it. Howland *v.* Flood, 160 Mass. 509, 36 N. E. 482.

Where the alleged slander charged the plaintiff with falsely representing that he was the defendant's agent, it was held competent, as evidence of good faith, for defendant to show that a number of people from certain sections had informed him that they had heard that plaintiff was his agent, and also to show that there was a rumor to this effect in certain neighborhoods. Arnold *v.* Jewett, 125 Mo. 241, 28 S. W. 614.

73. Easterwood *v.* Quin, 2 Brev. (S. C.) 64, 3 Am. Dec. 700; Williams *v.* Greenwade, 3 Dana (Ky.) 432; Rice *v.* Cottrel. 5 R. I. 340. See Wallace *v.* Rodgers, 156 Pa. St. 395, 27 Atl. 163; Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935.

74. Scullin *v.* Harper, 78 Fed. 460; Rice *v.* Cottrel. 5 R. I. 340; Nicholson *v.* Rust, 21 Ky. L. Rep. 645, 52 S. W. 933. *Contra.* — Hotchkiss *v.* Oliphant, 2 Hill (N. Y.) 510; Inman *v.* Foster, 8 Wend. (N. Y.) 602.

75. Nicholson *v.* Rust, 21 Ky. L. Rep. 645, 52 S. W. 933.

as of his own knowledge it has been held that he cannot show the source of his information or that he was merely repeating what he had previously heard.[76] Nor can he show that his informant had reasonable grounds to believe the truth of his communication unless this fact was known to and relied upon by the defendant.[77]

Communication Must Have Been Trustworthy. — But it has been held that evidence of such communications from third persons is not admissible unless it appears that the defendant was justified in relying upon them.[78]

9. Investigation Made and Care Taken by Defendant. — A. GENERALLY. — As bearing upon the question of malice the defendant may show the previous investigations made by him to ascertain the

76. Wallace *v.* Homestead Co., 117 Iowa 348, 90 N. W. 835; Elliott *v.* Boyles, 31 Pa. St. 65; Fenstermaker *v.* Tribune Pub. Co., 12 Utah 439, 43 Pac. 112, 35 L. R. A. 611; Marker *v.* Dunn, 68 Iowa 720, 28 N. W. 38.

Where it appeared that the defendant, in reply to a question reflecting upon the plaintiff's character, had answered either that the charge was true or that "they say it is true," it was held that in mitigation of damages it was proper for the defendant to show that other persons had previously made the same charge to him against the defendant. The court, however, suggests that if it had appeared positively that the defendant made the statement as of his own knowledge the evidence would not have been competent. Kennedy *v.* Gregory, 1 Binn. (Pa.) 85. See also Morris *v.* Duane, in a note to this case.

77. Hawkins *v.* Globe Print. Co., 10 Mo. App. 174.

Where the defendant, the proprietor of a newspaper, published the libel without inquiring into its truth, and without any knowledge on the subject, evidence that the correspondent who sent him the news had heard the story, and as to how and where such correspondent obtained his information, was held properly excluded, since the defendant was not entitled to the benefit of a fact of which he had no actual knowledge. Morey *v.* Morning Journal Ass'n, 123 N. Y. 207, 25 N. E. 161, 20 Am. St. Rep. 730, 9 L. R. A. 621. But where the alleged libel charging the plaintiff with having been convicted of swindling was based upon a telegram received from defendant's news correspondent, whose information was derived from another telegram, which, however, charged the defendant only with having violated the laws, it was held error to exclude the testimony of the correspondent as to how the discrepancy between the two telegrams occurred, and as to the grounds of his belief in the truth in the one which he sent to the defendant, such evidence being competent in disproof of express malice. Cameron *v.* Tribune Ass'n, 55 Hun 607, 7 N. Y. Supp. 739.

78. A defendant charged with publishing a defamatory statement in his newspaper cannot testify that reports of similar import came to him from various parties whom he could not mention. Edwards *v.* San José Print. & Pub. Soc., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70. It was claimed that this evidence was admissible in mitigation of damages because it tended to show good faith and want of malice. The court says: "The mere belief of the editor of a newspaper in the justice and truth of an attack which he makes upon the private character of a citizen is no defense to an action brought by the person assailed for the damages sustained by such an attack; nor can such belief be considered in mitigation of damages, unless it is shown to have been based upon information derived from a reliable source. It must be shown that the charge was only made after due investigation of the matter to which it relates."

truth or falsity of the defamatory charge,[79] though he cannot testify directly that he exercised great care in the matter.[80] The plaintiff, in rebuttal of evidence as to the investigation made by the defendant or the information upon which he relied, may show that the defendant made no effort to verify the truth of such information,[81] or that a reasonable investigation would have disclosed its falsity,[82] but he cannot show precautions taken by the defendant after the date of the publication.[83]

B. MANAGEMENT AND CONDUCT OF NEWSPAPER.— a. *Generally.* In an action against the publisher or proprietor of the newspaper in which the defamatory publication was made, as evidence of express malice it is competent to show not only the circumstances connected with the preparation and publication of the particular article relied upon, but also that the paper was conducted recklessly

79. Jones *v.* Townsend, 21 Fla. 431, 58 Am. Rep. 676; Mayo *v.* Sample, 18 Iowa 306; Folwell *v.* Providence Jour. Co., 19 R. I. 551, 37 Atl. 6.

Where it appears that the same statement had been published in other papers, and that they had subsequently published a retraction, it was held competent for the defendant to show that since the retraction was published by the other papers he had investigated the truth of the charges and the result of his investigation. Such evidence is relevant to rebut the inference that the other papers published a retraction because the charge was untrue, and because defendant's failure to investigate under such circumstances would warrant an inference of recklessness and malice on his part. Bathrick *v.* Detroit Post & Tribune Co., 50 Mich. 629, 16 N. W. 172, 45 Am. Rep. 63.

80. Jones *v.* Townsend, 21 Fla. 431, 58 Am. Rep. 676.

81. Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129, holding competent plaintiff's evidence that the defendant, in publishing the alleged libel, relied wholly upon a publication in another paper which he did not verify.

82. Other articles published by the defendant and composed by the author of the libelous article, and showing that the latter had easy means of ascertaining from the plaintiff the truth of the matters contained in the libel, were held properly admitted on the question of malice. Morrison *v.* Press Pub. Co., 59 N. Y. Super. Ct. 216, 14 N. Y. Supp. 131.

Where the defendant, as evidence of his good faith, had offered in evidence the original dispatch upon which the newspaper publication was based, it was held proper to permit the plaintiff in rebuttal to show the untruthfulness of the dispatch, and that investigation would have shown its incorrectness. Press Pub. Co. *v.* McDonald, 73 Fed. 440, 19 C. C. A. 516, 38 U. S. App. 557.

Where it appeared that the defendant's reporter obtained the information upon which the defamatory statement was based from a police station blotter, it was held competent for the plaintiff to introduce such blotter showing the entry therein to relate to a person of different though similar name as evidence of defendant's negligence and recklessness. Finnegan *v.* Detroit Free Press Co., 78 Mich. 659, 44 N. W. 585, *per* Sherwood, C. J.

83. Where the defendant, as evidence of his good faith, has shown the competency of the reporter who made the mistake in the libelous publication, the plaintiff in rebuttal cannot show the discharge of such reporter subsequent to the date of the publication. Such evidence is "in its nature similar to proof of precaution taken after an accident," and "could only have been admitted in disproof of his competency." Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129.

and without proper regard for the truth of matter published therein.[84] The defendant, on the other hand, may show the precautions taken by him to ascertain the truth of the article.[85] The plaintiff may show that the defendant was negligent in the employment of reporters and correspondents.[86]

b. *Failure To Publish Notice of Suit.* — As bearing on the question of malice it is competent to show that the defendant newspaper failed to publish any notice of the commencement of an action of libel against it by the plaintiff, and also that it was a party to an

84. Gibson *v.* Cincinnati Enquirer, 2 Flip 121, 10 Fed. Cas. No. 5392. See Detroit Daily Post Co. *v.* McArthur, 16 Mich. 447.

Introduction of Paper. — Where it becomes important to consider what degree of care and prudence has been exercised by the proprietor of the newspaper in which the libelous article was published, the character which the paper has earned may be shown irrespective of the truth or falsity of the articles by the introduction of the paper containing the articles in question. Scripps *v.* Reilly, 38 Mich. 10.

Practice of Making Sensational Charges. — In rebuttal of his claim of good faith and lack of malice it was held competent to ask the general manager of defendant's newspaper as to an alleged conversation between himself and the plaintiff tending to show that the witness' policy in conducting the newspaper was to increase its sale by making sensational charges against individuals, on the ground that such evidence indicated reckless indifference as to the rights of others. Post Pub. Co. *v.* Hallam, 59 Fed. 530.

A Publication One Month Subsequent to the one charged is too remote to afford any fair legal inference as to the management of the paper before and at the time of the appearance of the libel. Scripps *v.* Reilly, 35 Mich. 371.

85. Where the libel was published in a newspaper it was held proper for the defendant to show that the article was received through the press association, and that he knew its methods of collecting news, and therefore took no further precautions to determine its reliability. Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6.

Haste Incident to Publication of Newspaper. — It is not competent for the defendant to show in mitigation of damages that great haste was necessary to get the matter published to press, and that therefore a thorough investigation was impossible. Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6. *Contra.* — Courts judicially know that in the publication of large daily newspapers at times much haste is necessary in the preparation of articles in order that they may appear in the edition then going to press, and as part of the *res gestae* of the act of publication it is competent to show the hurry incident to the issuing of a newspaper, and the time at which the article in question was received. Scripps *v.* Reilly, 38 Mich. 10.

Rules Governing Action of Reporters. — It seems that the publisher of a newspaper may show the rules imposed by him upon his employes with reference to their investigation of the truth of a proposed publication. See Bennett *v.* Salisbury, 78 Fed. 769.

86. Where the alleged libel was published in defendant's newspaper, want of proper precaution in the employment of agents or assistants, or of proper care in the conduct of the paper, or the retention of improper employes after ascertaining their incompetency, carelessness or negligence, may be shown to increase the damages. But express malice in the employes would not be admissible for such purpose where the act was done without the knowledge or consent of the defendant, and proper care had been exercised in their employment and retention. Scripps *v.* Reilly, 38 Mich. 10.

Where there is no evidence of express malice on the part of the de-

agreement with other papers not to publish notice of any libel suits against themselves.[87]

10. Knowledge of Falsity. — As evidence of malice it is competent to show that the defendant, at the time of the publication, knew, or had good reason to believe, that the charge therein made was false.[88]

11. Facts Not Known to Defendant. — Facts of which the defendant had no knowledge previous to the publication are not admissible in his behalf to show his good faith and lack of malice.[89] Nor is

fendant, or that he had any actual knowledge of the publication of the article complained of, the burden is upon the plaintiff to show carelessness or negligence in the employment by the defendant of reporters or correspondents. Scripps *v.* Reilly, 38 Mich. 10.

87. In Post Pub. Co. *v.* Hallam, 59 Fed. 530, it was held proper for the plaintiff, in cross-examining the managing and city editors of the defendant's paper, to ask them whether, after the suit was brought, any notice of it had been published in the defendant's newspapers, this being a circumstance proper to be considered upon the question of malice. So also a similar question as to whether defendant was not a party to an agreement with all the other newspapers of the city of Cincinnati that they should not publish the fact that a libel suit had been brought against any one of them. Such an agreement, while not unlawful, tends to show a purpose to prevent the injured person from securing the partial remedy of publishing his denial and his intention of vindicating his character, and hence is indicative of malice.

88. Bullock *v.* Cloyes, 4 Vt. 304; Miller *v.* Cook, 124 Ind. 101, 24 N. E. 577; Briggs *v.* Byrd, 34 N. C. 377.

Previous Declarations. — As evidence of express malice, previous declarations of the defendant tending to show that he knew his statement was false at the time he made it are competent. Miller *v.* Cook, 124 Ind. 101, 24 N. E. 577.

Defendant's Knowledge of the Falsity Is Conclusive evidence of malice, even though the occasion was one of qualified privilege. Harwood *v.* Keech, 4 Hun (N. Y.) 389. See also Bodwell *v.* Osgood, 3 Pick. (Mass.) 379, 15 Am. Dec. 228.

89. *United States.* — Whitney *v.* Janesville Gazette, 5 Biss. 330, 29 Fed. Cas. No. 17,590; Sun Print. & Pub. Co. *v.* Schenck, 98 Fed. 925.

California. — Edwards *v.* San José Print. & Pub. Soc., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70.

Connecticut. — Hulbert *v.* New Nonpareil Co., 82 N. W. 928.

Maryland. — Negley *v.* Farrow, 60 Md. 158, 45 Am. Rep. 715.

Michigan. — Hitchcock *v.* Moore, 70 Mich. 112, 37 N. W. 914, 14 Am. St. Rep. 474; Simons *v.* Burnham, 102 Mich. 189, 60 N. W. 476; Wolff *v.* Smith, 112 Mich. 359, 70 N. W. 1010.

Minnesota. — Quinn *v.* Scott, 22 Minn. 456.

New York. — Morey *v.* Morning Journal Ass'n, 123 N. Y. 207, 25 N. E. 161, 20 Am. St. Rep. 730, 9 L. R. A. 621; Willover *v.* Hill, 72 N. Y. 36.

Pennsylvania. — Kellogg *v.* Cary, 3 Pen. & W. 102.

Wisconsin. — Massuere *v.* Dickens, 70 Wis. 83, 35 N. W. 349.

Facts not known and believed by the defendant at the time he uttered the slanderous words are not admissible in mitigation. Huffer *v.* Miller, 74 Md. 454, 22 Atl. 205; Hatfield *v.* Lasher, 81 N. Y. 246.

In an action against a husband and wife for words spoken by the wife it is not competent for the defendant to show that circumstances relating to the plaintiff's misconduct were communicated to the husband previous to the publication, the presumption from the relation of the parties that such information had been communicated to the wife not being considered sufficient to warrant the admission of the evidence. Petrie *v.* Rose, 5 Watts & S. (Pa.) 364.

Other Contemporaneous Publications cannot be shown by the defendant in mitigation of damages un-

such lack of knowledge competent against him as evidence of malice.[90]

A Subsequent Indictment of the plaintiff on the same charge has, however, been held competent evidence of good faith and probable cause for the defendant's statement;[91] so also has the subsequent preferment of charges against the plaintiff as a military officer, and his arrest thereon.[92]

12. Provocation. — A. Generally. — As in criminal prosecutions for assault or homicide, the defendant, in mitigation of exemplary damages, may show circumstances of provocation,[93] and the evidence seems to be governed by the same rules as are applied in such criminal prosecutions.[94]

B. Knowledge of Defendant. — Facts and circumstances offered

less they were known and believed by him. Witcher *v.* Jones, 17 N. Y. Supp. 491.

Previous Reports of Same Import. The defendant, to negative express malice, cannot show that at the time of his publication there were reports of the same import as his statement, where he does not show that such reports were known to him. Lothrop *v.* Adams, 133 Mass. 471, 43 Am. Rep. 528.

90. Moore *v.* Thompson, 92 Mich. 498, 52 N. W. 1000.

91. The Finding of an Indictment against the plaintiff subsequent to the publication raises a presumption of good faith in favor of the defendant who has charged him with the crime, but an acquittal or *nolle prosequi* rebuts any such presumption. Covington *v.* Roverson, 111 La. 326, 35 So. 586.

92. Subsequent Preferment of Charges and Arrest. — Where the defamatory statement was a newspaper account of certain drunken conduct of the defendant, who was a military officer, evidence as to the preferment of charges against him for such conduct by the military authorities, and the inspection roll of his company showing that he was absent under arrest from the time of the publication to a time considerably subsequent thereto, was held properly admitted to show the defendant's good faith, although these circumstances occurred after the main transaction. Jackson *v.* Pittsburg Times, 152 Pa. St. 406, 25 Atl. 613, 34 Am. St. Rep. 659.

93. Jauch *v.* Jauch, 50 Ind. 135, 19 Am. Rep. 699; Patton *v.* Cruce (Ark.), 81 S. W. 380; Walker *v.* Flynn, 130 Mass. 151; Shattuc *v.* McArthur, 25 Fed. 133; Duncan *v.* Brown, 15 B. Mon. (Ky.) 186; Knott *v.* Burwell, 96 N. C. 272, 2 S. E. 588.

In mitigation of damages as showing the absence of express malice, the defendant may show that the publication was due to excitement and provocation caused by some act or declaration of the plaintiff occurring at the time the defamatory charge was made, and shown to have been the immediate or proximate cause of provocation for the defendant's statement. Moore *v.* Clay, 24 Ala. 235, 60 Am. Dec. 461.

Some Connection between the provocation and the defamation must be shown. Knott *v.* Burwell, 96 N. C. 272, 2 S. E. 588. Thus evidence that the plaintiff had threatened to ruin the defendant and drive him out of town, and that such threat came to the knowledge of the defendant previous to the publication of the slander, was held properly excluded because not shown to be connected with the speaking of the slanderous words. Moyer *v.* Pine, 4 Mich. 409.

94. Quinby *v.* Minnesota Tribune Co., 38 Minn. 528, 38 N. W. 623, 8 Am. St. Rep. 693.

"The principle on which evidence of provocation is received is the same in a suit for slander as in a suit for an assault and battery." Sheffill *v.* Van Deusen, 15 Gray (Mass.) 485, 77 Am. Dec. 377. See also Fish *v.* St. Louis Co. Print. & Pub. Co., 102 Mo. App. 6, 74 S. W. 641.

for this purpose must have been known to the defendant at the time the publication was made.[95]

C. Responsibility of Plaintiff. — Only facts and circumstances for which the plaintiff is in some way responsible are competent to show provocation.[96]

D. Provocation Must Be Recent. — a. *Generally.* — As in criminal prosecutions, the provoking facts or circumstances must have occurred as a part of the transaction in which the publication was made, or so recently as to show that the publication was made under the influence of the provocation.[97] Provoking words and conduct of the plaintiff immediately preceding the publication[98] may

95. Borley *v.* Allison (Mass.), 63 N. E. 260.

96. Miller *v.* Johnson, 79 Ill. 58. Provoking language addressed to the defendant by the father of the plaintiff immediately previous to the uttering of the slanderous words cannot be shown in mitigation. Underhill *v.* Taylor, 2 Barb. (N. Y.) 348.

97. Lee *v.* Wolsey, 19 Johns. (N. Y.) 319; Fish *v.* St. Louis Co. Print. & Pub. Co., 102 Mo. App. 6, 74 S. W. 641; Graves *v.* State, 9 Ala. 447 (abusive and slanderous words used by the plaintiff concerning the defendant, and communicated to the latter one month previous, held properly excluded).

It is only where the provocation is so recent as to induce a fair presumption that it occasioned the utterance of the slanderous words, and that they were spoken during the continuance of the feelings excited by such provocation, that evidence of provocation can be admitted for the purpose of mitigating the damages. Porter *v.* Henderson, 11 Mich. 20, 82 Am. Dec. 59; Maynard *v.* Beardsley, 7 Wend. (N. Y.) 560.

In Bourland *v.* Eidson, 8 Gratt. (Va.) 27, the defendant offered to prove in mitigation of damages that at and about the time of the publication the plaintiff and the defendant were engaged in an angry and exciting legal controversy, and were in the habit of using toward and concerning each other violent and abusive language, and that about that time, although not at the time when the words were charged to have been spoken, the plaintiff had used to and about the defendant language equally abusive with that charged in the declaration. The exclusion of this evidence was held no error on the ground that such facts are only admissible as provocation, and to be such must have occurred in the same conversation with the defamation, or have been communicated to the defendant at that time.

In mitigation of damages the defendant cannot show that the plaintiff during the year preceding the speaking of the alleged slanderous words had visited defendant's patients and used derogatory language concerning him as a physician, which fact had come to his knowledge and excited him. De Pew *v.* Robinson, 95 Ind. 109.

Evidence that the plaintiff on the day before the slanderous words were spoken addressed provoking and violent words to the defendant was held properly excluded because too remote to show provocation. Sheffill *v.* Van Deusen, 15 Gray (Mass.) 485, 77 Am. Dec. 377.

98. Swann *v.* Rary, 3 Blackf. (Ind.) 298; De Pew *v.* Robinson, 95 Ind. 109; Walker *v.* Flynn, 130 Mass. 151. See Watson *v.* Churchill, 5 Day (Conn.) 256.

The defendant may show that the alleged slander was provoked by a letter received by him from the plaintiff. Day *v.* Backus, 31 Mich. 241.

In Stewart *v.* Minnesota Tribune Co., 41 Minn. 71, 42 N. W. 787, it was held that a publication in plaintiff's newspaper which came to defendant's notice on the day the libelous publication was made by him, and to which the latter was to a certain extent a response, was competent evidence in mitigation, because the time which had elapsed between the defendant's knowledge of the

be shown, as may also the fact that information of previous circumstances and conduct of the plaintiff was communicated to the defendant immediately preceding the publication.[99] It is not necessary that such provoking facts and circumstances should have been known to the hearers of the slander.[1]

b. *Distinction Between Written and Spoken Publications.* — It has been suggested that the provocation caused by a previous libel continues longer than that caused by a previous slander,[2] and printed publications a considerable time previous to the libel charged have been held competent to show provocation.[3] Such a distinction would seem, however, to be unfounded,[4] and due to a confusion of the

plaintiff's article and the writing of the article complained of was so short that it would be difficult to say, as matter of law, that it was long enough for "cooling time." The court distinguishes Quinby *v.* Minnesota Tribune Co., 38 Minn. 528, 38 N. W. 623, 8 Am. St. Rep. 693.

Provoking Misstatements by the plaintiff immediately previous to the slander are competent in mitigation. Ledgerwood *v.* Elliott (Tex. Civ. App.), 51 S. W. 872.

Where the slanderous charge was made immediately after a conversation between the plaintiff and the person to whom the words were spoken, it was held that if the defendant heard such conversation and there was anything in it of an insulting character, or tending to excite his anger, he had a right to show it in mitigation of damages. Ranger *v.* Goodrich, 17 Wis. 78.

In Davis *v.* Griffith, 4 Gill. & J. (Md.) 342, it was held proper for the defendant, in mitigation of damages, to show that shortly prior to the publication of the libel complained of the plaintiff had charged the defendant with perjury.

Previous Quarrel Between Parties. Where the slanderous publication was made in the evening during a quarrel between the parties, evidence of another quarrel between them on the same afternoon, of which the former was a mere renewal or continuance, was held properly admitted to show provocation. And plaintiff's previous conduct in provoking the speaking of the defamatory words may always be shown in mitigation of damages if the provocation be direct and immediate. Warner *v.* Lockerby, 31 Minn. 421, 18 N. W. 145, 821.

Details of Previous Difficulty Not Admissible. — In an action for libel, the court having permitted the defendant to show that he had previously had a difficulty with the plaintiff, there was no error in refusing to allow him to show the circumstances of the difficulty, such testimony being immaterial either on the question of justification or damages. Brown *v.* Autrey, 78 Ga. 753, 3 S. E. 669.

99. Walker *v.* Flynn, 130 Mass. 151; Knott *v.* Burwell, 96 N. C. 272, 2 S. E. 588.

As evidence of provocation the defendant may show that he was angered by what his children told him regarding language used to them by the plaintiff. Newman *v.* Stein, 75 Mich. 402, 42 N. W. 956, 13 Am. St. Rep. 447, *citing* Ritchie *v.* Stenius, 73 Mich. 563, 41 N. W. 687.

1. Zurawski *v.* Reichmann, 116 Iowa 388, 90 N. W. 69.

2. See Fish *v.* St. Louis Co. Print. & Pub. Co., 102 Mo. App. 6, 74 S. W. 641, suggesting that in case of previous newspaper publications by the plaintiff the passion and provocation might continue so long as the libel is in circulation and a continuing provocative to anger.

3. Hartford *v.* State, 96 Ind. 461 (a week previous); Knott *v.* Burwell, 96 N. C. 272, 2 S. E. 588. See Patton *v.* Cruce (Ark.), 81 S. W. 380.

4. Beardsley *v.* Maynard, 4 Wend. (N. Y.) 336, 355; Quinby *v.* Minnesota Tribune Co., 38 Minn 528, 38 N. W. 623, 8 Am. St. Rep. 693, in which evidence of a libelous publication by

purposes for which previous publications by the plaintiff may be offered.[5]

E. Mere Hostility. — The mere hostility previously existing between the parties cannot be shown in mitigation without further evidence that it was the immediate provocation of the libel or slander.[6]

F. Rebuttal. — Where the defendant has shown provoking circumstances, the plaintiff, in rebuttal, may show the true nature of the provocation.[7]

13. Manner of Publication. — The manner in which the publication was made may be shown as evidence of the *quo animo* of the defendant.[8]

the plaintiff on the day previous was excluded as too remote.

5. See Maynard *v.* Beardsley, 7 Wend. (N. Y.) 560, distinguishing between previous publications by the plaintiff introduced to explain the defendant's defamatory statement and those offered to show provocation. See also Gould *v.* Weed, 12 Wend. (N. Y.) 12, and *infra* this article "Previous Publications by Plaintiff."

6. Andrews *v.* Bartholomew, 2 Metc. (Mass.) 509; Sabin *v.* Angell, 46 Vt. 740.

The Mere Hostility of the Plaintiff Toward the Defendant cannot be shown in mitigation as evidence of provocation. Craig *v.* Catlet, 5 Dana (Ky.) 323, in which case the exclusion of defendant's testimony that "the plaintiff was and had for a considerable time been his enemy" was held no error. The court says: "Had the plaintiff provoked the defendant by injurious acts or disparaging epithets it would seem to us that that circumstance might have been some palliation of the wrongful imputation then made by the defendant. Will the *sight* or *presence* of an *enemy* be entitled to a similar effect? We cannot say that it should. The simple fact that the plaintiff was the defendant's enemy might have generated the motive for the slander, for the unjustifiable purpose of thus having revenge; and if so, that would be a circumstance in aggravation rather than in mitigation of the charge."

The defendant cannot show, in mitigation of damages, that during the six years prior to the trial inveterate feelings of hostility had existed between the plaintiff and the defendant, and that the plaintiff had taken every opportunity to irritate the defendant. There must be evidence to show that such hostility or conduct of the plaintiff was the immediate provocation of the libel or slander. Porter *v.* Henderson, 11 Mich. 20, 82 Am. Dec. 59.

7. Gandy *v.* Humphries, 35 Ala. 617. In this case the alleged slander was a charge by the defendant that the plaintiff had taken a bond from him when he gathered up his papers from the table where they were conducting some business; it was held proper for the plaintiff to show that he took the bond under advice of counsel, as such evidence tended to explain his motives and served to place the alleged provocation before the jury in its true proportions.

8. Defendant may show that when he made the alleged slanderous communication to his family he cautioned them not to tell any one, and also that when he learned that his statement had been overheard by his wife's brother he had begged the latter to say nothing about it. Campbell *v.* Bannister, 79 Ky. 205.

To avoid the inference of express malice the defendant may show that he did not repeat the slanderous words except to certain specified persons. Binford *v.* Young, 115 Ind. 174, 16 N. E. 142.

The person to whom the slanderous statement was made may testify that he received and understood the communication as private and confidential, although there was no injunction of secrecy by the defendant, such evidence being competent on the ques-

14. Malice Toward Others. — Evidence tending to show the defendant's malice or ill-will toward other persons is not admissible.[9]

15. Defendant's Motive and Intent. — Where exemplary damages are claimed, evidence as to the defendant's actual motive and intent in making the publication is relevant and admissible.[10] Thus for the purpose of rebutting any inference of express malice the defendant may testify directly that he was not actuated by a bad motive or intent.[11] He may also show the reasons and purposes for which

tion of malice. Stallings *v.* Newman, 26 Ala. 300, 62 Am. Dec. 723.

9. Letton *v.* Young, 2 Metc. (Ky.) 558 (malice toward plaintiff's daughter); Stowell *v.* Beagle, 57 Ill. 97 (previous difficulty between defendant and plaintiff's father); Yorke *v.* Pease, 2 Gray (Mass.) 282 (previous quarrels between defendant and plaintiff's father and next friend).

10. Scripps *v.* Reilly, 38 Mich. 10; Israel *v.* Israel (Mo. App.), 84 S. W. 453; Craig *v.* Catlet, 5 Dana (Ky.) 323.

A Letter Written by the Defendant to the plaintiff, and tending to show that defendant had been an unsuccessful suitor of the plaintiff, is admissible to show a motive for the utterance of the slander charged. Ransom *v.* McCurley, 140 Ill. 626, 31 N. E. 119.

To Rebut Malice it is competent to show the good motive with which the publication was made. Cunningham *v.* Underwood, 116 Fed. 803; Hearne *v.* De Young, 119 Cal. 670, 52 Pac. 150, 499; Lewis *v.* Humphries, 64 Mo. App. 466. See Lick *v.* Owen, 47 Cal. 252.

11. *United States.* — Scullin *v.* Harper, 78 Fed. 460.

Connecticut. — Hotchkiss *v.* Porter, 30 Conn. 414; Arnott *v.* Standard Ass'n, 57 Conn. 86, 17 Atl. 361, 3 L. R. A. 69.

Missouri. — Callahan *v.* Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583.

Montana. — Paxton *v.* Woodward, 78 Pac. 215.

New York. — Lally *v.* Emery, 54 Hun 517, 8 N. Y. Supp. 135 (that he did not intend such a charge to impute the commission of a crime).

North Dakota. — Wrege *v.* Jones, 100 N. W. 705.

Texas. — Cranfill *v.* Hayden, 22 Tex. Civ. App. 656, 55 S. W. 805.

On a Criminal Prosecution for libel the defendant may testify as to whether he had any malicious intent in making the publication charged. People *v.* Stark, 59 Hun 51, 12 N. Y. Supp. 688, *affirmed* 136 N. Y. 538, 32 N. E. 1046.

Under General Issue. — Although, under the Wisconsin statute, mitigating circumstances relied upon by the defendant must be alleged in his answer, he may, under the general issue, testify directly as to the absence of a bad motive. Wilson *v.* Noonan, 35 Wis. 321.

Although a charge be such as to raise a presumption of legal malice, the defendant may nevertheless testify directly that he was not actuated by a bad intent or motive, in order to rebut any inference of express malice from the charge and prevent the awarding of exemplary damages. Direct evidence may be received to disprove malice, "wherever the act complained of is not clearly and necessarily inconsistent with the supposition that such bad intent or malice did not or may not have existed." Wilson *v.* Noonan, 35 Wis. 321. In which case the publication complained of, though calculated on its face to convey the impression that the plaintiff had been bribed, did not make the charge directly. On a rehearing Dixon, C. J., says (p. 363): "It was only the defendant's individual intent, or intent as the operation of his mind, hidden from others and known only to himself, to which he was competent to testify. It was this intent which we said in a former opinion was, on a fair construction of the article, open to him to disprove. We said that the article, however it might carry that impression to the minds of others or be so construed by the courts, yet furnished no such clear and indisputable evidence on its face

the publication was made,[12] though not to entirely rebut the presumption of legal malice when the statement is actionable *per se*.[13] It has been held, however, that where the charge is clear and unambiguous on its face, and is actionable *per se*, the defendant's actual motive or intention is immaterial and cannot be shown by him.[14]

of this individual or inward intent and purpose to malign or to charge the plaintiff with having received a bribe, as to exclude direct evidence to the contrary, or that such inward intent did not exist. Of course, cases have arisen, and may arise again, where the language of the publication is so clear and positive to show the inward intent and malicious purpose and motive that the rejection of such evidence could not be looked upon as error. But we said, and still say, of this case, notwithstanding the outward manifestations, that exculpatory evidence of the kind was admissible when offered to rebut the presumption of malice in fact raised by the publication, and to meet and negative any claim which might be made for vindictive or punitory damages on that ground."

Where the libel charged was an accusation that plaintiff had broken into a woodshed and taken coal, it was held competent for the defendant to testify that he did not intend to charge the plaintiff with the crime of larceny; so far as compensatory damages were concerned the intent of the defendant was immaterial, but on the question of punitive damages he was entitled to show his actual intent. Short *v.* Acton (Ind. App.), 71 N. E. 505.

Where the libel charged was an accusation that plaintiff was acting like a thief, it was held competent for defendant to deny any intention of charging the plaintiff with stealing, as bearing upon the question of whether he entertained hostile and malicious feelings toward the plaintiff at the time, and whether the language used was understood by the hearers as charging the plaintiff with being a thief. Faxon *v.* Jones, 176 Mass. 206, 57 N. E. 359.

Form of Question. — In Mowry *v.* Raabe, 89 Cal. 606, 27 Pac. 157, the refusal of the court to permit defendant to answer the question, "Did you have any malice against the plaintiff at the time of the publication of the alleged libel?" was held proper since it was misleading, it being proper for the defendant to deny express malice, but improper to allow the denial of the legal malice presumed from the false and libelous publication. The question should have been so framed as to disclose its exact purpose.

12. Hearne *v.* De Young, 132 Cal. 357, 64 Pac. 576; Sands *v.* Robison, 12 Smed. & M. (Miss.) 704, 51 Am. Dec. 132; Bennett *v.* Smith, 23 Hun (N. Y.) 50.

Where the plaintiff has given evidence tending to show a right to recover punitive damages the defendant may testify as to his feelings toward the plaintiff and his purpose and intent in making the defamatory statement. Henn *v.* Horn (Ohio), 47 N. E. 248.

Where the defendant had been permitted to testify as to when, where and how he obtained the information concerning the matters published, and as to all the facts and circumstances relevant to the publication, and to state that he believed the statements to be true when he made them, it was held that the court committed no prejudicial error in refusing to permit the defendant to testify as to his purpose or motive in writing the article. State *v.* Clyne, 53 Kan. 8, 35 Pac. 789.

The Defendant, in Mitigation, Cannot Testify That He Believed He Was Justified in Making the Publication, and that it was made for the public good. Palmer *v.* Mahin, 120 Fed. 737.

13. On an indictment for a libel, evidence that the object of the defendant in publishing the alleged libel was to attack vicious persons and establishments injurious to the morals of the community is inadmissible to rebut the presumption of malice. Com. *v.* Snelling, 15 Pick. (Mass.) 337.

14. M'Kinly *v.* Rob, 20 Johns. (N.

When defendant's knowledge of the falsity of the statement at the time of the publication has been shown he cannot testify that he had no malicious intention.[15]

16. Agent's Motive. — Where the action is against a corporation or other principal, its agents in the publication may testify directly as to their good motives,[16] except where such motives are immaterial.[17] The motives, however, of the subordinate or agent from

Y.) 350; Nicholson *v.* Merritt, 23 Ky. L. Rep. 2281, 67 S. W. 5.

Where the language used by the defendant is plain and unambiguous he cannot testify that he did not intend to use it in its ordinary and usual meaning, his secret intent or motive in such case being wholly immaterial. Davis *v.* Hamilton, 88 Minn. 64, 92 N. W. 512, *distinguishing* Marks *v.* Baker, 28 Minn. 162, 9 N. W. 678, on the ground that in that case the publication was not libelous *per se* upon its face.

In Dillard *v.* Collins, 25 Gratt. (Va.) 343, where the slanderous charge was horse stealing, and the defendant claimed that the occasion was privileged, the exclusion of his testimony as to his feelings and motives in making the charge, and that he had no ill-will against the plaintiff, but was only trying to protect his own rights and interests, was held no error on the ground that the defendant's feelings and motives were wholly immaterial. In this case, however, the court held that the occasion was not privileged.

15. Harwood *v.* Keech, 4 Hun (N. Y.) 389. See Bodwell *v.* Osgood, 3 Pick. (Mass.) 379, 15 Am. Dec. 228.

16. In an action against a corporation for a libel published by the company in the form of a circular, it was held competent for the president, vice-president and general manager of the defendant corporation to testify that they had not, and that they did not know that any officer or employe of the defendant had, any hatred or ill-will or malicious intention toward the plaintiff in the publication of the alleged libel. "The malicious intention of the corporation would be shown by that of its officers and agents. The evidence was competent only upon the question whether the witness whose act with malicious intention would be that of the defendant, had such intention. As the intention of the officers and agents of the defendant in making or permitting the publication was the fact in question, it was competent for the defendant to call each or any of its officers to testify in regard to the fact of his own intention, and, as bearing upon that, as to what knowledge he had of the intention of others." Brown *v.* Massachusetts Title Ins. Co., 151 Mass. 127, 23 N. E. 733.

Newspaper Publication. — Where the libelous article had been published in defendant's paper, it was held proper for defendant to ask the managing editor what was the object of the publication, whether there was any feeling on the part of the newspaper against the plaintiff personally, and whether when the information upon which the publication was based was communicated to the witness he believed it to be true, such evidence being competent to show the motive and good faith of the defendant. Peoples *v.* Detroit Post & Tribune Co., 54 Mich. 457, 20 N. W. 528.

17. In an action against the proprietor of a newspaper for libelous matter published therein, the good faith or malice of the city editor who had charge of the paper when the publication was made is not material upon the question of punitory damages, which turn entirely upon the express malice of the defendant. Bennett *v.* Salisbury, 78 Fed. 769. (This ruling, however, seems to be based on the proposition that a principal is not liable in exemplary damages for the malice of his agent.)

whom the defendant obtained his information are not material on behalf of the defendant.[18]

17. Effect of Failure To Establish a Plea of the Truth. — A. GENERALLY. — At common law it seems that a failure to establish a plea of the truth was conclusive evidence of malice,[19] and the facts and circumstances proved under such a plea could not be considered for the purpose of showing the absence of malice.[20] But under modern decisions and statutes in most jurisdictions the question of whether a plea of the truth which has not been established may be considered as evidence of express malice depends upon whether the plea appears to have been interposed in bad faith.[21] It has been held under a statute permitting a defendant to plead several defenses that his failure to establish a plea of the truth cannot be considered as evidence against him.[22] So also it seems to be the general rule that evidence offered in support of such a plea, though insufficient to establish it, may be considered by the jury in

18. Maclean *v.* Scripps, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209.

19. Bisbey *v.* Shaw, 12 N. Y. 67; Spooner *v.* Keeler, 51 N. Y. 527 (changed by statute).

20. Fero *v.* Ruscoe, 4 N. Y. 162.

21. Lowe *v.* Herald Co., 6 Utah 175, 21 Pac. 991; Rayner *v.* Kinney, 14 Ohio St. 283; Pallet *v.* Sargent, 36 N. H. 496; Distin *v.* Rose, 69 N. Y. 122; Ward *v.* Dick, 47 Conn. 300, 36 Am. Rep. 75. See Parke *v.* Blackiston, 3 Har. (Del.) 373.

22. The mere failure to establish a plea of justification should not be considered as an aggravation of the injury, unless it appears that the plea was not made in good faith. The old rule has been changed by statute, which permits the defendant to allege in his answer both the truth of the matter charged and any mitigating circumstances to reduce the damages, and whether he proves the justification or not he may give in evidence the mitigating circumstances. "Indeed, the rule of the common law has been deemed so harsh and unjust that it has been modified in this country so that an unproved plea of the truth is probably at the present day nowhere held to be necessarily evidence of malice, but the question now turns upon the circumstances of the plea." And it is a matter for the jury to determine from all the circumstances. Upton *v.* Hume, 24 Or. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493.

Where there is a total failure to prove a plea of the truth, this fact may be considered by the jury in estimating the damages, but this rule must be confined to cases of bad faith, and if there be evidence tending to support the plea, although insufficient to establish it, the jury should not consider the failure as additional evidence of malice. Doe *v.* Roe, 32 Hun (N. Y.) 628.

A Plea of Justification Not Made in Good Faith is an aggravation of the slander, and may be considered by the jury in estimating the damages. Harbison *v.* Shook, 41 Ill. 141; Cruikshank *v.* Gordon, 118 N. Y. 178, 23 N. E. 457.

A Plea of Justification Which Is Not Supported by Evidence may be properly considered on the question of exemplary damages. Coffin *v.* Brown, 94 Md. 190, 50 Atl. 567.

When no Evidence Offered in Support of Plea. — A plea of justification, though no evidence be given under it, cannot be considered in aggravation of damages, since the defendant at the time of filing this plea may have witnesses to prove it, but through no fault of his be deprived of their testimony before the trial. Shoulty *v.* Miller, 1 Ind. 544.

A plea of the truth which is not supported by any evidence, and which is not withdrawn, may be considered as evidence of malice. Simpson *v.*

mitigation of exemplary damages.[23] In some cases, however, it is said that the failure to establish a plea of the truth is evidence of express malice.[24]

B. Evidence To Show Good Faith of Plea. — On the question whether a plea in justification was filed in good faith the plaintiff may introduce evidence tending to show the defendant's bad faith.[25]

Robinson, 12 Q. B. 511, 64 E. C. L. 509.

A plea of the truth, though not sustained by the evidence, cannot be considered as evidence of malice where the statute gives the defendant the right to plead as many several matters, whether of law or fact, as he may deem necessary to his defense. Express Print. Co. *v.* Copeland, 64 Tex. 354.

23. Ranson *v.* Christian, 49 Ga. 491; Chalmers *v.* Shackell, 6 Car. & P. 475, 25 E. C. L. 496; Distin *v.* Rose, 69 N. Y. 122; Thomas *v.* Dunaway, 30 Ill. 373; McAllister *v.* Sibley, 25 Me. 474.

Where the evidence adduced under a plea of justification shows that the defendant had reason to believe from the plaintiff's conduct that the charges were true, it may be considered in mitigation of damages, though it does not establish the plea. Shoulty *v.* Miller, 1 Ind. 544; Byrket *v.* Monohon, 7 Blackf. (Ind.) 83, 41 Am. Dec. 212.

While a plea of justification is to some extent an aggravation of the tort, yet when the defendant introduces testimony tending to sustain that plea, though it fails to make it out, the jury may take such testimony into consideration in mitigation of damages. Henderson *v.* Fox, 80 Ga. 479, 6 S. E. 164.

The common-law rule that evidence offered in support of the truth, but which failed to establish such plea, could not be considered by the jury in mitigation of damages, and that the plea of such a defense when not fully sustained was evidence of malice, has been abrogated by statute, and the defendant is entitled to the benefit of such mitigating circumstances in reduction of damages. Kennedy *v.* Holborn, 16 Wis. 457.

Does Not of Itself Warrant Exemplary Damages. — The mere failure of the defendant to establish his plea of justification does not authorize the assessment of exemplary damages, but "if the defendant maliciously, and for the purpose of spreading and perpetuating the slander, pleads the truth of the words in justification and fails to prove it, it may be regarded as evidence proving or tending to prove malice in speaking the words originally; and may tend indirectly to increase the damages for speaking the slanderous words charged in the declaration by showing the degree of malice in speaking them. It is a circumstance to be considered in estimating damages for the cause of action alleged in the declaration and proved, but is not of itself a cause for which damages may be directly assessed in that suit." Ward *v.* Dick, 47 Conn. 300, 36 Am. Rep. 75.

24. Burckhalter *v.* Coward, 16 S. C. 435; Farley *v.* Ranck, 3 Watts & S. (Pa.) 554; Aspenwall *v.* Whitemore, 1 Root (Conn.) 408; Richardson *v.* Roberts, 23 Ga. 215; Root *v.* King, 7 Cow. (N. Y.) 613; Fero *v.* Ruscoe, 4 N. Y. 162; Sun Print. & Pub. Co. *v.* Schenck, 98 Fed. 925.

On the Question of Privilege. Where the defendant pleaded not guilty and justification, and offered no evidence in proof of the justification, but attempted to show under the first plea circumstances rendering the communication privileged, it was held that the jury could not take into consideration, in determining the question whether the publication was privileged, the fact that the justification had been pleaded and abandoned. If, however, they had determined that the publication was not privileged, the failure to support the plea of justification might be considered in aggravation of damages. Wilson *v.* Robinson, 7 Q. B. 68, 53 E. C. L. 67.

25. Kansas City Star Co. *v.* Carlisle, 108 Fed. 344. The alleged libel

18. Malice on a Criminal Prosecution. — On a prosecution for criminal libel the defendant may introduce evidence of any facts or circumstances to show that he was not actuated by malice.[26]

in this case was a newspaper publication describing the arrest of the plaintiff and removal to another state on a charge of cattle stealing, and containing other statements to the effect that the plaintiff belonged to a gang of cattle thieves. The defendant filed pleas both in mitigation of damages and in justification embodying a subsequent publication in his newspaper to the effect that the case against the plaintiff had been dismissed because he had been able to "convince the prosecutor that the charges were false," and containing an allegation that the criminal case "was never tried on its merits." It appeared also that the defendant's counsel in his opening statement said that the case had been dismissed against the plaintiff in consideration of his turning state's evidence. On the question of whether the plea of justification had been filed in good faith, and to rebut the false inferences which might be drawn from the statements in the defendant's pleas and the opening statement of his counsel, it was held proper for the plaintiff to introduce the entire record of the criminal case against the plaintiff, a part of which was a sworn statement of the prosecuting attorney giving as his reason for dismissing the case the fact that from the evidence in his possession a further prosecution would be absurd and ridiculous and a useless expense. Upon the same issue of whether the plea of justification had been filed in good faith, it was held proper for the plaintiff to show the investigations made by the defendant previous to its filing, and the facts known to him indicating the falsity of the libelous statement, and also for the defendant to prove the facts discovered by him tending to show a reasonable ground for his belief in the truth of his statement. The court, after commenting on the common-law rule that the failure to establish a plea of justification is evidence of express malice, and the changes which have been made in this rule by statute and otherwise, by which the question of whether this fact is evidence of malice is made to depend upon whether the plea was interposed in good faith, says: "It is evident, therefore, that the issue respecting the motive or good faith of the defendant inheres in every action for slander or libel where a plea of justification is filed and is not sustained by the proof, although the issue is not formally raised by the pleadings, inasmuch as the jury, when they come to assess the damages, are entitled to determine what motive prompted the defendant to file the plea and to repeat the libelous charge." But see dissenting opinion of Sanborn, J.

In Sun Print. & Pub. Co. *v.* Schenck, 98 Fed. 925, where the alleged libel consisted of a statement published in defendant's newspaper to the effect that two indictments for forgery had been found by the grand jury against the plaintiff, and the defendant by way of justification pleaded the truth of the statement, it was held competent, as evidence of his bad faith in making his answer, for the plaintiff to show that previous to the commencement of the action one of the indictments referred to had been dismissed on motion of the district attorney, and that there was a verdict of not guilty upon the trial of the second. "The answer was interposed long after these judicial proceedings had taken place. They were part of the history of the incriminating transactions which the defendant had set up in its answer as defensive matters. Common justice required the defendant to acquaint itself with the result of the criminal proceedings before interposing such matters in its answer. If it did not do so, or if it interposed the answer after it was informed, the circumstance tended to discredit the good faith of the pleading, and to weigh in aggravation of damages."

26. In a prosecution for criminal libel the evidence upon which the publication was made is admissible to rebut malice. "In every case where

IV. PRIVILEGE.

1. Burden of Proof. — A. GENERALLY. — The burden is on the defendant to prove that the publication was made on a privileged occasion, unless this fact appears on the face of the publication.[27]

B. MALICE. — When, however, it has been shown that the occasion was one of qualified privilege, the plaintiff must show that the publication was made with actual malice as distinguished from the malice implied from the speaking of actionable words.[28]

a publication is made the foundation of a criminal action for libel, malice is an essential ingredient, and therefore any evidence which tends to show a want of malice is admissible. So to rebut malice any mitigating circumstances, or such as show a justifiable motive, may be admitted, and likewise evidence which tends to show that the charges contained in the libelous publication are true, because if a publication defamatory in character is found to be false it is itself evidence of a malicious intent, and such evidence may be admitted for the purpose of repelling the legal inference of malice, even though it be insufficient in justification." People *v.* Glassman, 12 Utah 238, 42 Pac. 956.

27. Day *v.* Backus, 31 Mich 241; King *v.* Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622; Fahr *v.* Hayes, 50 N. J. L. 275, 13 Atl. 261; Smith *v.* State, 32 Tex. 594; Byam *v.* Collins, 111 N. Y. 143, 19 N. E. 75, 7 Am. St. Rep. 726, 2 L. R. A. 129; Sibley *v.* Lay, 44 La. Ann. 936, 11 So. 581; Beiser *v.* Scripps-McRae Pub. Co., 113 Ky. 383, 68 S. W. 457, *distinguishing* Smith *v.* Com., 98 Ky. 437, 33 S. W. 419; Stewart *v.* Hall, 83 Ky. 375.

"To rebut and entirely remove the evidence of malicious intent, where the writing is both defamatory and false, upon the ground of a privileged communication, it must appear: (1.) That the party had a right, or was under some obligation, to give the information which was believed to be true. (2.) The mode and style of communication must not contain intrinsic evidence of malicious intent over and above what is reasonably necessary and proper in conveying the information. (3.) It must be free from attendant and concomitant extrinsic circumstances showing a malicious intent." Holt *v.* Parsons, 23 Tex. 9, 76 Am. Dec. 49.

Absolute Privilege. — Where it appears that words admittedly defamatory were spoken or written in judicial proceedings, but are claimed to be absolutely privileged, the burden is upon the party claiming the privilege to show clearly that the defamatory statements were material to the issue or inquiry before the court. Marsh *v.* Elsworth, 36 How. Pr. (N. Y.) 532. *Contra*, Calkins *v.* Sumner, 13 Wis. 193, 80 Am. Dec. 738.

28. *England.* — Bromage *v.* Prosser, 4 B. & C. 247, 10 E. C. L. 321; Wright *v.* Woodgate, 2 C. M. & R. 573; Henwood *v.* Harrison, L. R. 7 C. P. Cas. 606, 626; Child *v.* Affleck, 9 B. & C. 403, 17 E. C. L. 405; Taylor *v.* Hawkins, 16 Q. B. 308, 71 E. C. L. 307; Clark *v.* Molyneux, L. R. 3 Q. B. Div. 237.

United States. — Erber *v.* Dunn, 12 Fed. 526; White *v.* Nicholls, 3 How. 266.

California. — Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845.

Delaware. — Cameron *v.* Corkran, 2 Marv. 166, 42 Atl. 454.

Florida. — Coogler *v.* Rhodes, 38 Fla. 240, 21 So. 109.

Illinois. — McDavitt *v.* Boyer, 169 Ill. 475, 48 N. E. 317.

Kentucky. — Evening Post *v.* Richardson, 113 Ky. 641, 68 S. W. 665; Smith *v.* Com., 98 Ky. 437, 33 S. W. 419; Beiser *v.* Scripps-McRae Pub. Co., 113 Ky. 383, 68 S. W. 457; Stewart *v.* Hall, 83 Ky. 375; Faris *v.* Starke, 9 Dana 128, 33 Am. Dec. 536; Hart *v.* Reed, 1 B. Mon. 166, 35 Am. Dec. 179.

Maine. — Bearce *v.* Bass, 88 Me. 521, 34 Atl. 411.

Maryland. — Hagan *v.* Hendry, 18

C. Falsity. — The only effect, however, of a showing of privilege is to overcome the legal implication of malice when the words are actionable *per se*.[29] No additional burden is thereby imposed on the plaintiff to show the falsity of the charge,[30] though there are expressions in some cases to the contrary.[31] But the untruth of the publication must appear either by presumption or proof.[32]

Md. 177; McBee *v.* Fulton, 47 Md. 403, 427.

Massachusetts. — Bradley *v.* Heath, 12 Pick. 163. See Brow *v.* Hathaway, 13 Allen 239.

Michigan. — Konkle *v.* Haven, 103 N. W. 850; Howard *v.* Dickie, 120 Mich. 238, 79 N. W. 191; Livingston *v.* Bradford, 115 Mich. 140, 73 N. W. 135.

Minnesota. — Marks *v.* Baker, 28 Minn. 162, 9 N. W. 678.

Mississippi. — Sands *v.* Robison, 12 Smed. & M. 704, 51 Am. Dec. 132.

New Jersey. — King *v.* Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622; Fahr *v.* Hayes, 50 N. J. L. 275, 13 Atl. 261.

New York. — Root *v.* King, 7 Cow. 613; Youmans *v.* Paine, 86 Hun 479, 35 N. Y. Supp. 150; Hamilton *v.* Eno, 81 N. Y. 116; Byam *v.* Collins, 111 N. Y. 143, 19 N. E. 75, 7 Am. St. Rep. 726, 2 L. R. A. 129; Lewis *v.* Chapman, 16 N. Y. 369; Liddle *v.* Hodges, 2 Bosw. 537; Coloney *v.* Farrow, 5 App. Div. 607, 39 N. Y. Supp. 460.

North Carolina. — Adcock *v.* Marsh, 30 N. C. 360; Gattis *v.* Kilgo, 128 N. C. 402, 38 S. E. 931.

North Dakota. — Lauder *v.* Jones, 101 N. W. 907.

Ohio. — Liles *v.* Gaster, 42 Ohio St. 631.

South Dakota. — Myers *v.* Longstaff, 14 S. D. 98, 84 N. W. 233.

Texas. — Cranfill *v.* Hayden, 80 S. W. 609; Bradstreet Co. *v.* Gill, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 762, 2 L. R. A. 405.

Vermont. — Shurtleff *v.* Stevens, 51 Vt. 501, 31 Am. Rep. 698; Nott *v.* Stoddard, 38 Vt. 25, 88 Am. Dec. 633.

Virginia. — Dillard *v.* Collins, 25 Gratt. 343; Brown *v.* Norfolk & W. R. Co., 100 Va. 619, 42 S. E. 664; Farley *v.* Thalhimer, 49 S. E. 644.

West Virginia. — Ward *v.* Ward, 47 W. Va. 766, 35 S. E. 873; Johnson *v.* Brown, 13 W. Va. 71.

Wisconsin. — Calkins *v.* Sumner, 13 Wis. 193, 80 Am. Dec. 738.

Malice is not presumed if the publication is privileged, but must be proved by the plaintiff, even though the charge is shown to be false. Fowles *v.* Bowen, 30 N. Y. 20; Ormsby *v.* Douglass, 37 N. Y. 477.

29. Allen *v.* Wortham, 89 Ky. 485, 13 S. W. 73; Laing *v.* Nelson, 40 Neb. 252, 58 N. W. 846; Garrett *v.* Dickerson, 19 Md. 418, 450. See Cranfill *v.* Hayden (Tex. Civ. App.), 75 S. W. 573.

30. Lauder *v.* Jones (N. D.), 101 N. W. 907; Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865; Laing *v.* Nelson, 40 Neb. 252, 58 N. W. 846 (*disapproving* Edwards *v.* Chandler, 14 Mich. 471); Cranfill *v.* Hayden (Tex.), 80 S. W. 609 (containing an extended discussion of the cases apparently to the contrary). See also Garrett *v.* Dickerson, 19 Md. 418, 450; Morse *v.* Times-Republican Print. Co., 124 Iowa 707, 100 N. W. 867; Conroy *v.* Pittsburg Times, 139 Pa. St. 334, 21 Atl. 154, 23 Am. St. Rep. 188, 11 L. R. A. 725.

31. *England.* — Weatherton *v.* Hawkins, 1 T. R. 110 (*per* Buller, J.); McIntyre *v.* Bean, 13 U. C. Q. B. 540.

Michigan. — Edwards *v.* Chandler, 14 Mich. 471.

New York. — Howard *v.* Thompson, 21 Wend. 319, 34 Am. Dec. 238; Fowles *v.* Bowen, 30 N. Y. 20; Hume *v.* Kusche, 42 Misc. 414, 87 N. Y. Supp. 109.

North Carolina. — Byrd *v.* Hudson, 113 N. C. 203, 18 S. E. 209.

Pennsylvania. — Briggs *v.* Garrett, 111 Pa. St. 404, 2 Atl. 513, 56 Am. Rep. 274.

West Virginia. — Ward *v.* Ward, 47 W. Va. 766, 35 S. E. 873.

32. **The Falsity of the Publication Must Appear** either by presumption or proof. Where the publication is of such a nature that its falsity

2. Nature and Sufficiency of Evidence. — A. Generally. Where the defamatory publication is claimed to be conditionally privileged, any relevant facts or circumstances tending to show that it was made on a privileged occasion are competent.[33] A witness cannot, however, testify directly that the communication was privileged.[34]

B. Express Malice. — Evidence of express malice is competent in rebuttal of a plea of privilege.[35] Express malice may be shown by evidence of the facts and circumstances attending the publication or by other extrinsic evidence.[36] It may be inferred from the intemperate and unnecessarily violent nature of the language employed.[37]

C. Sufficiency of Falsity as Evidence of Malice. — Where a plea of privilege is made the plaintiff may show the falsity of the statement as evidence that the publication was made with express malice, and he is not compelled to rely upon the presumption of

is presumed this presumption is sufficient, but it would seem that in the absence of such a presumption the plaintiff would be required to show the untruth of the publication. See Cranfill *v.* Hayden (Tex.), 80 S. W. 609.

33. Jones *v.* Forehand, 89 Ga. 520, 16 S. E. 262, 30 Am. St. Rep. 81; Piper *v.* Woolman, 43 Neb. 280, 61 N. W. 588.

Where it was contended that the defamatory statements were conditionally privileged because made in good faith as evidence in an inquiry by a committee of the board of aldermen, it was held that the defendant might show that this committee had enlarged the scope of their investigation beyond their instructions for the purpose of showing that the words charged were pertinent and relevant to matters actually before the committee, and therefore privileged. Blakeslee *v.* Carroll, 64 Conn. 223, 238, 29 Atl. 473, 25 L. R. A. 106.

Where the defendants claim that the defamatory statement was privileged because made in their capacity of church council having authority to discipline members, of whom the plaintiff was one, and the plaintiff in reply claimed that the action of the council was without authority because no notice had been given to him, it was held error to exclude parts of the church constitution showing that the council had no authority to discipline a member without giving him notice and oral evidence that no such notice had been given. Over *v.* Hildebrand, 92 Ind. 19.

34. Jones *v.* Forehand, 89 Ga. 520, 16 S. E. 262, 30 Am. St. Rep. 81.

35. Bee Pub. Co. *v.* World Pub. Co., 59 Neb. 713, 82 N. W. 28.

36. Garrett *v.* Dickerson, 19 Md. 418, 450; Morse *v.* Times-Republican Printing Co., 124 Iowa 707, 100 N. W. 867; Mielenz *v.* Quasdorf, 68 Iowa 726, 28 N. W. 41.

37. Gilpin *v.* Fowler, 9 Ex. 615; Wright *v.* Woodgate, 2 C. M. & R. (Eng.) 573; Strode *v.* Clement, 90 Va. 553, 19 S. E. 177; Morse *v.* Times-Republican Print. Co., 124 Iowa 707, 100 N. W. 867; Liddle *v.* Hodges, 2 Bosw. (N. Y.) 537; Coogler *v.* Rhodes, 38 Fla. 240, 21 So. 109. See Briggs *v.* Byrd, 34 N. C. 377; Wharton *v.* Wright, 30 Ill. App. 343.

Libel Must Be Submitted to the Jury. — The plaintiff is not required to prove malice by extrinsic evidence only. He has a right to require that the alleged libel itself shall be submitted to the jury that they may judge whether there is any evidence of malice on the face of it. Bacon *v.* Michigan Cent. R. Co., 66 Mich. 166, 33 N. W. 181, *citing* Summerville *v.* Hawkins, 10 C. B. 583; Cooke *v.* Wildes, 5 E. & B. (Eng.) 329; Hastings *v.* Lusk, 22 Wend. (N. Y.) 410, 421; Coward *v.* Wellington, 7 Car. & P. (Eng.) 531; Wright *v.* Woodgate, 2 C. M. & R. (Eng.) 573, 578; Jackson *v.* Hopperton, 16 C. B. (N. S.), 111 E. C. L. 829.

falsity.[38] Such evidence, however, is not of itself sufficient to establish malice unless it also appears that the defendant knew of its falsity at the time of the publication or was negligent in not ascertaining the truth.[39] It has been held, however, that where the publication charges an indictable offense the presumption of innocence and falsity is sufficient proof of malice to put the defendant to proof of facts in support of his claim of privilege.[40] So also it

Where the publication is conditionally privileged, mere proof of its falsity is not alone sufficient evidence of actual malice. Such malice may, however, be inferred from the unnecessarily violent and intemperate nature of the language employed. Kent *v.* Bongartz, 15 R. I. 72, 22 Atl. 1023, 2 Am. St. Rep. 870.

38. See Missouri Pac. R. Co. *v.* Behee, 2 Tex. Civ. App. 107, 21 S. W. 384.

Although the truth of the charges is not pleaded in justification, but a plea of privilege and good faith is made, the falsity of the charges may be affirmatively shown to establish malice. The court recognizes the conflict in the authorities as to the admissibility of such evidence when no justification is pleaded. "Upon a review of the decisions we think the proper rule to be that while the plaintiff might rely upon the presumption of falsity of the charges made against him, he is not required to do so, but may introduce affirmative evidence of such falsity in cases where malice must be expressly shown, as a step in the proof of malice; but the falsity of the charges is not in itself sufficient to establish malice, and only becomes sufficient when coupled with evidence tending to show that the plaintiff made the charges knowing them to be false, or with other evidence tending to show malice." Laing *v.* Nelson, 40 Neb. 252, 58 N. W. 846, *citing* Fountain *v.* Boodle, 3 Q. B. 5; Child *v.* Affleck, 9 B. & C. (Eng.) 403; Fairman *v.* Ives, 5 B. & A. (Eng.) 642; Blagg *v.* Sturt, 10 Q. B. 899; Edwards *v.* Chandler, 14 Mich. 471; but disapproving of the statement in the last case that the plaintiff, in order to recover, must necessarily prove the falsity of the charge, since while the privilege arising from the occasion of the publication rebuts the presumption of malice, it does not rebut the presumption of innocence of slanderous charges.

39. Fountain *v.* Boodle, 3 Q. B. 5, 43 E. C. L. 605; Kent *v.* Bongartz, 15 R. I. 72, 22 Atl. 1023, 2 Am. St. Rep. 870; Howard *v.* Dickie, 120 Mich. 238, 79 N. W. 191; Coogler *v.* Rhodes, 38 Fla. 240, 21 So. 109; Stewart *v.* Hall, 83 Ky. 375; Ramsey *v.* Cheek, 109 N. C. 270, 13 S. E. 775 (*disapproving* Wakefield *v.* Smithwick, 49 N. C. 327); Laing *v.* Nelson, 40 Neb. 252, 58 N. W. 846.

Where the words were used on a privileged occasion, the absence of probable cause for the statement does not warrant a legal inference of malice; it is evidence to be left to the jury. Gray *v.* Pentland, 4 Serg. & R. (Pa.) 420.

Where the occasion of the publication is privileged express malice must be proved, but direct evidence is unnecessary and may be inferred if the publisher knew at the time that the statement was false. Behee *v.* Missouri Pac. R. Co., 71 Tex. 424, 9 S. W. 449.

40. Where the publication is one of qualified privilege there must be some evidence of malice "beyond the mere fact of publication, but there is no requirement as to what the form of the evidence shall be. It may be intrinsic, from the style and tone of the article. 'If the communication contains expressions which exceed the limits of privilege, such expressions are evidence of malice, and the case shall be given to the jury.' . . . Or it may be extrinsic, as by proof of actual malice, or that the statement was knowingly false, or that it was made without probable cause, or in any way that fairly and reasonably tends to overcome the *prima facie* presumption of protection under the privilege. One of such ways is by the counter-presumption of innocence.

has been held that proof of the falsity of the statement may be sufficient evidence of express malice to go to the jury, although the occasion of the publication was privileged.[41]

V. TRUTH OR FALSITY.

1. Presumption of Falsity. — A. GENERALLY. — A defamatory charge which is actionable *per se* is presumed to be false, this presumption being merely one phase of the general presumption of innocence.[42] The fact that the publication was made on a privileged occasion does not rebut the presumption of its falsity.[43]

. . . So where the alleged libel charges an indictable offense the presumption of innocence ought and must stand as *prima facie* evidence of falsity and want of probable cause, and therefore of malice, even in cases of a claim of privilege. . . . We are of opinion that where the publication charges an indictable offense the presumption of innocence is *prima facie* evidence of falsity and want of probable cause, and sufficient to put defendant to proof of the facts to support his claim of privilege." Conroy *v.* Pittsburgh Times, 139 Pa. St. 334, 21 Atl. 154, 23 Am. St. Rep. 188, 11 L. R. A. 725.

41. See Child *v.* Affleck, 9 B. & C. 403, 17 E. C. L. 405; Wakefield *v.* Smithwick, 49 N. C. 327, *disapproved* in Ramsey *v.* Cheek, 109 N. C. 270, 13 S. E. 775.

In Blagg *v.* Sturt, 10 Q. B. 899, 59 E. C. L. 897, in which it was held that the publication in question was not privileged, Lord Denman, C. J., says: "We are also of opinion that proof of falsehood in a part of the statement is evidence for the jury to renew the presumption of malice where the occasion of the publication has been evidence to rebut it."

42. *United States.* — Broughton *v.* McGrew, 39 Fed. 672; Times Pub. Co. *v.* Carlisle, 94 Fed. 762; Cunningham *v.* Underwood, 116 Fed. 803.

Arkansas. — Stallings *v.* Whittaker, 55 Ark. 494, 18 S. W. 829.

California. — Dixon *v.* Allen, 69 Cal. 527, 11 Pac. 179.

Connecticut. — Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865.

Georgia. — Holmes *v.* Clisby, 48 S. E. 934.

Indiana. — Byrket *v.* Monohon, 7 Blackf. 83, 41 Am. Dec. 212; Hallowell *v.* Guntle, 82 Ind. 554.

Iowa. — Parker *v.* Lewis, 2 Greene 311; Morse *v.* Times-Republican Print. Co., 124 Iowa 707, 100 N. W. 867; Prewitt *v.* Wilson, 103 N. W. 365.

Kansas. — Russell *v.* Anthony, 21 Kan. 450, 30 Am. Rep. 436.

Kentucky. — McIntyre *v.* Bransford, 13 Ky. L. Rep. 454, 17 S. W. 359.

Maryland. — Hagan *v.* Hendry, 18 Md. 177.

Minnesota. — Wilcox *v.* Moore, 69 Minn. 49, 71 N. W. 917.

New York. — Prince *v.* Brooklyn Daily Eagle, 16 Misc. 186, 37 N. Y. Supp. 250.

North Dakota. — Lauder *v.* Jones, 101 N. W. 907.

Oregon. — Thomas *v.* Bowen, 29 Or. 258, 45 Pac. 768.

Texas. — Mitchell *v.* Spradley (Tex. Civ. App.), 56 S. W. 134; Cranfill *v.* Hayden (Tex. Civ App.), 75 S. W. 573; Clark *v.* Bohms (Tex. Civ. App.), 37 S. W. 347; Ledgerwood *v.* Elliott (Tex. Civ App.), 51 S. W. 872.

Wisconsin. — Bradley *v.* Cramer, 66 Wis. 297, 28 N. W. 372; Candrian *v.* Miller, 98 Wis. 164, 73 N. W. 1004.

The plaintiff is presumed to be innocent of a criminal charge made against him, and this presumption becomes conclusive where the defendant does not plead the truth of such charge. Pokrok Zapadu Pub. Co. *v.* Zizkovsky, 42 Neb. 64, 60 N. W. 358.

43. Lauder *v.* Jones (N. D.), 101 N. W. 907. But see *supra* this article, "Privilege. — Burden of Proof. — Falsity."

B. In Criminal Prosecution. — On a prosecution for criminal libel, however, this presumption of falsity ceases because incompatible with the contrary presumption of the defendant's innocence.[44]

2. Burden of Proof. — The burden of proving a plea of the truth of the defamatory matter is upon the defendant.[45] It is not sufficient for him to establish the literal truth of his words as where the charge is made on information or belief, but the truth of the imputation therein contained must be shown.[46]

3. Nature of Evidence. — A. Generally. — Under a plea of the truth any evidence tending to show the truth of the defamatory charge is admissible.[47] And in rebuttal thereof any facts and cir-

44. Where the defamatory statement imputes unchastity on the part of the prosecuting witness in a criminal prosecution, the presumption in favor of chastity is incompatible with the legal presumption in favor of the innocence of the defendant. McArthur *v.* State, 59 Ark. 431, 27 S. W. 628.

45. *United States.* — Cunningham *v.* Underwood, 116 Fed. 803.

Arkansas. — Stallings *v.* Whittaker, 55 Ark. 494, 18 S. W. 829.

Georgia. — Ranson *v.* Christian, 56 Ga. 351.

Indiana. — Heilman *v.* Shanklin, 60 Ind. 424; Gaul *v.* Fleming, 10 Ind. 253; Hauger *v.* Benua, 153 Ind. 642, 53 N. E. 942.

Iowa. — Klos *v.* Zahorik, 113 Iowa 161, 84 N. W. 1046; Prewitt *v.* Wilson, 103 N. W. 365.

Kansas. — Russell *v.* Anthony, 21 Kan. 450, 30 Am. Rep. 436.

Maine. — Ellis *v.* Buzzell, 60 Me. 209.

Massachusetts. — Sperry *v.* Wilcox, 1 Metc. 267.

Michigan. — Finley *v.* Widner, 112 Mich. 230, 70 N. W. 433.

Minnesota. — Wilcox *v.* Moore, 69 Minn. 49, 71 N. W. 917.

Texas. — Cranfill *v.* Hayden (Tex. Civ. App.), 75 S. W. 573.

Washington. — Hall *v.* Elgin Dairy Co., 15 Wash. 542, 46 Pac. 1049.

Where the publication is libelous *per se* the burden of proving justification, excuse or extenuation is upon the defendant. White *v.* Nicholls, 3 How. (U. S.) 266.

On a plea of justification alleging the truth of the criminal charge the burden is upon the defendant, although he is compelled thereby to prove a negative. Hinchman *v.* Lawson, 5 Leigh (Va.) 695, 27 Am. Dec. 622.

46. Brewer *v.* Chase, 121 Mich. 526, 80 N. W. 575.

Under a plea justifying a statement by the defendant that he believed the plaintiff to be guilty of a particular crime, the burden is on the defendant to prove the plaintiff's guilt, and not merely the defendant's belief in his guilt. Fountain *v.* West, 23 Iowa 9, 92 Am. Dec. 405.

Where the alleged libel consisted of a statement made by the defendant to the effect that certain persons believed they had been swindled by the plaintiff in a particular transaction, evidence that at the date of the publication such persons actually believed that they had been swindled was held inadmissible, either in justification or mitigation of damages. Wilson *v.* Fitch, 41 Cal. 363.

In support of a plea of the truth of a charge to the effect that the prosecutor was called "a murderer and forsworn," it is not competent for the defendant to prove the literal truth of the statement by showing the prevalence of a general report to this effect. State *v.* White, 29 N. C. 180.

47. *Georgia.* — Ranson *v.* Christian, 49 Ga. 491.

Iowa. — State *v.* Keenan, 111 Iowa 286, 82 N. W. 792.

Maryland. — Blumhardt *v.* Rohr, 70 Md. 328, 17 Atl. 266.

Massachusetts. — Odiorne *v.* Bacon, 6 Cush. 185.

Michigan. — Whittemore *v.* Weiss, 33 Mich. 348.

Missouri. — McCloskey *v.* Pulitzer Pub. Co., 152 Mo. 339, 53 S. W. 1087.

cumstances tending to show the falsity of the charge are competent.[48]

Texas. — Cranfill *v.* Hayden, 80 S. W. 609.

Where the alleged libel charges the plaintiff as juror in a previous trial with rendering a corrupt verdict, he may be asked on cross-examination by the defendant whether the verdict rendered in that case was the one agreed upon in the jury room; such evidence is not rendered incompetent by a statute providing that no juror shall be questioned in regard to any verdict rendered by him. Welch *v.* Tribune Pub. Co., 83 Mich. 661, 47 N. W. 562, 21 Am. St. Rep. 629, 11 L. R. A. 233.

In support of the truth of a charge of gross fraud and cheating the defendant cannot show that the plaintiff proposed to another that he sell damaged meat for the plaintiff without letting it be known that the plaintiff was concerned in the transaction, since such evidence had no tendency to show that a fraudulent or criminal purpose was actually accomplished. Chapman *v.* Ordway, 5 Allen (Mass.) 593.

Under a plea of justification for a charge against plaintiff of drunkenness and cruelty to her children, the defendant cannot show the plaintiff's condition subsequent to the publication of the libel. Tobin *v.* Sykes, 71 Hun 469, 24 N. Y. Supp. 943.

In a criminal prosecution, where the alleged libel charged the prosecuting witness with having been intoxicated on several occasions, the exclusion of testimony by witnesses shown to be well acquainted with him, that they had seen him acting as though he were intoxicated, was held error. State *v.* Mayberry, 33 Kan. 441, 6 Pac. 553.

Where the alleged libel charged the plaintiff, as one of the managers of an insurance company, with fraudulently conducting the concern and embezzling its funds, under a plea of justification it was held competent to show the business methods and practices of the company. Mosier *v.* Stoll, 119 Ind. 244, 20 N. E. 752.

Where the alleged slander charged the plaintiff with swearing falsely in a proceeding to test the sanity of a particular person, in support of the truth of the charge the defendant cannot show that the plaintiff entertained strong hostility toward the person as to whose sanity he was testifying; such evidence would not tend to show that he testified falsely. Hutts *v.* Hutts, 62 Ind. 214.

Where the Charge Was the Keeping of a Disorderly House it was held that the defendant could show either the general reputation of the house, the general reputation of the inmates or persons who resorted to the house and any specific acts of lewdness on the part of the plaintiff, or state specific acts of immorality and impropriety on her part, as furnishing a reasonable inference as to the real character of the place. Lanpher *v.* Clark, 149 N. Y. 472, 44 N. E. 182.

Evidence tending to show the truth of the charge is not admissible unless it is within the scope of the justification pleaded. Swan *v.* Thompson, 124 Cal. 193, 56 Pac. 878.

48. Murphy *v.* Daugherty, 10 Ill. App. 214; Stow *v.* Converse, 3 Conn. 325.

Where the libelous charge was dishonesty, and the defendant had offered evidence to show that the plaintiff had failed to pay his debts, in rebuttal it was held proper for the plaintiff to show his domestic circumstances, means and occupation at the time in question, and also that he had never been sued for debt but the one time shown by the defendant. State *v.* Keenan, 111 Iowa 286, 82 N. W. 792.

Where the libel charged the plaintiff, a preacher, with using liquor and tobacco and being untruthful, evidence as to the financial condition of his church and the number of members admitted under his pastorate was held properly excluded as having no tendency to disprove the truth of the charges or to show malice. Konkle *v.* Haven (Mich.), 103 N. W. 850.

In rebuttal of defendant's evidence in support of the truth of the libel the plaintiff may show his own conduct tending to prove its untruth. Stow *v.* Converse, 4 Conn. 17.

Where the alleged libel charged

It is competent to show all of the circumstances connected with the act charged as evidence of its real character.[49]

B. Criminal Charge. — Where the alleged defamatory statement charges the plaintiff with criminal conduct, the defendant, in support of a plea of the truth, may offer any evidence which would have been competent on a criminal prosecution against the plaintiff for the same offense.[50] In rebuttal the plaintiff may introduce any evidence which would be competent in his defense on such a prosecution.[51]

Evidence Required. — Some cases hold that where the defamatory charge imputes criminal conduct a plea of the truth must be proved by the same evidence as would be required to convict the plaintiff if he were on trial for that offense.[52]

the plaintiff with making mistakes in his accounts and failing to correct them until the persons affected thereby had discovered them, in rebuttal of evidence of particular mistakes in his own favor plaintiff may show other mistakes against himself. People *v.* Seeley, 139 Cal. 118, 72 Pac. 834.

Where the libel charged was that the plaintiff was associating with lewd women, in rebuttal of direct testimony by the defendant upon this subject plaintiff may show that there was no general talk in the community in which he lived that he was associating with women of that character. State *v.* Keenan, 111 Iowa 286, 82 N. W. 792.

Where the libel charged was a statement accusing the plaintiff, a school treasurer, of misappropriating funds, expert testimony as to the condition of the plaintiff's books and the state of his accounts was held properly admitted to show the falsity of the charge and the want of probable cause in publishing the libel, since the books were public records open to the examination of the defendant. Forke *v.* Homann, 14 Tex. Civ. App. 670, 39 S. W. 210.

49. Where the alleged defamatory statement charges larceny, all the circumstances connected with the transaction may be shown under a plea of justification in determining whether the act amounted to larceny. Palmer *v.* Haight, 2 Barb. (N. Y.) 210. Evidence as to what the plaintiff said and did on the occasion of the alleged larceny was held properly admitted as part of the *res gestae,* although the defendant was not present. Polston *v.* See, 54 Mo. 291.

50. Peoples *v.* Evening News Ass'n, 51 Mich. 11, 16 N. W. 185, 691.

Where the defamatory statement charges the plaintiff with keeping a disorderly house, and the defendant pleads the truth as a justification, he may show "what the general reputation of the house was, and the general reputation of the inmates or persons who resorted to the house, and any specific acts of lewdness on the part of the plaintiff, who kept it and had charge of it, or such specific acts of immorality and impropriety on her part as to furnish a reasonable inference as to the real character of the place. In fine, the defendant under his justification could give any proof that would have been admissible upon an indictment against the plaintiff for keeping a disorderly house." Lanpher *v.* Clark, 149 N. Y. 472, 44 N. E. 182.

Under a plea of the truth of a criminal charge, any circumstances which are relevant and tend to establish the plaintiff's guilt of the crime charged against him are competent. Bathrick *v.* Detroit Post & Tribune Co., 50 Mich. 629, 16 N. W. 172, 45 Am. Rep. 63. See Scott *v.* Mortsinger, 2 Blackf. (Ind.) 454.

51. Burton *v.* March, 51 N. C. 409 (holding competent evidence of the plaintiff's good character).

52. Offutt *v.* Earlywine, 4 Blackf. (Ind.) 460, 32 Am. Dec. 40; Mix *v.* Woodward, 12 Conn. 262.

4. Direct Testimony. — The defendant cannot ordinarily testify to the conclusion that the defamatory statements were true.[53] The plaintiff may testify directly that he did not do the act charged in the alleged defamatory publication.[54] And where the charge made is general in its nature, and fails to specify any particular act of misconduct by the plaintiff, he may be permitted to deny its truth generally.[55]

5. The Opinions of witnesses as to the truth of the charge are not competent.[56] Neither the opinions of persons not witnesses nor public opinion as to the truth of the charge are admissible.[57]

The truth of an accusation of forgery must be established by the same evidence necessary to convict the plaintiff if he were on trial for such offense. Chalmers *v.* Shackell, 6 Car. & P. 475, 25 E. C. L. 496.

53. Davis *v.* Hamilton, 88 Minn. 64, 92 N. W. 512.

In a prosecution for criminal libel the defendant's statement that the article "is true in every particular" was held properly excluded as a conclusion. State *v.* Heacock, 106 Iowa 191, 76 N. W. 654.

Contra. — A witness may properly be asked how much, if anything, stated in the libel is true or false to his own knowledge. Such question is not objectionable as calling for a conclusion, being plainly designed to elicit a statement of fact. Turton *v.* New York Recorder Co., 144 N. Y. 144, 38 N. E. 1009.

54. Laing *v.* Nelson, 40 Neb. 252, 58 N. W. 846.

55. Where the alleged defamatory statements charged the plaintiff with being an unworthy, dishonest man, and a villain, a criminal, a forger, a perjurer, an outlaw, and a dishonest scoundrel, and accused him of having committed crimes which would put him in the penitentiary, it was held no error to permit the plaintiff to testify that he had never committed any crime or done any act which under the laws would entitle him to be sent to the penitentiary, and that he was not an unworthy, dishonest man, a villain or a criminal or forger. Such questions, though objectionable, were rendered necessary by the general nature of the charges. "The impossibility, in view of the general charges made, of negativing them by proof of specific facts, justified the trial court in permitting the questions to be put directly and in a general form. It is true that some of these questions, such as whether the plaintiff was a villain, and whether he had done anything which should send him to the penitentiary, were so very broad and indefinite in their nature that the trial court probably should not have permitted the questions to be answered. They necessarily left a good deal to the judgment or inference of the witness as to what acts would justify such charges, and the method of examination was for that reason objectionable; but the very generality and indefiniteness of the language renders it impossible for us to see how the defendant could have been prejudiced by the testimony. . . . General testimony of this character is admissible to rebut equally general charges made against the person offering it, and while the court might properly require some of these questions to be put more specifically, we do not think that the defendant was prejudiced by his failure to do so." Laing *v.* Nelson, 40 Neb. 252, 58 N. W. 846.

56. Where the libel imputes to the plaintiff harsh and cruel treatment toward his employes, and the defendant pleads a justification, the opinions of third persons as to such conduct are inadmissible. The acts of the plaintiff which are relied upon as a justification must be shown. Fry *v.* Bennett, 3 Bosw. (N. Y.) 200. Where the alleged slander charges the plaintiff with criminal conduct, the opinion of an officer of the law as to the plaintiff's guilt is not admissible. Fowler *v.* Gilbert, 38 Mich. 292.

57. Where the slander charged

6. A Previous Indictment or Judgment of conviction for the offense charged is not competent evidence of its truth.[58] A judgment acquitting the plaintiff of the act charged is not competent in his behalf as evidence that the charge was untrue.[59]

7. Other Instances. — A. Generally. — Where the defamatory statement charges a particular instance of misconduct on the part of the plaintiff, evidence of other instances of misconduct by him is not admissible unless it is relevant to and tends to establish the act charged.[60]

B. When Evil Habit or Bad Character Is Charged. Where, however, the defamatory statement charges the plaintiff

the plaintiff with incompetency in his judicial capacity, it was held that in justification the plaintiff could not show the opinions of persons who were not witnesses as to the incapacity charged, nor could he even show public opinion on this question. Robbins *v.* Treadway, 2 J. J. Marsh. (Ky.) 540, 19 Am. Dec. 152.

Rumor or Reputation. — The truth of the alleged slander cannot be proved by neighborhood rumor or reputation. Richardson *v.* Roberts, 23 Ga. 215.

In support of his plea of the truth of a publication charging the plaintiff with being a liar the defendant cannot show conversations held by him with plaintiff's neighbors in which they stated that plaintiff's reputation for truthfulness was bad. Mitchell *v.* Spradley, 23 Tex. Civ. App. 43, 56 S. W. 134.

Mere Accusations against the plaintiff cannot be shown. Brewer *v.* Chase, 121 Mich. 526, 80 N. W. 575.

58. See article "Judgments," Vol. VII, p. 850.

Where the libel charges the plaintiff with being a law-breaker, previous indictments against him which had been dismissed because defective are not competent in support of the truth of the charge, nor are proceedings showing his indictment and conviction of an offense in which a new trial had been granted. Davis *v.* Hamilton, 88 Minn. 64, 92 N. W. 512.

59. Corbley *v.* Wilson, 71 Ill. 209, 22 Am. Rep. 98.

60. Other Instances of Misconduct, whether of the same or of a different nature to that charged, cannot be shown. Andrews *v.* Vanduzer, 11 Johns. (N. Y.) 38; Wagner *v.* State, 17 Tex. App. 554; Pallet *v.* Sargent, 36 N. H. 496; Downs *v.* Hawley, 112 Mass. 237; Haddock *v.* Naughton, 74 Hun 390, 26 N. Y. Supp. 455; Matthews *v.* Davis, 4 Bibb (Ky.) 173; Gregory *v.* Atkins, 42 Vt. 237.

Where the alleged slander charged the plaintiff with perjury, evidence that on other occasions when not under oath he made statements repugnant to those charged by the defendant to have been false, while perhaps competent to show that the alleged false oath was willful, is not competent to show that it was in fact false. Eastburn *v.* Stephens, Litt. Sel. Cas. (Ky.) 83.

In support of a plea of the truth of a charge of perjury, evidence of any other perjury than that laid in the declaration is not admissible. Whitaker *v.* Carter, 26 N. C. 461.

Charge of Unchastity. — In an action upon a slanderous charge of unchastity, where the plaintiff has testified to her chastity, evidence of her familiarities with men, although not amounting to unchaste conduct, is competent. McDougald *v.* Coward, 95 N. C. 368. *Contra.* — Proctor *v.* Houghtaling, 37 Mich. 41 (holding incompetent unchaste conduct with others); Watters *v.* Smoot, 33 N. C. 315.

Where the libel charged consisted of a statement that improper relations existed between the plaintiff and another upon a particular occasion, acts of familiarity between the parties three months subsequent to the libel were held properly admitted as evidence of its truth. Matthews *v.* Detroit Journal Co., 123 Mich. 608, 82 N. W. 243. See articles "Adultery" and "Divorce."

with an evil habit or with a bad character in certain respects without specifying any particular instance, the defendant in justification may show particular instances tending to establish such habit or character.[61] Ordinarily, however, such instances are required to be pleaded in the answer; otherwise they cannot be proved.[62]

8. Admissions of Plaintiff. — While the plaintiff's previous admissions are competent against him,[63] evidence of the statement of a third person in his presence not amounting to an admission is not competent.[64]

9. Guilt of Third Person. — The plaintiff, in rebuttal of evidence as to the truth of the charge, may show that the act imputed to him was done by a third person.[65]

10. General Reputation. — The bad reputation of the plaintiff generally, or with respect to the subject-matter of the charge, cannot

61. Kimball *v.* Fernandez, 41 Wis. 329.

Where the alleged defamatory statement charges a habit of stealing as well as a specific theft, evidence of particular acts of stealing other than the one contained in the charge is admissible to establish the truth of the general charge. Talmadge *v.* Baker, 22 Wis. 596.

In Duke *v.* State, 19 Tex. App. 14, a criminal prosecution for slandering a woman by calling her a whore, it was held that evidence of particular acts of unlawful sexual intercourse was competent as tending to show the truth of the charge. To the same effect, Wagner *v.* State, 17 Tex. App. 554.

Where a part of the libel charged the plaintiff with having been in more rows than any other man in the country, in justification thereof it was held proper for the defendant to show specific instances of quarrels and disturbances in which the plaintiff had been engaged. The question as to how far such evidence went toward establishing the truth of the libelous charge was for the jury. Ratcliffe *v.* Louisville Courier-Journal Co., 99 Ky. 416, 36 S. W. 177.

62. Kansas City Star Co. *v.* Carlisle, 108 Fed. 344; Cooke *v.* O'Malley, 109 La. 382, 33 So. 377; Halley *v.* Gregg, 82 Iowa 622, 48 N. W. 974; Dole *v.* Lyon, 10 Johns. (N. Y.) 447; Barthelemy *v.* People, 2 Hill (N. Y.) 248.

Where the libel charged the officers of a particular township with arresting every poor traveler who passed through such township for the purpose of increasing their fees, and charged a particular instance of such misconduct by the plaintiff, who was one of the officers, it was held that in justification the defendant could not prove acts of the plaintiff not set out in the answer. Bourreseau *v.* Detroit Evening Journal Co., 63 Mich. 425, 30 N. W. 376, 6 Am. St. Rep. 320, *per* Campbell, C. J.

63. Abshire *v.* Cline, 3 Ind. 115.

A Plea of Guilty by the plaintiff in a criminal prosecution for the offense charged against him by the defendant is not conclusive upon him in an action for slander. Crawford *v.* Bergen, 91 Iowa 675, 60 N. W. 205.

64. The defendant cannot show that previous to the speaking of the slanderous words by him another person had made the same charge in the plaintiff's presence and he had failed to deny it, his failure to deny under such circumstances not amounting to an admission. Fuller *v.* Dean, 31 Ala. 654.

65. Where the defamatory statement charged the plaintiff with a particular theft it was held competent for the plaintiff, in rebuttal of evidence as to the truth of the charge, and in connection with other evidence indicating the guilt of a third person, to show that an anonymous letter had been written by some person to the owner of the stolen goods offering to return them in settlement of

be shown in support of a plea of the truth,[66] except where the charge itself consists of a statement that the plaintiff's reputation is bad,[67] or to rebut defendant's evidence of good reputation.[68]

11. Justification Must Be as Broad as Charge. — Evidence in justification is not admissible unless it is as broad as the defamatory charge.[69]

the matter. "This conduct of a third party, amounting almost to a confession of guilt, was properly shown as tending to prove the falsity of the charge that plaintiff was the thief." Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935.

66. In proof of the truth of charges of unfairness, arbitrariness and oppressiveness, evidence of general reputation for these qualities is not admissible. Cooke *v.* O'Malley, 109 La. 382, 33 So. 377.

Contra. — In Sanford *v.* Rowley, 93 Mich. 119, 52 N. W. 1119, the alleged libel was a statement published in defendant's newspaper to the effect that the plaintiff would not hesitate to lie in court or anywhere else in order to defend himself against the truthful charges of political treachery which had been previously preferred against him in defendant's newspaper, and that in bold, willful, skillful and systematic prevarication the plaintiff had probably never had an equal in the state. The defendant pleaded the truth in justification. Upon this issue it was held proper for him to show both the plaintiff's general bad reputation for integrity and his bad reputation for political integrity. "The defendant had pleaded the truth of the publication, and he had a right to show what the political reputation of the plaintiff was, in order to justify a publication. The article charged the plaintiff with being a political traitor, a traitor to his party, and with having entered into a conspiracy to defeat the election of a party candidate whose nomination he had acquiesced in; and the words counted upon as libelous had reference to that fact, as they charged that the defendant 'would lie in court or anywhere else' to defend himself against those charges of treachery set forth in the articles. The defendant had a right to show the articles in full, and to have the language counted upon interpreted in accordance with the meaning of the articles as a whole. He had pleaded the truth as justification, and, as he had charged in the articles that he knew the plaintiff would lie to defend himself against these charges, his only justification was the truth; and he could only show the truth of the charges by proving the general reputation of the plaintiff for political treachery. The general rule is that the plea of justification must be as broad as the charge, and, in point of law, must be identical with it. But here the words import only political treachery, and lying 'even in court,' to defend himself against the charge. The defendant had the right, under the circumstances, to show, not only what the general reputation of the plaintiff was for truth and veracity, but also in justification to show by proper proofs that the plaintiff was generally regarded in that community as a person who, in political matters, was unworthy of belief. This defense was open to proof, and the defendant would have cast upon him the burden of showing it. This would be making a justification as broad as the charge, and, in point of law, identical with it."

Statute. — Criminal Prosecution for Imputing Unchastity. — For right given by statute to show prosecutrix's reputation for chastity, see *infra*, "Criminal Prosecution for Imputation of Unchastity."

67. Leader *v.* State, 4 Tex. App. 162.

68. See *infra*, "Character and Reputation."

69. Burford *v.* Wible, 32 Pa. St. 95; United States *v.* Callender, 25 Fed. Cas. No. 14,709.

Justification Must Be as Broad as the Charge. — Where the slanderous statement consisted of the words "Your boys stole my corn," in an action by the eldest of the three boys

12. Admissibility as Affected by Pleading. — Where the publication of the words is denied, evidence as to their truth is incompetent.[70] Where several distinct charges are alleged in the complaint and the defendant pleads a justification to only one of them, he may nevertheless show any facts tending to support the justification pleaded.[71] Where the defendant relies solely upon a plea of the truth, evidence of mitigating circumstances is not admissible at common law.[72]

13. Criminal Prosecution. — The truth of the words is no defense to a prosecution for criminal libel,[73] but statutes sometimes permit it to be shown either in mitigation of punishment[74] or as a complete defense if the publication was made in good faith and for justifiable ends.[75] On whom lies the burden of proving the latter facts depends

referred to, evidence that the two younger boys had stolen corn from the defendant shortly before the speaking of the slanderous words was held properly excluded. Maybee *v.* Fisk, 42 Barb. (N. Y.) 326.

70. McNaughton *v.* Quay (Mich.), 64 N. W. 474.

Evidence as to the truth of the charge is not admissible where the defendant merely denies the utterance and does not attempt to justify or plead any mitigation. McClure *v.* McMartin, 104 La. 496, 29 So. 227.

71. Lanpher *v.* Clark, 149 N. Y. 472, 44 N. E. 182.

72. Fenstermaker *v.* Tribune Pub. Co., 13 Utah 532, 45 Pac. 1097; Root *v.* King, 7 Cow. (N. Y.) 613. See Larned *v.* Buffinton, 3 Mass. 546.

Under the Indiana Statute the fact that the defendant pleads a justification does not deprive him of the right to offer evidence in mitigation. Heilman *v.* Shanklin, 60 Ind. 424.

73. Perry *v.* Porter, 124 Mass. 338.

74. Although the truth cannot be shown in justification on a criminal prosecution for libeling individuals who are not officers or candidates for office, yet it may be given in evidence in mitigation of the fine. Com. *v.* Morris, 1 Va. Cas. 175, 5 Am. Dec. 515.

75. Under the Massachusetts statute, if the defendant in a criminal prosecution proves the truth of the defamatory statement, the burden is upon the prosecution to show that it was made with malicious intention. Perry *v.* Porter, 124 Mass. 338.

Under the old Massachusetts statute permitting a defendant on a criminal prosecution to show the truth of the libel, but providing that this fact should not constitute a justification unless it be made to appear that the publication was with good motives and for justifiable ends, the burden was on the defendant not only to prove the truth of the matter charged, but also his good motives and justifiable ends. Com. *v.* Bonner, 9 Metc. (Mass.) 410.

Where the state constitution provides that in all civil or criminal cases for libel the truth may be given in evidence, and if it shall appear that the alleged libelous matter was published for justifiable ends the accused party shall be acquitted, it was held that a statute requiring the jury to find the defendant guilty unless they found that the matter charged as libelous was true and was published with good motives, and for justifiable ends, was broader than the constitutional provision and therefore invalid, since the legislature had no right to place upon the defendant the additional burden of showing that the publication was made with good motives. State *v.* Verry, 36 Kan. 416, 13 Pac. 838.

On a criminal prosecution where the defense is the truth of the charge, its falsity must be established beyond reasonable doubt, since falsity is the gravamen of the offense. McArthur *v.* State, 59 Ark. 431, 27 S. W. 628.

On a prosecution for criminal libel, after proof of the publication of the libel the burden is upon the defendant to establish justification, or show

largely on the form of the statute. Where proof of the truth is not a defense unless the statements were made in good faith, the testimony of the defendant as to his belief in their truth is competent.[76]

14. Degree of Proof. — A. In Civil Cases. — Where the defamatory charge imputes criminal conduct the rule laid down in England and in the early cases in some of the states required a plea of the truth to be established beyond a reasonable doubt or by the same degree of proof as would be necessary to sustain a criminal prosecution on the same charge.[77] These cases, however, have been largely overruled or superseded by statutes, and the almost universal

in excuse that it was published upon reasonable grounds of belief and from good motives. State *v.* Shippman, 83 Minn. 441, 86 N. W. 431.

76. Under the New York statute the truth alone is not a defense to a criminal prosecution for libel, and therefore the defendant, after evidence as to the truth of the charge, should be permitted to testify to his belief in its truth; yet where there is no evidence of the truth of the charge the defendant's belief can operate only in mitigation of punishment, and not as a defense. People *v.* Sherlock, 166 N. Y. 180, 59 N. E. 830.

77. *England.* — Wilmett *v.* Harmer, 8 Car. & P. 695, 34 E. C. L. 589.

United States. — Baker *v.* Kansas City Times Co., 2 Fed. Cas. No. 773.

California. — Merk *v.* Gelzhaeuser, 50 Cal. 631 (the rule is not changed by Code Civ. Proc., § 2061, which provides that in all civil cases the affirmative of the issue must be proved by a preponderance of evidence).

Delaware. — See Parke *v.* Blackiston, 3 Har. 373.

Georgia. — Williams *v.* Gunnels, 66 Ga. 521.

Illinois. — Crandall *v.* Dawson, 6 Ill. 556 (perjury); Crotty *v.* Morrissey, 40 Ill. 477 (larceny); Corbley *v.* Wilson, 71 Ill. 209, 22 Am. Rep. 98 (this rule is not changed by the act of 1867 concerning evidence).

Indiana. — Tucker *v.* Call, 45 Ind. 31; Hutts *v.* Hutts, 62 Ind. 214; Swails *v.* Butcher, 2 Ind. 84; Landis *v.* Shanklin, 1 Ind. 92; Gants *v.* Vinard, 1 Ind. 476; Shoulty *v.* Miller, 1 Ind. 544; Lander *v.* M'Ewen, 8 Blackf. 495.

Iowa. — Mott *v.* Dawson, 46 Iowa 533.

Missouri. — Elder *v.* Oliver, 30 Mo. App. 575.

South Carolina. — Burckhalter *v.* Coward, 16 S. C. 435.

The justification of a charge imputing a crime must be proved beyond a reasonable doubt. "It is with reluctance and regret that we yield to the decisions upon this point, and sustain the instruction. It has been so often and so emphatically asserted that the question is so firmly settled that the rule can only be changed by legislation, that we feel bound to adhere to the doctrine of our cases. We are satisfied that the rule grew out of a misconception of principle, and we should be glad to escape from it; and if we were not impelled by duty we should decline to give it our adherence. The decisions are numerous, and their assertions unqualified and strong." Fowler *v.* Wallace, 131 Ind. 347, 31 N. E. 53. See Wintrode *v.* Renbarger, 150 Ind. 556, 50 N. E. 570.

To Sustain the Truth of a Charge of Perjury the same proof is required that would be necessary on an indictment for perjury; hence two witnesses or one witness and strong corroborating circumstances are necessary.

Georgia. — Ranson *v.* Christian, 56 Ga. 351.

Iowa. — Bradley *v.* Kennedy, 2 Greene 231.

Maine. — Newbit *v.* Statuck, 35 Me. 315, 58 Am. Dec. 706.

New York. — Woodbeck *v.* Keller, 6 Cow. 118; Hopkins *v.* Smith, 3 Barb. 599; Clark *v.* Dibble, 16 Wend. 601.

Pennsylvania. — Steinman *v.* McWilliams, 6 Pa. St. 170.

rule now is that the truth of such a charge may be established by a preponderance of the evidence.[78] The rule in England requiring

Tennessee. — Coulter *v.* Stuart, 2 Yerg. 225.

But the necessity of more than one witness is confined to the proof of the falsity of the plaintiff's statement. As to all the other material allegations in the plea one witness is sufficient. Byrket *v.* Monohon, 7 Blackf. (Ind.) 83, 41 Am. Dec. 212.

The Plaintiff's Extra-Judicial Confession of his guilt of the crime charged against him by the defendant is not sufficient to support a plea of the truth of the charge in an action for slander or libel, since the rule applicable to a criminal charge that the confession of the defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that the offense was committed, applies equally to an action for defamation. Georgia *v.* Kepford, 45 Iowa 48. (But it seems that the rule would be different under the later cases holding that a preponderance of the evidence is sufficient.)

Unchastity. — Under the statute making a charge of unchastity actionable *per se,* a plea of the truth of the charge need not be proved beyond a reasonable doubt contrary to the rule where the charge imputes criminal conduct. Wilson *v.* Barnett, 45 Ind. 163.

78. *California.* — Hearne *v.* De Young, 119 Cal. 670, 52 Pac. 150, 499.

Colorado. — Downing *v.* Brown, 3 Colo. 571.

Iowa. — Riley *v.* Norton, 65 Iowa 306, 21 N. W. 649, *following* the principle of Welch *v.* Jugenheimer, 56 Iowa 11, 8 N. W. 673, and *overruling* on this point Bradley *v.* Kennedy, 2 Greene 231; Forshee *v.* Abrams, 2 Iowa 571; Fountain *v.* West, 23 Iowa 9, 92 Am. Dec. 405; Ellis *v.* Lindley, 38 Iowa 461.

Kentucky. — Sloan *v.* Gilbert, 12 Bush 51, 23 Am. Rep. 708.

Maine. — Ellis *v.* Buzzell, 60 Me. 209, 11 Am. Rep. 204.

Michigan. — Owen *v.* Dewey, 107 Mich. 67, 65 N. W. 8; Peoples *v.* Evening News Ass'n, 51 Mich. 11, 16 N. W. 185, 691.

Missouri. — Edwards *v.* Knapp, 97 Mo. 432, 10 S. W. 54, *overruling* Polston *v.* See, 54 Mo. 291.

New Hampshire. — Folsom *v.* Brown, 25 N. H. 114.

New York. — Lewis *v.* Shull, 67 Hun 543, 22 N. Y. Supp. 484.

North Carolina. — Kincade *v.* Bradshaw, 10 N. C. 63; Barfield *v.* Britt, 47 N. C. 41, 62 Am. Dec. 190.

Ohio. — Bell *v.* McGinniss, 40 Ohio St. 204, 48 Am. Rep. 673.

Wisconsin. — Kidd *v.* Fleek, 47 Wis. 443, 2 N. W. 1121.

"The defendant must fasten upon the plaintiff all the elements of the crime, both in act and in intent, and to do this he must furnish evidence enough to overcome in the minds of the jury the natural presumption of innocence, as well as the opposing testimony, but to go further and say that this shall be done by a degree and quantity of proof as shall suffice to remove from their minds every reasonable doubt that might be suggested is to import into the trial of civil causes between party and party a rule which is appropriate only in the trial of an issue between the state and a person charged with crime." McBee *v.* Fulton, 47 Md. 403, 428, *following* and *quoting* Ellis *v.* Buzzell, 60 Me. 209, 11 Am. Rep. 204.

Where the defendant pleads the truth of the alleged slander it is error to charge the jury that he must satisfy them by a preponderance of the evidence by clear and convincing proof that the words used were actually true. Sanborn *v.* Gerald, 91 Me. 366, 40 Atl. 67, *citing* French *v.* Day, 89 Me. 441, 36 Atl. 909.

The code provision that in all civil cases a preponderance of testimony shall be considered sufficient to produce mental conviction applies to actions for libel or slander in which a plea of justification is made, although the defamatory statement imputes the commission of a crime. Atlanta Journal *v.* Mayson, 92 Ga. 640, 18 S. E. 1010, 44 Am. St. Rep. 104, *disapproving* and *explaining*

a higher degree of proof is due to the fact that a verdict establishing the truth of the charge stands as an indictment of the plaintiff on such charge.[79]

B. Criminal Prosecution. — On a prosecution for criminal libel or slander the defendant's guilt must be established beyond a reasonable doubt.[80]

VI. MEANING OF WORDS USED.

1. Generally. — To determine the meaning of the alleged defamatory words it is competent to show the facts and circumstances attending their publication, the situation of the parties and their relation to the subject-matter or occasion of the slander, and any other portions or all of the same conversation or writing in which the publication was made.[81]

2. Words Actionable Per Se. — Although the language used is actionable *per se,* the defendant may nevertheless show that the circumstances surrounding the publication were such that it could not have been understood in a defamatory sense.[82] Although the words are actionable on their face because they import a criminal charge, nevertheless the defendant may prove that they were spoken with reference to facts and circumstances which show that they were not intended to charge a crime, if it further appears that such facts and circumstances were known to and understood by all the hearers.[83]

Ranson *v.* Christian, 56 Ga. 351; Williams *v.* Gunnels, 66 Ga. 521.

A plea of the truth of the charge of perjury must be supported by such proof as would be required to convict the plaintiff in an indictment for the offense, but the truth need not be proved beyond a reasonable doubt, a preponderance of the evidence being sufficient. Spruil *v.* Cooper, 16 Ala. 791.

The Rule in Illinois Has Been Changed by Statute, under which a preponderance of the evidence is sufficient. Tunnell *v.* Ferguson, 17 Ill. App. 76; Scott *v.* Fleming, 17 Ill. App. 561.

79. Downing *v.* Brown, 3 Colo. 571; Edwards *v.* Knapp, 97 Mo. 432, 10 S. W. 54; Sloan *v.* Gilbert, 12 Bush (Ky.) 51, 23 Am. Rep. 708, *citing* Cook *v.* Field, 3 Ex. 133.

80. State *v.* Heacock, 106 Iowa 191, 76 N. W. 654; Giles *v.* State, 6 Ga. 276. See Manning *v.* State, 37 Tex. Crim. 180, 39 S. W. 118; Ballew *v.* State (Tex. Crim.), 85 S. W. 1063.

It is sufficient on a criminal prosecution for libel for the defendant to raise a reasonable doubt of his guilt. State *v.* Grinstead, 10 Kan. App. 78, 61 Pac. 976, 980; State *v.* Bush, 122 Ind. 42, 23 N. E. 677; State *v.* Wait, 44 Kan. 310, 24 Pac. 354. But see Ridgley *v.* State, 75 Md. 510, 514.

On a criminal prosecution, while the falsity of the statement and the defendant's malice in making it must be shown beyond a reasonable doubt, direct proof is not necessary. The jury may infer malice from the character of the accusation and the absence of probable or reasonable ground for making it. Beal *v.* State, 99 Ala. 234, 13 So. 783.

81. Barton *v.* Holmes, 16 Iowa 252; Dickson *v.* State, 34 Tex. Crim. 1, 30 S. W. 807.

The whole conversation in the course of which the alleged slander was uttered, and the facts leading up to it, may be proved to show what was intended by the party charged, and understood by his hearers. Kidd *v.* Ward, 91 Iowa 371, 59 N. W. 279.

82. Line *v.* Spies (Mich.), 102 N. W. 993.

83. Smith *v.* Miles, 15 Vt. 245; Sabin *v.* Angell, 46 Vt. 740; Dempsey

Burden of Proof. — The burden is on the defendant to show that words slanderous on their face were not understood by the hearers in a defamatory sense, where the circumstances are such as to render such a showing permissible.[84]

3. Undisclosed Intent of Defendant. — When the defamatory statement is plain and unambiguous the defendant cannot testify as to his undisclosed intention or meaning.[85] Thus he cannot show that he did not intend to charge a crime where his words on their face import a criminal charge.[86]

v. Paige, 4 E. D. Smith (N. Y.) 218; Welker *v.* Butler, 15 Ill. App. 209; Eaton *v.* White, 2 Pinn. (Wis.) 42.

It must be shown that all who heard the words spoken understood them in the restricted or mitigated sense. Delaney *v.* Kaetel, 81 Wis. 353, 51 N. W. 559; Hamlin *v.* Fautl (Wis.), 95 N. W. 955. See Fawsett *v.* Clark, 48 Md. 494; Myers *v.* Dresden, 40 Iowa 660.

In McCormack *v.* Sweeney, 140 Ind. 680, 40 N. E. 114, where the words charged on their face imputed the commission of a crime, it was held proper to show by the parties who heard the words spoken that before the speaking of the words the defendant claimed that plaintiff had defrauded him of an amount of money in their partnership business, and that the witnesses understood that the words were spoken with reference to this fact, and were not intended to charge the plaintiff with a crime. The merits of the controversy between the plaintiff and the defendant cannot, however, be inquired into.

Where the alleged defamatory statement charged the plaintiff with swearing to a lie while testifying in a particular case, and a general denial was pleaded, it was held proper for the defendant to show what the plaintiff testified to on such trial, on the ground that this evidence showed the character of the transaction to which the alleged slanderous words referred, and was properly submitted to the jury to enable them to determine whether the witnesses who heard the words understood them to import a charge of perjury. "Where the persons who hear a charge made against another know that a particular transaction is referred to, and know also that the transaction was not such as constituted a crime, no action for slander can be maintained." Berry *v.* Massey, 104 Ind. 486, 3 N. E. 942.

84. Israel *v.* Israel (Mo. App.), 84 S. W. 453.

Where the words on their face impute a crime, the defendant is, nevertheless, not liable if they were not so understood by those who heard them. The burden of proving the latter fact, however, is upon the defendant, the presumption being that the words were understood to charge the offense which they designate. Myers *v.* Dresden, 40 Iowa 660.

Words are presumed to have been intended in their ordinary meaning, and the burden is upon the defendant to overcome this presumption by showing that they were not so intended and understood by the speaker and those who heard him. Emerson *v.* Miller, 115 Iowa 315, 88 N. W. 803.

85. Davis *v.* Hamilton, 88 Minn. 64, 92 N. W. 512 (*distinguishing* Marks *v.* Baker, 28 Minn. 162, 9 N. W. 678); State *v.* Heacock, 106 Iowa 191, 76 N. W. 654; M'Kinly *v.* Rob, 20 Johns. (N. Y.) 350. But see Faxon *v.* Jones, 176 Mass. 206, 57 N. E. 358; Short *v.* Acton (Ind. App.), 71 N. E. 505.

86. Miller *v.* Johnson, 79 Ill. 58.

Where the defendant has made a charge which clearly imputes a crime he cannot afterward be permitted to say that he did not intend what the words legally impute; the intent must be collected from the expressions used, when they have a certain and definite meaning, but if it is doubtful whether the words used impute a crime the intent may become a fair subject of inquiry. M'Kinly *v.* Rob, 20 Johns. (N. Y.) 350.

4. Understanding or Opinion of Witnesses. — A. Generally. On the question of whether the understanding or opinion of the hearers of a slander or the readers of a libel is competent evidence of its meaning the cases are in considerable conflict and confusion. The conflict seems to be due to some extent to the different rules which have been applied for the construction of the words charged.[87] No general rules can be laid down.[88]

B. Of Slanderous Words. — a. *Generally.* — Some cases seem to hold flatly that the hearers of a slander may testify directly as to how they understood it;[89] while others hold that such evidence is incompetent.[90]

b. *When Words Ambiguous.* — Where the words used are ambiguous or uncertain in their meaning some cases hold that the hearers may testify as to how they understood them.[91]

87. Barton *v.* Holmes, 16 Iowa 252.

88. "The authorities are not agreed as to the admissibility of such evidence. . . . It is difficult, if not impossible, to lay down a rule applicable to all cases. Each case must very largely depend upon its own peculiar circumstances." Farrand *v.* Aldrich, 85 Mich. 593, 48 N. W. 628.

89. Freeman *v.* Sanderson, 123 Ind. 264, 24 N. E. 239; Burton *v.* Beasley, 88 Ind. 401; De Armond *v.* Armstrong, 37 Ind. 35, 56; Foval *v.* Hallett, 10 Ill. App. 265. See Tidwell *v.* Witherspoon, 21 Fla. 359, 58 Am. Dec. 665.

90. Callahan *v.* Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583 (in this case the words used charged the plaintiff with being a "downright thief," and are distinguished on this ground in Lewis *v.* Humphries, 64 Mo. App. 466); Rangler *v.* Hummel, 37 Pa. St. 130.

Witnesses may state the words and the circumstances under which they were uttered, but they cannot testify as to how they understood the charge. Wright *v.* Page, 36 Barb. (N. Y.) 438. (But in this case the words were apparently unambiguous and clearly imputed a criminal charge on their face.)

In Weed *v.* Bibbins, 32 Barb. (N. Y.) 315, the opinion or understanding of witnesses as to the meaning of the expression "the Cunningham affair," which expression was used in the alleged slander, was held improperly admitted, the meaning of the language employed and the intention of the defendant in using it being a question for the jury.

A witness, after testifying to all that was said by the defendant, with all the attendant circumstances and connections, cannot testify as to his understanding of the defendant's meaning in the language used. Snell *v.* Snow, 13 Metc. (Mass.) 278, 46 Am. Dec. 730.

91. Reason for Rule. — Where words are clearly actionable on their face, evidence of their meaning is unnecessary, but when the meaning is ambiguous it is competent for witnesses who heard them to testify as to the sense in which they understood them. Barton *v.* Holmes, 16 Iowa 252, recognizing the conflict in the authorities upon this question, and fully discussing the objections urged against the rule adopted. "The main reasons given for the rejection of the testimony of witnesses as to the sense in which they understood the words are that it is but the opinion of the witness, and that if a party is to be liable for the construction another may place upon his language, instead of for the language which he uses, there will be no safety in conversation; and further, that corrupt witnesses might thereby involve innocent parties in utter ruin, by their professed understanding of language perfectly harmless and proper in itself. But these objections are not, in our opinion, well founded. In the first place, when a witness testifies as to the sense in which he understood

c. *When Language Used Unambiguous.* — Some cases hold that where the words used by the defendant are plain and unambiguous, evidence as to their meaning is unnecessary, and the testimony of the hearers that they understood them in a different sense is incompetent.[92]

d. *Words Apparently Not Defamatory.* — Where the words used are not defamatory on their face, plaintiff must show that they were understood in a defamatory sense, and for this purpose the testimony of the hearers as to how they understood the words is admissible.[93]

e. *Dependent on Accompanying Circumstances.* — Where the slan-

the words spoken, he does not testify to an opinion, but to an ultimate fact. The question at issue, under the more modern rule in slander, is, how did the hearers understand the words charged to be slanderous? This is a question of fact to be determined by the jury. The courts all agree that it is competent to prove the facts and circumstances attending the speaking of the words, the situation of the parties, and their relations to the subject-matter or occasion of the slander, and any other portions, or all, of the same conversation. This testimony is admitted in order to enable the jury to correctly determine the ultimate fact, to wit, how the hearers understood the words used. It is not to ascertain the words, for they are directly proved; nor to learn the sense in which the speaker intended to be understood, for his intentions are immaterial, since they cannot limit the injury or atone for the wrong; nor is it to demonstrate the correct definition of the words used, but simply to determine how the hearers understood them. Such evidence is merely circumstantial, tending to prove the ultimate fact, while the testimony of the hearer is direct evidence of the same fact. It is true that the circumstantial evidence is competent, and may be satisfactory and even sufficient to overcome the direct testimony, but the latter is not for that reason to be rejected."

Charges of unchaste conduct are seldom made in plain words, and it is often necessary to prove what the persons who heard the slanderous words understood the person who uttered them to mean. In such a case it is proper to permit a witness who heard the words to state what he understood the defendant to mean by them. Binford *v.* Young, 115 Ind. 174, 16 N. E. 142.

Where the words used are ambiguous they must be construed in the sense in which they were understood by the hearers, and in such case the sense in which they were understood may be proved by witnesses. McLaughlin *v.* Bascom, 38 Iowa 660.

Morgan *v.* Livingston, 2 Rich. L. (S. C.) 573 (*distinguishing* Olmsted *v.* Miller, 1 Wend. [N. Y.] 506; Gibson *v.* Williams, 4 Wend. [N. Y.] 320); Shaw *v.* Shaw, 49 N. H. 533; Wimer *v.* Allbaugh, 78 Iowa 79, 42 N. W. 587, 16 Am. St. Rep. 422 (holding competent the testimony of a hearer that he understood the word "onery" used by the defendant to impute a charge of unchastity); Blakeman *v.* Blakeman, 31 Minn. 396, 18 N. W. 103; Hess *v.* Fockler, 25 Iowa 9. See Riddle *v.* State, 30 Tex. App. 425, 17 S. W. 1073; Foval *v.* Hallett, 10 Ill. App. 265; McKee *v.* Ingalls, 5 Ill. 30; Chamberlin *v.* Vance, 51 Cal. 75.

92. Sowers *v.* Sowers, 87 N. C. 303; Barton *v.* Holmes, 16 Iowa 252; Kidd *v.* Fleek, 47 Wis. 443, 2 N. W. 1121; Jarnigan *v.* Fleming, 43 Miss. 710, 5 Am. Rep. 514.

93. Nidever *v.* Hall, 67 Cal. 79, 7 Pac. 136.

Where the words used are not actionable *per se*, and are not obviously slanderous, evidence of the hearers as to how they understood the words is competent. Lewis *v.* Humphries, 64 Mo. App. 466, *distinguishing* Callahan *v.* Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583, on the ground that in that case the words used were actionable *per se*.

derous character of the words used depends upon accompanying gestures, tones of the voice and other facts which cannot be described, the testimony of the hearers as to how they understood the words is competent.[94]

f. *When Meaning Is Dependent on Facts Known to Hearers.* — So where the meaning is dependent upon some fact known to the hearers they may testify as to how they understood the words used.[95]

g. *When no Circumstances Indicating a Different Meaning.* Some cases seem to hold that evidence as to the understanding of the hearers is not admissible without proof of surrounding circumstances or conduct indicating that the words might have been intended in a sense different from that apparent on their face.[96]

94. Smith *v.* Miles, 15 Vt. 245.

"Where, as is often the case, the slanderous charge is not made in direct terms, but by equivocal expressions, insinuations, gestures, or even tones of the voice, which often have a potent meaning incapable of description, it is competent for witnesses who heard and saw them to state what they understood by them, and to whom they understood them to be applied." Blakeman *v.* Blakeman, 31 Minn. 396, 18 N. W. 103.

Witnesses who heard the charge may testify what they understood the defendant to mean by using "certain expressions, gestures and intonations," both as to the person intended and in regard to the charge made against him. "When the charge is made by gestures and signs, and not solely in words, it is the more necessary to allow a departure from the strict rule that has certainly to some extent prevailed of refusing to permit a witness to state what meaning he understood the defendant to convey by the words used." Leonard *v.* Allen, 11 Cush. (Mass.) 241, *distinguishing* Snell *v.* Snow, 13 Metc. (Mass.) 278, on the ground that that was a case of naked conversation, and that the whole language used was capable of being stated fully to the jury, and of being fully understood by them.

95. Smith *v.* Miles, 15 Vt. 245.

Where the charge is made by using a cant phrase or words having a local meaning, or when advantage is taken of a fact known to the persons spoken to in order to convey a meaning which they understand by connecting the words with such fact, there must be an averment by the plaintiff of the meaning of such phrase or the existence of such collateral fact, and also that the words used were understood in the defamatory sense by the persons addressed, and the latter averment may be proved by the testimony of such persons as to the sense in which they understood the words to be used. Briggs *v.* Byrd, 33 N. C. 353; Sasser *v.* Rouse, 35 N. C. 142.

96. Simmons *v.* Mitchell, L. R. 6 App. Cas. 156. See Smith *v.* Miles, 15 Vt. 245.

Form of Question. — In Daines *v.* Hartley, 3 Ex. 200, the exclusion of the question put to a witness who heard part of the defamatory conversation — "What do you understand by that?" was held no error. Pollock, C. B., says: "There can be no doubt that words may be explained by bystanders to import something very different from their obvious meaning. The bystanders may perceive that what is uttered is uttered in an ironical sense, and therefore that it may mean directly the reverse of what it professed to mean. Something may have previously passed which gives a peculiar character and meaning to some expression; and some word which ordinarily or popularly is used in one sense, may, from something that has gone before, be restricted and confined to a particular sense, or may mean something different from that which it ordinarily and usually does mean. But the proper course for a counsel who proposes so to get rid of the plain and obvious meaning of words imputed to a defendant, as

h. *Witnesses Who Did Not Hear the Slander.* — Witnesses who did not hear the slanderous statement cannot testify as to how they understood it, whether it is ambiguous or unambiguous.[97]

i. *Understanding Must Be at Time of Publication.* — The testimony of the hearers as to their understanding of the words, when competent, must have reference to the time the words were spoken.[98]

C. Of Libel. — a. *Generally.* — Some cases hold that a witness cannot testify as to how he understood the libel;[99] others hold that he may.[1]

b. *Understanding Based on Mere Reading of Libel.* — A witness cannot testify as to his understanding of the libel based on the mere reading of it, unaided by a knowledge of other explanatory facts and circumstances.[2]

c. *Unambiguous Libel.* — Where the meaning of the words used

spoken of the plaintiff, is to ask the witness, not 'What did you understand by those words?' but, 'Was there anything to prevent those words from conveying the meaning which ordinarily they would convey?' because, if there was, evidence of that may be given; and then the question may be put. When you have laid the foundation for it, the question then may be put, 'What did you understand by them?' when it appears that something occurred by which the witness understood the words in a sense different from their ordinary meaning. I believe we may say that generally no question ought to be put in such a form as possibly to lead to an illegal answer. Now, taken by itself, and without more, the understanding of a person who hears an expression is not the legal mode by which it is to be explained. If words are uttered or printed, the ordinary sense of those words is to be taken to be the meaning of the speaker; but no doubt a foundation may be laid by showing something else which has occurred; some other matter may be introduced, and then, when that has been done, the witness may be asked, with reference to that other matter, what was the sense in which he understood the words. But the mere question, 'What did you understand with reference to such an expression?' we think is not the correct mode of putting the question." See also Newbold *v.* Bradstreet, 57 Md. 38.

97. Wimer *v.* Allbaugh, 78 Iowa 79, 42 N. W. 587, 16 Am. St. Rep. 422.

98. Briggs *v.* Byrd, 34 N. C. 377.

99. Beardsley *v.* Maynard, 4 Wend. (N. Y.) 336 (*citing* Van Vechten *v.* Hopkins, 5 Johns. [N. Y.] 211, and *distinguishing* such evidence from testimony as to how others, or people generally, understood the libel); Maynard *v.* Beardsley, 7 Wend. (N. Y.) 560 (suggesting, however, that in case the libel was shown to but one or two persons who did not understand it as conveying any injurious imputation against the plaintiff, their testimony to this effect might be competent to show that there was no publication). Republican Pub. Co. *v.* Miner, 12 Colo. 77, 20 Pac. 345.

1. Where the plaintiff has alleged the meaning of certain words charged as libelous and the persons to whom they refer, he may show by witnesses what they understood the words to mean and to whom they understood them to refer. De Armond *v.* Armstrong, 37 Ind. 35, 56.

Where the word fraud or "frod" was written by the proprietor of a hotel immediately after the name of one of his guests on the hotel register, it was held proper to ask witnesses to whom he exhibited such register what they understood it to mean. State *v.* Fitzgerald, 20 Mo. App. 408.

2. Tompkins *v.* Wisener, 1 Sneed (Tenn.) 458; Chiatovich *v.* Hanchett, 96 Fed. 681.

in the alleged libel is not ambiguous, evidence of witnesses as to how they understood it is not admissible.[3]

d. *Ambiguous Libel.* — Where the character of the charge made is ambiguous or uncertain, readers of the libel familiar with circumstances which would explain it may testify as to how they understood it.[4]

e. *Understanding of Persons Not Witnesses.* — **(1.) Conduct and Statements of Such Persons.** — The conduct and statements of third persons have been held admissible to show their understanding of the alleged libel.[5]

(2.) Opinion as to the Understanding of Others. — A witness cannot

3. Wagner *v.* Saline Co. Progress Print. Co., 45 Mo. App. 6.

Where the defamatory statement charged the plaintiff, a street car conductor, with a failure to ring up fares collected, the testimony of witnesses who had read the statement as to how they understood the words was held incompetent, there being nothing in the evidence to show that the words were susceptible of any other than the single sense of their ordinary use in the business. "It is not competent in an action of libel to aid the innuendo by the mere opinion of a witness." Pittsburgh, A. & M. P. R. Co. *v.* McCurdy, 114 Pa. St. 554, 8 Atl. 230, 60 Am. Rep. 363.

Where the language of the libel is plain and unambiguous it is not competent for a witness who has read it to testify as to what he thinks it means. Quinn *v.* Prudential Ins. Co. of America, 116 Iowa 522, 90 N. W. 349, *citing* Anderson *v.* Hart, 68 Iowa 400, 27 N. W. 289.

4. Wagner *v.* Saline Co. Progress Print. Co., 45 Mo. App. 6.

If the language of the libel is ambiguous either as to the person referred to or as to the nature of the charge intended to be made, the readers who are familiar with the facts and circumstances which would explain the ambiguous statement may testify as to how they understood it and to whom they understood it to refer. "If the language of the article is unambiguous there is no room for evidence of the witness' understanding of its meaning. But if it is ambiguous or ironical . . . it is a case where acquaintances may state their understanding of the language made use of," since it is not necessary that all the world should understand the libel; but it is sufficient that those who know the plaintiff can make out that he is the person meant. Knapp *v.* Fuller, 55 Vt. 311, 45 Am. Rep. 809.

"Upon a careful examination of the cases we are inclined to hold that the true rules to be deduced from them are these: That where the words are ambiguous, and the application doubtful, it must be shown by the plaintiff: (1.) That the words were actually used in their actionable sense, and were applied to the plaintiff. (2.) That the hearers so understood them; and, upon this point, the testimony of the hearers as to how they understood them is admissible, although it would have no legal tendency to show in what sense they were actually used, inasmuch as the hearers may have been under a total misapprehension, both of the meaning and the application, and it would be hard that the defendant should be responsible for such mistake. . . . Great care, however, should be taken that under the pretense of showing how the hearers understood an ambiguous expression the mere opinion of the witness as to the interpretation of the language should not be received." Smart *v.* Blanchard, 42 N. H. 137.

5. Evidence as to insulting letters received by the plaintiff, and of untimely visits by men to her house at night, was held properly admitted, although no special damage upon this ground was alleged, because such evidence tended to show in what sense the publication was understood by the persons sending the letters and

state what was the understanding of other people as to who and what was meant by the alleged libel.[6]

D. Distinction Between Innuendo and Averment. — The truth of an innuendo cannot be proved, but an averment as to the meaning of the words used or their application to the plaintiff must be proved, and evidence is of course competent for this purpose.[7]

E. Meaning of Terms and Expressions Used. — a. *Generally.* Where the alleged defamatory statement contains a local or technical expression or other language which may have an unusual or peculiar meaning, it is competent for a properly qualified witness to state what such expressions mean.[8] Where it appears that words of the defam-

making the visits. Stafford *v.* Morning Journal Ass'n, 68 Hun 467, 22 N. Y. Supp. 1008.

6. Schulze *v.* Jalonick, 14 Tex. Civ. App. 656, 38 S. W. 264.

7. Park *v.* Piedmont & A. L. Ins. Co., 51 Ga. 510.

Evidence is not admissible to support or explain an innuendo. The court explains the difference between an innuendo and an averment, the former being merely by way of recital, and not in the form of a direct allegation. State *v.* Henderson, 1 Rich. L. (S. C.) 179.

The opinion of a witness who had read the libel that he understood it to apply to the plaintiff was held inadmissible, on the ground that it was not proper to permit proof of an innuendo; distinguishing in this respect the averment and colloquium which introduce extrinsic matter. Van Vechten *v.* Hopkins, 5 Johns. (N. Y.) 211. See also Rangler *v.* Hummel, 37 Pa. St. 130.

On a Criminal Prosecution, an innuendo stating the meaning intended by the words used cannot be proved by the opinion or understanding of the hearers. The court says that the rule differs in civil cases, because there the understanding of the hearers is the material inquiry and not the intention of the speaker, but that in a criminal case the intention of the defendant is the gist of the offense. Dickson *v.* State, 34 Tex. Crim. 1, 30 S. W. 807, *reversing* on a rehearing the former opinion in the same case, 28 S. W. 815. But see Riddle *v.* State, 30 Tex. App. 425, 17 S. W. 1073.

8. Com. *v.* Morgan, 107 Mass. 199 (holding competent evidence as to the meaning of the words "state cop"); Schulze *v.* Jalonick, 14 Tex. Civ. App. 656, 38 S. W. 264 (testimony as to the meaning of the expression "blind tiger" admissible); Haley *v.* State, 63 Ala. 89.

"When slanderous words contain a word or phrase in a foreign language which has in common parlance among the people who speak that language a meaning somewhat different from its meaning by lexicographers, and is thus commonly understood by them in common speech, it is competent to prove that fact. . . . This is but an application of the general rule that words are to be construed in the sense in which the hearers would naturally understand them." Blakeman *v.* Blakeman, 31 Minn. 396, 18 N. W. 103.

Where the alleged defamatory statement charged the plaintiff, a street car conductor, with "failing to ring up the fares collected," evidence was held admissible to explain this somewhat technical expression. Pittsburgh, A. & M. P. R. Co. *v.* McCurdy, 114 Pa. St. 554, 8 Atl. 230, 60 Am. Rep. 363.

In explanation of a local phrase not well defined and in general use, witnesses may testify as to the signification or meaning of such words in the locality. Dickson *v.* State, 34 Tex. Crim. 1, 30 S. W. 807, *citing* Com. *v.* Morgan, 107 Mass. 199.

Where the defendant appeared to have charged the plaintiff with being a "blackleg," the testimony of a witness as to what the word "blackleg" meant was held properly admitted, the court on appeal being equally divided on the question of whether

atory publication were used in their ordinary and popular sense, the

there was such ambiguity in the expression as to warrant the introduction of such testimony. Barnett *v.* Allen, 3 H. & N. (Eng.) 376.

Where the alleged slander consisted of the plaintiff's commercial rating in the defendant's books "in blank," it was held proper for witnesses in possession of the key to defendant's reports to explain what was meant by reporting a merchant's standing "in blank," but the opinions of such witnesses as to the effect of such a reading upon the plaintiff's credit in commercial circles were held inadmissible, being mere opinion upon a matter which the jury were capable of estimating for themselves without opinion evidence. Bradstreet Co. *v.* Gill, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 762, 2 L. R. A. 405.

Where the meaning of the words is ambiguous, and it is doubtful whether they contain a slanderous charge, a witness shown to have a special knowledge of the peculiar expressions or abbreviations used in the defamatory statement may testify as to their meaning. In Newbold *v.* Bradstreet, 57 Md. 38, the alleged libel was published in a daily circular publication called "Bradstreet's Daily Sheet of Changes," which was circulated only among subscribers to the defendant's mercantile agency in the city where published. It contained separate divisions or headings relating to different classes of business transactions, and under the heading "Chattels" in one of its sheets occurred the words "Newbold & Sons to J. R. Burns," without anything further to explain the entry. The plaintiff alleged that the meaning of the entry as understood among the subscribers to the agency was that the plaintiff had made a chattel mortgage to J. R. Burns. A witness who stated that he had been for some time a subscriber to, and a reader of, the daily publication and had known instances of chattel mortgages having been placed under the head "Chattels," was held competent to testify as to the meaning of the words in question. "The general rule doubtless is that the ordinary popular meaning or sense of the language alleged to be libelous is to be taken to be the meaning of the publisher; but a foundation may be laid for showing another or a different meaning. And so where the language is of doubtful meaning or import, or where it fails to convey any explicit meaning without the aid of extrinsic circumstances. In such cases, something may have previously passed, or some habit or usage may have obtained, that gave peculiar meaning or significance to the expressions employed. When, therefore, it is desired to get at this peculiar or extraordinary meaning of what is alleged to be libelous, the witness should be first asked whether there be any extraordinary or peculiar meaning expressed by the words in question; and if the answer be in the affirmative he should then state the means and extent of his knowledge upon the subject of the peculiar meaning of the words; and if it appears to be adequate he may then be asked the question, 'What did you understand by the words employed?' This seems to be the settled formula in such cases. Humphreys *v.* Miller, 4 C. & P. 7; Daines *v.* Hartley, 3 Exch. 200, 206; 2 Greenl. Ev., sec. 417. It is the same mode of proof as in the cases of libel published in a foreign language, or in cipher; in each of which cases the witness must first establish to the satisfaction of the court that he understood the language, cipher or symbol employed, before he is allowed to give to the jury his understanding of the libel."

Distinction Between Meaning of Words Used and Meaning Intended. Where the expression "fine work" was used in the alleged libel it was held that the defendant's own testimony as to what he meant when he used these words was properly excluded, but that he should have been permitted to state what the ordinary meaning of these words is. Johnston *v.* Morrison (Ariz.), 21 Pac. 465.

testimony or opinion of a witness as to what they mean is inadmissible.[9]

b. *Subsequent Publications.* — The defendant's subsequent publications defamatory of the plaintiff may be competent to explain ambiguity in the publications relied upon.[10]

VII. REFERENCE TO PLAINTIFF.

1. Burden of Proof. — Where the alleged libel or slander is charged by innuendo to refer to the plaintiff, but this does not appear from the statement itself, the burden is upon the plaintiff to show that he was the person at whom the statement was aimed.[11]

2. Nature of Evidence. — A. GENERALLY. — As evidence that the libel or slander was directed at the plaintiff, he may show the circumstances under which it was published,[12] or that he was known by the name used in the defamatory statement.[13] It has been held that a slander apparently directed against an agent may be shown to have been really intended and understood as a defamation

9. Haley *v.* State, 63 Ala. 89.

Where an action for libel is based upon the use of a particular word in a publication, and it is clear from a consideration of the whole publication that such word was used in its popular and ordinary meaning, and not in a technical sense, the court should so decide, and no evidence of its technical meaning should be permitted to go to the jury. Rodgers *v.* Kline, 56 Miss. 808, holding incompetent testimony of a physician as to the technical meaning of the term "malpractice."

Courts Take Judicial Notice of the meaning of words and idioms in the vernacular language, and no colloquium or innuendo is necessary to point out their meaning. Gibson *v.* Cincinnati Enquirer, 2 Flip. 121, 10 Fed. Cas. No. 5392, *holding* that the court properly defined to the jury the meaning of the abbreviations "crim. con." and "*flagrante delicto*." See article "JUDICIAL NOTICE," Vol. VII.

10. Knapp *v.* Fuller, 55 Vt. 311, 45 Am. Rep. 809; Witcher *v.* Richmond, 8 Humph. (Tenn.) 473. See *infra* "Reference to Plaintiff. — Subsequent Publications."

Slanderous words spoken since the commencement of the suit are admissible in evidence for the sole purpose of showing the sense in which the slanderous words relied upon, and not otherwise actionable, were uttered. Carter *v.* McDowell, Wright (Ohio) 100.

Contra. — Words used by the defendant after the commencement of the suit are not admissible on behalf of the plaintiff to explain ambiguity in the alleged defamatory statement, since the point to be determined is the effect upon the hearers at the time the charge was made, and subsequent words or acts would therefore be immaterial. Lucas *v.* Nichols, 52 N. C. 32.

11. Boone *v.* Herald News Co., 27 Tex. Civ. App. 546, 66 S. W. 313. See also Finnegan *v.* Detroit Free Press Co., 78 Mich. 659, 44 N. W. 585, *per* Sherwood, C. J.

12. Aspenwall *v.* Whitemore, 1 Root (Conn.) 408.

13. In Finnegan *v.* Detroit Free Press Co., 78 Mich. 659, 44 N. W. 585, *per* Sherwood, C. J., it was held that the plaintiff, in order to show that he was the person referred to, was properly allowed to offer in evidence city directories of certain years, letters addressed to him, his father's last will and a bond and mortgage made by himself and mother, as evidence that he was known by the name used in the libel, and that no other person of the same name resided in the city at the time the libelous article was published.

of his corporation principal.[14] The plaintiff may give evidence of all the surrounding circumstances and other extraneous facts which point out the person to whom the allusion applies.[15]

B. Identity of Name. — The identity of the plaintiff's name with that used in the libel or slander is presumptive evidence that he was the person referred to.[16]

C. Understanding of Witnesses. — a. *Generally.* — As to whether a witness may testify as to whom he understood the libel or slander to refer, the cases are in such conflict and confusion that it is practically impossible to formulate many general rules.[17]

b. *Words Referring to no Particular Person.* — Where there is nothing in the words used or in the surrounding circumstances showing that any particular person was intended to be charged, the testimony of the hearers or readers as to their understanding is not competent.[18]

14. Although a defamatory article appears on its face to refer individually to the managing agent of a corporation, it may be shown by extrinsic evidence that it was published concerning the corporation acting through its agent, and would be so understood by those who read it. Martin Co. Bank *v.* Day, 73 Minn. 195, 75 N. W. 1115.

15. Van Ingen *v.* Mail & Express Pub. Co., 156 N. Y. 376, 50 N. E. 979. In this case the alleged libel was a publication in defendant's evening paper charging the London head of a New York firm of cloth jobbers with collecting a corruption fund in England for political purposes in America. As evidence that the plaintiff was the person referred to, several articles in morning papers published on the same day, making the same charge against the plaintiff and describing him as the London head of a New York firm of cloth jobbers, were held properly admitted. The court said: "Under these circumstances it seems to me that proof of the condition of the public mind and the means of information the public had was admissible as an attendant circumstance which indicated that the defendant's article referred to the plaintiff."

16. See article "Identity," and also Hatcher *v.* Rocheleau, 18 N. Y. 86; Jackson *v.* King, 5 Cow. (N. Y.) 237; Jackson *v.* Goes, 13 Johns. (N. Y.) 518; Simpson *v.* Dinsmore, 9 M. & W. (Eng.) 47; Sewell *v.* Evans, 4 Q. B. 626.

Where the alleged libel was concerning "John Finnegan," and there was evidence to show that the plaintiff called himself and was generally known as "John D. Finnegan," a refusal to instruct the jury that if they found that the plaintiff was universally and generally known by the latter name and not by the former, and that the middle initial had been adopted by him expressly to distinguish himself from persons known by the former name, then there would be no presumption that the article referred to the plaintiff, was held error by Morse, J. But see the opinion of Sherwood, C. J. Finnegan *v.* Detroit Free Press Co., 78 Mich. 659, 44 N. W. 585.

17. See Farrand *v.* Aldrich, 85 Mich. 593, 48 N. W. 628.

18. Herzman *v.* Oberfelder, 54 Iowa 83, 6 N. W. 81.

Where the alleged libel consisted of an affidavit plainly charging forgery of a note presented to defendant for payment, but not naming any person, the opinion of a witness as to whom it referred was held not competent. "When a libelous communication on its face directly or by way of innuendo, or otherwise, refers to any person it is possibly true that a witness may be asked who or what person was meant. Subject to this rule, the decided weight of authority, we think, is that the alleged libel

c. *Of Slander.* — **(1.) Generally.**— Some cases hold that a witness who heard the words spoken may testify as to whether he understood the charge to refer to the plaintiff.[19]

(2.) When Not Apparent From Words Used.— Where the slanderous statement does not on its face directly refer to the plaintiff the hearers may testify that they understood it to refer to the plaintiff.[20] Where the slanderous statement does not directly refer to the plaintiff the hearers may testify that they understood from the gestures, tone of voice and expressions of the defendant that the plaintiff was the person intended to be referred to.[21] Such testimony should be cautiously received in all cases, and should be excluded when the meaning of the words is reasonably plain.[22]

(3.) Distinction Between Absent and Present Person.— A distinction has been drawn between slander of an absent person and one who is present, and it has been held that in the latter case if the name of the person addressed is not used the hearers may testify as to the person intended.[23]

must be construed by the court and jury." In this case there were no attending circumstances indicating that plaintiff was the person referred to. Anderson *v.* Hart, 68 Iowa 400, 27 N. W. 289, *distinguishing* Prime *v.* Eastwood, 45 Iowa 640; Dixon *v.* Stewart, 33 Iowa 125; McLaughlin *v.* Bascom, 38 Iowa 660; Kinyon *v.* Palmer, 18 Iowa 377; Barton *v.* Holmes, 16 Iowa 252.

19. Tottleben *v.* Blankenship, 58 Ill. App. 47; Dexter *v.* Harrison, 146 Ill. 169, 34 N. E. 46, *following* Nelson *v.* Borchenius, 52 Ill. 236.

Whether those who heard the words understood that they had reference to the plaintiff is one of the extrinsic facts by which the application of the defamatory matter to the plaintiff, if controverted, must be established, and it may be shown by the understanding of the hearers that they were applicable to the plaintiff. Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845.

20. Where the defamatory statement imputed a charge of theft, but did not directly name the plaintiff as the guilty party, the opinion of a witness who heard the statement as to whether it was intended to refer to the plaintiff was held properly admitted. Smawley *v.* Stark, 9 Ind. 386, *following* Miller *v.* Butler, 6 Cush. (Mass.) 71, and *quoting* from 2 Greenl. Ev., § 417: "The meaning of the defendant is a question of fact, to be found by the jury. It may be proved by the testimony of any persons conversant with the parties and circumstances; and from the nature of the case they must be permitted, to some extent, to state their opinion, conclusion and belief, leaving the grounds of it to be inquired into on a cross-examination." The court further says: "From the facts, the opinions of the witnesses as to the person meant, and the grounds of these opinions, the jury will be enabled to reach a more satisfactory conclusion than from the facts themselves. Besides, this exception to the general rule can only be called into requisition when there is the purpose to injure, conjoined with equivocal language to elude the law. . . . The witness is only permitted to explain an ambiguity in the conversation, just as he would in a writing, that it may have its proper legal operation."

21. Blakeman *v.* Blakeman, 31 Minn. 396, 18 N. W. 103; Leonard *v.* Allen, 11 Cush. (Mass.) 241; Cook *v.* Barkley, 2 N. J. L. 169, 2 Am. Dec. 343. See also Briggs *v.* Byrd, 33 N. C. 353; Sasser *v.* Rouse, 35 N. C. 142.

22. Shaw *v.* Shaw, 49 N. H. 533.

23. In McCue *v.* Ferguson, 73 Pa. St. 333, where the slanderous words were spoken in the second person to one of several persons present, for the purpose of determining which one of such persons was addressed

d. *Of Libel.* — **(1.) Generally.** — Some cases seem to hold that witnesses who read the libel cannot testify that they understood it to refer to the plaintiff;[24] others hold that they can.[25]

(2.) When Language Is Ambiguous. — (A.) GENERALLY.— Where the language of the libel is ambiguous and does not show on its face against whom the charge was directed, some cases hold that the readers of the libel may testify that they understood it to refer to the plaintiff.[26]

(B.) WITNESSES ACQUAINTED WITH PLAINTIFF AND EXPLANATORY CIRCUMSTANCES.— Where there is ambiguity or uncertainty as to whom the defamatory publication was directed against, witnesses who were at the time acquainted with the plaintiff and with facts and circum-

a bystander may give his opinion, since that is the only evidence possible under the circumstances. The court approves, but distinguishes Rangler *v.* Hummel, 37 Pa. St. 130, and other similar cases on the ground that they were cases of the slander of an absent person. "The opinion of a witness could only be as to the meaning of the words used, of which, when all the facts and circumstances were given in evidence, the jury would be as good judges as any witness. But when the words are in the second person, addressed to some one present, the question to whom addressed is a question of fact, necessarily dependent upon opinion more or less distinct. If the name of the person addressed is not used the bystanders can only have an opinion as to whom was meant to be addressed, and this may depend upon many things in the voice, eyes and gestures of the utterer."

24. Smart *v.* Blanchard, 42 N. H. 137 (distinguishing in this respect the testimony of witnesses as to their understanding of the words used and of their application to the plaintiff); People *v.* McDowell, 71 Cal. 194, 11 Pac. 868; White *v.* Sayward, 33 Me. 322 (disapproving statements apparently to the contrary in 2 Stark. Ev., § 861, and 2 Greenl. Ev., § 417. The decision, however, seems to be based upon the proposition that the opinions of witnesses as to the intention and meaning of the defendant are not competent).

25. De Armond *v.* Armstrong, 37 Ind. 35, 56.

26. Schulze *v.* Jalonick, 14 Tex. Civ. App. 656, 38 S. W. 264. See also Goodrich *v.* Davis, 11 Metc. (Mass.) 473, 484.

Although the authorities are conflicting upon the question whether a witness may explain the sense in which he understood the defamatory language, the weight of authority supports the view that when the person sought to be libeled is designated in an ambiguous manner, witnesses may be asked as to whom they understood the defendant to mean. People *v.* Ritchie, 12 Utah 180, 42 Pac. 209.

In Farrand *v.* Aldrich, 85 Mich. 593, 48 N. W. 628, where the name used in the libel was misspelled, but in sound was very similar to the correct name, it was held proper for the plaintiff to ask a witness, who had read the libel, to whom he thought it referred. The court says: "The authorities are not agreed as to the admissibility of such evidence. . . . It is difficult, if not impossible, to lay down a rule applicable to all cases. Each case must very largely depend upon its own peculiar circumstances."

When the libelous publication does not name the person referred to, but describes him in respect to his former occupation, conduct and size, the opinion of a witness who testified that he thought the plaintiff was referred to, and who gave the facts upon which his opinion rested, is admissible in evidence, since the fact that a reader of the libel thought it referred to the plaintiff was injurious to the latter, and the evidence was competent not only to distinguish the plaintiff as the party slandered, but in aggravation of damages. Howe Mach. Co. *v.* Souder, 58 Ga. 64.

stances explaining the ambiguous language may testify that they understood it to apply to the plaintiff.[27]

(C.) Distinction Between Opinion and Direct Testimony. — A distinction has been made between the opinion of a witness as to the identity of the person referred to in the libel and his direct testimony that he knows to whom it refers.[28]

27. *England.* — Bourke *v.* Warren, 2 Car. & P. 307, 12 E. C. L. 138.

California. — Russell *v.* Kelly, 44 Cal. 641.

Massachusetts. — Miller *v.* Butler, 6 Cush. 71, *distinguishing* Snell *v.* Snow, 13 Metc. 278.

Michigan. — Finnegan *v.* Detroit Free Press Co., 78 Mich. 659, 44 N. W, 585, *per* Sherwood, C. J.

Ohio. — McLaughlin *v.* Russell, 17 Ohio 475.

Oregon. — State *v.* Mason, 26 Or. 273, 38 Pac. 130, 46 Am. St. Rep. 629, 26 L. R. A. 779.

Vermont. — Knapp *v.* Fuller, 55 Vt. 311, 45 Am. Rep. 809.

In Enquirer Co. *v.* Johnston, 72 Fed. 443, 18 C. C. A. 628, 34 U. S. App. 607, it was held proper for an acquaintance of the plaintiff to testify that when he read the libel he understood it to refer to plaintiff, the identity of the person referred to not clearly appearing from the words used. The court distinguishes Eastwood *v.* Holmes, 1 F. & F. (Eng.) 349, on the ground that in that case the publication showed on its face that it had no application to the plaintiff.

In Chiatovich *v.* Hanchett, 96 Fed. 681, upon the question of whether the publication relied upon was defamatory it was held no error to admit on behalf of the plaintiff the testimony of witnesses living in the community who knew both parties, and who read the statement, as to their understanding of the meaning of the words contained in the statement. The court distinguishes Hearne *v.* De Young, 119 Cal. 670, 52 Pac. 150, 499, on the ground that there the witnesses "knew nothing of the parties or the circumstances, save what they gathered from the publication; their conclusions were based alone upon the reading of the article, and under such conditions the jurors were as competent to arrive at a correct conclusion as to the meaning of the publication as were witnesses."

Reason for Rule. — While the witness cannot give an opinion which is based merely on a reading of the libel, or hearing the words spoken, unaided by any circumstances previously within his knowledge, or accompanying the act, nevertheless the understanding of a witness as to the meaning of words, or of their application to the plaintiff, derived from accompanying circumstances or facts previously known to him, and detailed by him as the ground of such understanding, is competent, its correctness being a matter for the jury. "From the very nature of the case, witnesses must be permitted, under proper qualifications, to state their understanding and conclusion, as well in regard to the sense in which the words were used as to their application; for it is the sense and application of the words, *as understood by the hearers,* which caused the damage and constituted the very *gist* of the action." Tompkins *v.* Wisener, 1 Sneed (Tenn.) 458.

28. Where the libel is such that it is doubtful to whom it refers a witness cannot give his opinion as to the identity of the person referred to, but may testify directly as to whether he knows to whom it refers, and may give facts and circumstances upon which his testimony is based. Smith *v.* Sun Pub. Co., 50 Fed. 399, *distinguishing* Van Vechten *v.* Hopkins, 5 Johns. (N. Y.) 211, and Maynard *v.* Beardsley, 7 Wend. (N. Y.) 560. On appeal this ruling was approved without expressly passing upon the question involved, on the ground that even if incompetent the testimony was not prejudicial, because there was practically no dispute as to the identity of the person referred to. Smith *v.* Sun Pub. Co., 55 Fed. 240. See also Smart *v.* Blanchard, 42 N. H. 137.

e. *Understanding Based Merely on Reading of Libel or Hearing the Slander.* — Some cases hold that a witness cannot testify as to his understanding that the defamatory statement was directed at the plaintiff merely from reading the libel or hearing the slander, without a further knowledge of the facts and circumstances.[29]

f. *In Criminal Prosecutions.* — The rules applied in civil actions as to the understanding of the hearers or readers of the slander or libel are equally applicable to criminal prosecutions.[30]

D. Subsequent Publications by the defendant may be competent to show that the publication charged was intended to refer to the plaintiff[31] if it be ambiguous on this point.

VIII. DAMAGES.

1. Presumption of Damage. — Some actual damage to the plaintiff is presumed to have resulted from the publication of a charge which is actionable *per se*.[32] And unless the occasion was privileged this

29. Tompkins *v.* Wisener, 1 Sneed (Tenn.) 458; Chiatovich *v.* Hanchett, 96 Fed. 681. See McLaughlin *v.* Russell, 17 Ohio 475.

30. "The object and purpose to be attained by such evidence is the same in civil and criminal cases, and the reason and necessity for its admission applies with equal force to both classes of actions." State *v.* Mason, 26 Or. 273, 38 Pac. 130, 46 Am. St. Rep. 629, 26 L. R. A. 779.

31. Subsequent publications referring to the libel on which the action is based are admissible to show malice, and that the defendant himself considered the libel sued on as applying to the plaintiff. Chubb *v.* Wesley, 6 Car. & P. 436, 25 E. C. L. 474.

Where the Plaintiff's Name Does Not Appear in the Publication, a subsequent publication by the defendant may be admissible to show that the first statement referred to the plaintiff. Russell *v.* Kelly, 44 Cal. 641, *citing* Chubb *v.* Wesley, 6 Car. & P. 436, 25 E. C. L. 474; White *v.* Sayward, 33 Me. 322.

Evidence that the defendant, after suit brought, published another article referring to the plaintiff by name was held admissible to show malice and the intention in publishing the first article, which was ambiguous as to the person referred to and as to the nature of the charge. Knapp *v.* Fuller, 55 Vt. 311, 45 Am. Rep. 809.

In an action against the editor of a newspaper for a libelous publication the plaintiff may show articles in subsequent numbers of the same paper for the purpose of proving that he was the person intended to be defamed. White *v.* Sayward, 33 Me. 322.

32. *Alabama.* — Shelton *v.* Simmons, 12 Ala. 466.

Colorado. — Republican Pub. Co. *v.* Mosman, 15 Colo. 399, 24 Pac. 1051; Republican Pub. Co. *v.* Miner, 12 Colo. 77, 20 Pac. 345.

Delaware. — Donahoe *v.* Star Pub. Co., 4 Pen. 166, 55 Atl. 337.

Indiana. — Gabe *v.* McGinnis, 68 Ind. 538; Dean *v.* Miller, 66 Ind. 440; Yeates *v.* Reed, 4 Blackf. 463, 32 Am. Dec. 43.

Iowa. — Prewitt *v.* Wilson, 103 N. W. 365; Parker *v.* Lewis, 2 Greene 311; Morse *v.* Times-Republican Print. Co., 100 N. W. 867.

Kansas. — Miles *v.* Harrington, 8 Kan. 425.

Louisiana. — McClure *v.* McMartin, 104 La. 496, 29 So. 227; Mallerich *v.* Mertz, 19 La. Ann. 194; Mequet *v.* Silverman, 52 La. Ann. 1369, 27 So. 885; Savoie *v.* Scanlan, 43 La. Ann. 967, 9 So. 916, 26 Am. St. Rep. 200.

Maine. — True *v.* Plumley, 36 Me. 466.

Maryland. — Shafer *v.* Ahalt, 48 Md. 171.

Michigan. — Newman *v.* Stein, 75

presumption of actual damage from the publication of the libel is conclusive.[33]

2. Effect on Reputation. — The plaintiff may show the effect of the defamatory publication upon his reputation,[34] and for this purpose it is competent to show the conduct and attitude of the plaintiff's friends and acquaintances toward him before and after the publication.[35] A witness cannot, however, testify directly that the plaintiff's standing and reputation in the community were not injuriously affected.[36]

3. Belief of Hearers and Effect on Their Minds. — The fact that the persons who heard the slander did not believe it is not competent for any purpose.[37] But it has been held that the plaintiff may show by the readers of the libel what effect it produced upon them, as evidence that he was damaged.[38]

4. Extent of Circulation. — A. GENERALLY. — Where the libel is published in an edition of many copies for general circulation the extent of the circulation may be shown as evidence of the extent

Mich. 402, 42 N. W. 956, 13 Am. St. Rep. 447; Mains *v.* Whiting, 87 Mich. 172, 49 N. W. 559; Haney Mfg. Co. *v.* Perkins, 78 Mich. 1, 43 N. W. 1073; Whittemore *v.* Weiss, 33 Mich. 348.

Missouri. — Rammell *v.* Otis, 60 Mo. 365; Price *v.* Whitely, 50 Mo. 439.

Nebraska. — Pokrok Zapadu Pub. Co. *v.* Zizkovsky, 42 Neb. 64, 60 N. W. 358; Boldt *v.* Budwig, 19 Neb. 739, 28 N. W. 280.

Oregon. — Upton *v.* Hume, 24 Or. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493.

Texas. — Bailey *v.* Chapman, 15 Tex. Civ. App. 240, 38 S. W. 544; Boone *v.* Herald News Co., 27 Tex. Civ. App. 546, 66 S. W. 313.

Damage is presumed from a false imputation against plaintiff's chastity. Israel *v.* Israel (Mo. App.), 84 S. W. 453; Hulbert *v.* New Nonpareil Co., 111 Iowa 490, 82 N. W. 928.

The Fact That the Hearers of the Slander Did Not Believe It does not overcome the presumption of injury from a publication libelous *per se*. Hacker *v.* Heiney, 111 Wis. 313, 87 N. W. 249.

33. Staub *v.* Van Benthuysen, 36 La. Ann. 467; Wimbish *v.* Hamilton, 47 La. Ann. 246, 16 So. 856; Palmer *v.* Mahin, 120 Fed. 737.

34. Schulze *v.* Jalonick, 18 Tex. Civ. App. 296, 38 S. W. 264.

35. As evidence of the injurious effect of the publication upon the plaintiff's reputation among his friends and acquaintances it is competent to show their unfavorable comments concerning him made after the publication, such injury having been specially alleged. O'Toole *v.* Post Print. & Pub. Co., 179 Pa. St. 271, 36 Atl. 288.

But the conduct of plaintiff's friends and acquaintances toward him after the publication is only admissible where it is shown to be the direct result of the libel or slander. Kersting *v.* White, 107 Mo. App. 265, 80 S. W. 730.

36. Schomberg *v.* Walker, 132 Cal. 224, 64 Pac. 290.

A Witness Cannot Give His Opinion that the reputation of the plaintiff was not affected by the slander. Titus *v.* Sumner, 44 N. Y. 266.

37. Such evidence is not competent either on the theory that it shows the defendant to be unworthy of belief, or that it indicates that plaintiff's character was too good to be affected. Richardson *v.* Barker, 7 Ind. 567.

38. In proof of an allegation of special and general damage resulting from the publication of certain letters by defendant, it was held proper to ask the parties who received the letters or overheard their contents discussed as to the effect produced upon them

of the damage.[39] It is not necessary that such circulation be shown to have been caused or procured directly by the defendant publisher.[40]

B. NEWSPAPER. — Where the libel was published in a newspaper, as evidence of the injury inflicted it is competent to show the extent of the circulation of such paper.[41] This fact may be shown in various ways, as by the books and subscription lists of the publishers,[42] statements in the newspaper itself,[43] the fact that various persons called the plaintiff's attention to the libelous article,[44] or that it was reproduced in other papers.[45] The evidence of the circulation

by the letters, the evidence not being offered to prove the meaning of the words used or the innuendo charged, but the substantive fact of damage. Warner *v.* Clark, 45 La. Ann. 863, 13 So. 203, 21 L. R. A. 502.

39. Bigelow *v.* Sprague, 140 Mass. 425, 5 N. E. 144; Gathercole *v.* Miall, 15 M. & W. (Eng.) 319.

40. Where the alleged libel consisted of hand bills published by the defendant with the avowed purpose of deterring strangers from traveling in plaintiff's coaches, evidence that unknown persons had put up such hand bills in public houses was held properly admitted to show the extent of the publication. "The defendant having procured the hand bills to be printed, must be responsible for the publication of them. The publication under such circumstances should be presumed to be done at his solicitation and by his procurement, unless he prove the contrary." Rice *v.* Withers, 9 Wend. (N. Y.) 138.

Where the libel was published in a newspaper, evidence that copies of the newspaper containing the libel have been gratuitously circulated, although not shown to have been sent by the defendant publisher, is admissible to show the extent of the circulation of the paper and the consequent damage to the plaintiff, though not to show malice, the reason apparently being that a newspaper is published for general circulation. The court further held that the testimony of a witness that he had seen a copy of the newspaper, containing, according to the best of his recollection, the libel which was the subject of the pending action, in a public reading room, but that it had since disappeared, was a sufficient showing that the paper seen in the reading room was one of the copies of the defendant's newspaper containing the libel, and also was sufficient proof of the loss of the paper to warrant the introduction of secondary evidence of its contents. Gathercole *v.* Miall, 15 M. & W. (Eng.) 319.

41. Fry *v.* Bennett, 28 N. Y. 324; Bee Pub. Co. *v.* Shields (Neb.), 94 N. W. 1029; Locke *v.* Chicago Chronicle Co., 107 Iowa 390, 78 N. W. 49; Park *v.* Detroit Free Press Co., 72 Mich. 560, 40 N. W. 731, 16 Am. St. Rep. 544, 1 L. R. A. 599; Palmer *v.* Mahin, 120 Fed. 737.

42. The Shipping, Mailing and Subscription Lists of the Paper and Its Books of Account with its subscribers are competent. Palmer *v.* Mahin, 120 Fed. 737.

43. Copies of the Newspaper published by the defendant at about the date of the libel stating the extent of its circulation at that time are competent evidence to prove that fact. Fry *v.* Bennett, 3 Bosw. (N. Y.) 200.

44. Plaintiff should be permitted to show that various persons called his attention to the libelous article. Such facts would tend to indicate the extent of its circulation. Park *v.* Detroit Free Press Co., 72 Mich. 560, 40 N. W. 731, 16 Am. St. Rep. 544, 1 L. R. A. 599.

45. Reproduction of Article in Other Papers. — As evidence of the extensive circulation of the libel in aggravation of damages it was held proper to permit the plaintiff to introduce in evidence a copy of the "Police Gazette," published in New York, containing the substance of the obnoxious publication, illustrated with a picture representing the act charged. Ratcliffe *v.* Louisville

of the paper need not be confined to the date of the publication.[46]

C. Rumors and General Currency of the Charge. — While the defendant is not responsible for the circulation of the defamatory charge by other persons,[47] nevertheless as evidence of the extent of the circulation of the charge relied on it is competent to show rumors or reports that the defendant has made such a charge, or the general currency of the statement if there be any circumstance tending to show the defendant's connection therewith and his responsibility therefor.[48]

5. Opinion as to Damage. — The opinion of a witness as to whether the plaintiff has sustained damages, or as to the amount

Courier-Journal Co., 99 Ky. 416, 36 S. W. 177.

46. The Circulation of the Paper Six Months Subsequent to the date of the publication charged may be shown. "The difficulty in such case for the plaintiff to procure evidence is apparent. . . . It was peculiarly within the power of the defendants to show the extent of their circulation. Considerable latitude should certainly be allowed plaintiffs in libel suits to make out a *prima facie* case in this respect." Farrand *v.* Aldrich, 85 Mich. 593, 48 N. W. 628.

47. Repetition of the slander by a third person cannot be shown, since the defendant is not responsible for the damages resulting therefrom. Cameron *v.* Corkran, 2 Marv. (Del.) 166, 42 Atl. 454.

48. A Rumor or Current Report that defendant had made the defamatory statement charged may be shown to increase the damages. "The repetition of a slander, so far as it is the result of the defendant's wrongful act, is always competent to be shown in evidence." Smith *v.* Moore, 74 Vt. 81, 52 Atl. 320. To the same effect, Kidder *v.* Bacon, 74 Vt. 263, 52 Atl. 322; Nott *v.* Stoddard, 38 Vt. 25, 88 Am. Dec. 633.

Where the slanderous statement charged the plaintiff with professional misconduct, evidence that the slanderous story was current after the date of its publication by the defendant was held properly admitted, although there was no evidence directly tracing the current report to the defendant's utterance of the slander, the connection between the two being a question for the jury. Rice *v.* Cottrel, 5 R. I. 340. But see Leonard *v.* Allen, 11 Cush. (Mass.) 241, where it was held that the plaintiff cannot show that it was currently reported in the neighborhood that the defendant had charged him with the crime imputed to him by the alleged slander, on the theory that the plaintiff was injured by the charges of the defendant being put into general circulation, when there is nothing but hearsay to connect such current reports with the defendant.

Evidence that other persons than those in whose presence the words were spoken had heard of them and of the charge made is not admissible in the absence of evidence tending to show a repetition of the language by the defendant or the circumstances under which it is repeated. Zurawski *v.* Reichmann, 116 Iowa 388, 90 N. W. 69.

Evidence that there were rumors in the neighborhood, subsequent to the publication alleged, that defendant had made the slanderous charge, is not competent without evidence of the circumstances under which the slanderous words were repeated, since the defendant is not responsible for an independent repetition of the words by others. Prime *v.* Eastwood, 45 Iowa 640.

A Letter Written by a Third Person stating that the writer knew of the slanderous report is admissible to show that the report had circulated, but not to show that the defendant was responsible therefor. Schwartz *v.* Thomas, 2 Wash. 167, 1 Am. Dec. 479.

thereof, is ordinarily incompetent.[49] The opinion or conclusion of a witness as to the effect of the defamatory statement upon the plaintiff's business and standing is ordinarily incompetent.[50]

6. Damage in Profession or Employment. — A. GENERALLY. Where the plaintiff claims that the defamatory publication injured him in his profession or employment he may show this fact by evidence of a resulting decrease in his professional income,[51] or that in consequence thereof he was discharged from his employment or was unable to obtain employment.[52] The plaintiff may show what his profession is, and his standing and reputation therein before and

49. See more fully the articles "DAMAGES" and "EXPERT AND OPINION EVIDENCE."

The opinion of a witness as to whether the plaintiff has sustained damages generally in consequence of the slanderous words is not admissible, this being a question for the jury. Alley *v.* Neely, 5 Blackf. (Ind.) 200.

Where the complaint does not aver special damage a witness cannot give his opinion as to the amount of damage which the plaintiff has sustained. Fleming *v.* Albeck, 67 Cal. 226, 7 Pac. 659.

Where the defendant, a clergyman, was charged with uttering false statements and defaming the good name of members of the church, the opinion of another clergyman as to the effect which such a charge would have upon defendant's reputation and usefulness was held improperly admitted, being a mere conclusion. Piper *v.* Woolman, 43 Neb. 280, 61 N. W. 588.

50. Where the libel was published concerning the plaintiff as an opera manager, a witness cannot be asked what was the effect of the libel upon plaintiff's operahouse and the attendance thereat. Such a question calls for an inadmissible conclusion. Fry *v.* Bennett, 3 Bosw. (N. Y.) 200.

Where the libel complained of was the publishing of defendant's name in a list of persons unworthy of business credit, testimony of a witness, who did not know the plaintiff, that the latter's credit would have been injured by such a publication, and that the effect thereof would be to damage the commercial standing of any man, was held incompetent because merely the opinion of the witness. Brown *v.* Durham, 3 Tex. Civ. App. 244, 22 S. W. 868.

A witness who has examined the books of the plaintiff newspaper cannot testify to his conclusion that the advertising business had fallen off during the year following the libel. Bee Pub. Co. *v.* World Pub. Co., 59 Neb. 713, 82 N. W. 28.

51. Crouch *v.* Mining Journal, 130 Mich. 294, 89 N. W. 936.

Evidence as to the injuries suffered by the defendant in his calling, which he had abandoned twelve years previous, is not admissible. Ward *v.* Ward, 47 W. Va. 766, 35 S. E. 873.

Where the slander attacks the plaintiff in his professional capacity it is competent for him to show that immediately thereafter his professional income decreased. Rice *v.* Cottrel, 5 R. I. 340.

52. In Fowles *v.* Bowen, 30 N. Y. 20, as evidence of special damage it was held competent for the plaintiff to show the contents of a letter written by the person to whom the slander was uttered advising his partner to discharge the plaintiff from their employ, and stating the substance of the writer's conversation with the defendant.

Plaintiff may show that by reason of the charges he lost his employment, and that his employer gave this as the reason for his discharge. Smith *v.* Moore, 74 Vt. 81, 52 Atl. 320.

Where the libel charged was a publication in a newspaper charging the plaintiff with theft, and it was alleged that plaintiff had been discharged from her employment as a result thereof, evidence that a few days after the publication her employer had discharged her, giving as his reason that there were flying re-

after the publication.[53] So also he may show his occupation[54] and the various employments in which he was engaged at the time of the publication.[55]

B. Proof of Trade, Profession or Official Capacity. — Where the defamatory words charge the plaintiff with incompetency or misconduct in his trade, profession or official capacity, and the charge itself by its terms assumes that the plaintiff was carrying on such a trade or profession, or acting in such official capacity, there is no necessity for proving this fact,[56] or at most it is only necessary for the plaintiff to show that he was acting in such capacity.[57] Where, however, the defamatory statement questions the plaintiff's legal

ports in the newspaper about her and her sister, was held properly admitted, although there was no other evidence that the employer had seen the particular publication charged, or to what reports and newspapers he referred. Moore *v.* Stevenson, 27 Conn. 14.

53. Where it is charged that because of the libel the plaintiff, a physician, has been annoyed, disgraced and subjected to loss of reputation and business and greatly damaged in his profession, he may show his income before and after the publication, the conduct and treatment of his patients and acquaintances, and his own feelings. Parker *v.* Republican Co., 181 Mass. 392, 63 N. E. 931.

Where the complaint charges that the plaintiff suffered special damage in her professional character because of the defamatory statement, evidence was held properly admitted in respect to her reputation and standing in her profession before the speaking of the words, and the loss of employment in that capacity in consequence of the slander. Kidder *v.* Bacon, 74 Vt. 263, 52 Atl. 322.

Where the alleged slander charged the plaintiff with dishonesty in his profession, it was held proper to show the rank, profession and standing of either plaintiff or defendant. Parke *v.* Blackiston, 3 Har. (Del.) 373.

54. Perrine *v.* Winter, 73 Iowa 645, 35 N. W. 679; Peltier *v.* Mict, 50 Ill. 511.

55. In Halley *v.* Gregg, 82 Iowa 622, 48 N. W. 974, it was held competent for the plaintiff to testify as to his various employments at the time of the slander as postmaster, station agent and janitor of a church, and that he had taught school, on the ground that the slander charged would affect him prejudicially in these various employments.

56. Where the words charged were spoken of the plaintiff in his trade, if the words proved assume that when they were spoken the plaintiff was carrying on such trade there is no need of proving that fact. Hesler *v.* Degant, 3 Ind. 501.

Where the alleged defamatory statement is made concerning plaintiff's professional character it is sufficient for him to prove that he has practiced his profession. Ritchie *v.* Widdemer, 59 N. J. L. 590, 35 Atl. 825.

57. In an action for slander where the words used were "the Rev. Thomas Smith is a perjured man," the plaintiff may prove by parol evidence that he is a minister of the gospel. Strict evidence of the church records is not necessary, because the defendant by his own words has avowed the fact to be proved. Cummin *v.* Smith, 2 Serg. & R. (Pa.) 440.

In an action by an attorney for defamatory words spoken of him in his profession, evidence that he acted as an attorney is sufficient proof of his official capacity. Berryman *v.* Wise, 4 T. R. 366.

On a criminal prosecution for libeling a public officer his official character may be proved by parol. It is necessary to show the record of his appointment only in proceedings where the officer undertakes to justify his own conduct. State *v.* Lyon, 89 N. C. 568.

right to engage in a profession or hold office, the right must be fully proved to warrant damages for injury thereto.[58]

7. Loss to Business. — A. GENERALLY. — The plaintiff may show the loss to his business resulting from the defamatory publication,[59] and where the words are actionable *per se* he may show the general loss to his business without specially pleading it.[60] But special damages must be pleaded before evidence relating thereto is admissible.[61] The defendant may show the general decrease in his business without proving the details of the loss.[62] He may, however, show the amount of his daily receipts previous to and following the defamatory publication.[63]

58. Ritchie *v.* Widdemer, 59 N. J. L. 290, 35 Atl. 825.

Where the slander charges the plaintiff with incompetency in his profession and an absence of legal right to practice the same, the plaintiff must show fully his legal right to practice such profession. Collins *v.* Carnegie, 1 A. & E. 695, 28 E. C. L. 180.

59. Couch *v.* Mining Journal, 130 Mich. 294, 89 N. W. 936.

Where the plaintiff alleges injury to his business, the amount of his sales for the year in which the libel was published may be shown, though it covered some time previous to the publication, but the defendant should not be precluded from drawing out the facts in detail afterward so as to enable the jury to distinguish between the business before and after the publication. Whittemore *v.* Weiss, 33 Mich. 348.

The plaintiff may show the decrease in the income from his business occurring immediately after the publication, although it is impossible to determine exactly how much of the decrease is due to the publication. Morse *v.* Times-Republican Printing Co., 124 Iowa 707, 100 N. W. 867, and cases cited.

60. Noeninger *v.* Vogt, 88 Mo. 589; Mitchell *v.* Bradstreet Co., 116 Mo. 226, 22 S. W. 724, 38 Am. St. Rep. 592, 20 L. R. A. 138.

Where the alleged slander charged the plaintiff, a butcher, with selling diseased meat, it was held proper for him to show as evidence of his general damages, the difference in the number of animals slaughtered by him before and after the publication. No special allegation of damages is necessary to warrant the introduction of such evidence. Blumhardt *v.* Rohr, 70 Md. 328, 17 Atl. 266.

61. Dicken *v.* Shepherd, 22 Md. 399.

62. Under a general allegation of loss of business it is competent for the plaintiff to prove a general loss or decline of patronage without naming particular customers, or proving that they had ceased to advertise with it. Bee Pub. Co. *v.* World Pub. Co., 59 Neb. 713, 82 N. W. 28, and cases cited.

In support of an allegation of special damage to his business the plaintiff may testify as to the extent to which his business decreased immediately following the publication. Daniel *v.* New York News Pub. Co., 67 Hun 649, 21 N. Y. Supp. 862, *affirmed* in 142 N. Y. 660, 37 N. E. 569.

In proof of the injury to his business plaintiff may show that his sales decreased immediately upon the publication of the libel. It is not necessary for him to show that particular persons refused to trade with him. Steketee *v.* Kimm, 48 Mich. 322, 12 N. W. 177.

Where the Plaintiff Sets Out Specific Instances of Damage to his business he will be restricted to proof of these instances, and cannot give evidence of the general diminution of his business. Dellegall *v.* Highley, 8 Car. & P. 444, 34 E. C. L. 472, 5 Scott 154, 3 Bing. (N. C.) 950.

63. Where plaintiff had pleaded injury to his business by loss of good will and patronage it was held competent for him to state that immediately after the publication his business fell off, and also to give the

Where the Plaintiff Is a Newspaper Publisher, evidence as to the effect of the defamatory publication on its advertising business is competent.[64]

B. Effect on Business Credit. — Evidence as to the effect which the publication had on the defendant's business credit is competent.[65]

C. Loss of Particular Patrons or Customers. — Evidence as to the loss of particular patrons or customers cannot be proved unless specially alleged,[66] though evidence as to the number of the plaintiff's customers may be relevant on the question of general damages without being specially pleaded.[67]

D. The Declarations of Third Persons at the time of taking action injurious to the plaintiff may be competent[68] to show that such

amount of his daily sales up to the time of publication and immediately thereafter, although this evidence was objected to because not specifically set out in the answer. Bergmann *v.* Jones, 94 N. Y. 51.

64. Value of Reputation for Stability. — Where the plaintiff is a newspaper, evidence is admissible to show the importance and value to a newspaper of a reputation for stability and permanence, and the disastrous consequence of the want of such a reputation. "The business of a great newspaper is something with which the average juror is not familiar. The considerations which influence advertisers to give or withhold patronage are not known to him, and it is therefore permissible for persons of special experience to testify to what extent the success of a publisher in getting and retaining business depends upon his good reputation." Bee Pub. Co. *v.* World Pub. Co., 59 Neb. 713, 82 N. W. 28.

65. Where the libel charged the defendant with being a delinquent debtor, evidence that he was refused credit by the persons to whom the libel was addressed was held properly admitted. Western Union Tel. Co. *v.* Pritchett, 108 Ga. 411, 34 S. E. 216; Muetze *v.* Tuteur, 77 Wis. 236, 46 N. W. 123, 20 Am. St. Rep. 115, 9 L. R. A. 86. See Newbold *v.* Bradstreet, 57 Md. 38.

66. Special damage due to loss of customers cannot be proved, except as to those customers alleged in the declaration. Reusch *v.* Roanoke Cold Storage Co., 91 Va. 534, 22 S. E. 358.

In proof of alleged damage to his trade the plaintiff cannot show that persons not named in his declaration stopped dealing with him in consequence of the slander. Hallock *v.* Miller, 2 Barb. (N. Y.) 630.

Contra. — Although special damage must be pleaded, it is not necessary, where the charge was unchastity, for the plaintiff to set out the names of persons who had left her boarding house or refused to patronize her school, this being a matter of evidence not required to be pleaded. Ross *v.* Fitch, 58 Tex. 148.

67. In an action based on a libelous statement charging the plaintiff with embezzling his employer's money, evidence offered by the plaintiff as to the number of customers he had was held properly admitted without special averment, being relevant on the question of general damages, and similar to evidence of the extent of the plaintiff's acquaintance. Mallory *v.* Pioneer Press Co., 34 Minn. 521, 26 N. W. 904.

68. Moore *v.* Stevenson, 27 Conn. 14; Smith *v.* Moore, 74 Vt. 81, 52 Atl. 320 (statement of plaintiff's employer when discharging him). See also Fowles *v.* Bowen, 30 N. Y. 20.

Where it was alleged that the defendant's false statement to the effect that there was arsenic enough in the silk used by plaintiff's workmen to seriously injure them had caused the workmen to quit plaintiff's employ, the declarations of the workmen when they left, giving their reasons

action was due to the defamatory statement, though it has been held to the contrary.[69]

E. Absence of Injury. — Evidence that the defamatory publication was not injurious to the plaintiff's business is competent only in rebuttal.[70]

8. Mental Suffering. — A. Generally. — Where mental suffering is regarded as a proper element of damage, evidence tending to show it is admissible, even when the words are actionable *per se*.[71] The plaintiff may testify as to the fact of his suffering, but not as to the amount of damages arising therefrom.[72] The declarations, exclamations and conduct of the plaintiff may be competent to show his mental suffering.[73]

B. Family Relations of Plaintiff. — In aggravation of damages due to mental suffering the plaintiff may give evidence as to his family relations,[74] as that he is married and has children.[75] He

therefor, were held admissible to show their belief in the truth of the statement, but not competent to show that the defendant was the author of the statement. Elmer *v.* Fessenden, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724.

As evidence of the injury to his business the plaintiff may show that a former customer, upon returning goods bought from plaintiff, stated that his customers would not buy the goods from him after they had read defendant's libelous statement Porter *v.* Henderson, 11 Mich. 20, 82 Am. Dec. 59.

Where the libel charged was publishing the plaintiff's name in a list of bad debtors, it was held proper for the plaintiff to show that upon applying to a certain merchant for goods on credit he was refused, and that the merchant, as the reason for his action, showed the plaintiff a book containing the list of bad debtors with plaintiff's name therein. Muetze *v.* Tuteur, 77 Wis. 236, 46 N. W. 123, 20 Am. St. Rep. 115, 9 L. R. A. 86.

69. Newbold *v.* Bradstreet, 57 Md. 38.

The Declarations of Former Customers are not competent on the plaintiff's behalf in support of an allegation that they had stopped dealing with him in consequence of the slander. Hallock *v.* Miller, 2 Barb. (N. Y.) 630.

70. Fish *v.* St. Louis Co. Print. & Pub. Co., 102 Mo. App. 6, 74 S. W. 641.

71. Nott *v.* Stoddard, 38 Vt. 25, 88 Am. Dec. 633; Laing *v.* Nelson, 40 Neb. 252, 58 N. W. 846 (*explaining* Boldt *v.* Budwig, 19 Neb. 739, 28 N. W. 280).

72. Laing *v.* Nelson, 40 Neb. 252, 58 N. W. 846.

73. See fully the articles "Mental and Physical State" and "Injuries to Persons."

In proof of the plaintiff's mental suffering it is competent to show her conduct, exclamations and acts when she first read the libelous publication, and also her subsequent appearance and the fact that she was heard to weep at night. Farrand *v.* Aldrich, 85 Mich. 593, 48 N. W. 628.

In proof of his mental suffering the plaintiff may state the outward signs thereof, such as that he was overcome and cried, could not sleep, could not work and did not feel like seeing any one. Rea *v.* Harrington, 58 Vt. 181, 2 Atl. 475, 56 Am. Rep. 561.

74. Beehler *v.* Steever, 2 Whart. (Pa.) 313 (plaintiff may show the number of his children and the state of his family); Dixon *v.* Allen, 69 Cal. 527, 11 Pac. 179 (holding certain evidence admissible, which the syllabus of the reporter states to be testimony of plaintiff's mother as to the number and ages of her children, the brothers and sisters of plaintiff, and the death of her husband).

75. Rhodes *v.* Naglee, 66 Cal. 677,

cannot, however, show the effect of the defamatory publication on his wife's health.[76]

C. The Physical Appearance and Strength of Defendant cannot be shown by the plaintiff in aggravation of damages.[77]

9. Exemplary Damages. — A. Sufficiency of Proof of Malice. While exemplary damages can only be allowed where there is some evidence of actual malice, nevertheless the inference of malice arising from a false publication which is actionable *per se*[78] is itself sufficient

68 Pac. 863; Barnes *v.* Campbell, 60 N. H. 27.

The plaintiff may show that she had a family of young children. "It certainly was a serious aggravation that the words were spoken of a mother having children, who would be disgraced by such a charge." Enos *v.* Enos, 135 N. Y. 609, 32 N. E. 123.

To enhance the damages resulting from the plaintiff's mental suffering it is competent for her to show the number and ages of her children, but not the fact that they were dependent upon her for support. Cahill *v.* Murphy, 94 Cal. 29, 30 Pac. 195, 28 Am. St. Rep. 88.

In Enquirer Co. *v.* Johnston, 72 Fed. 443, 18 C. C. A. 628, 34 U. S. App. 607, where the libelous statement involved a charge of unchastity, it was held proper for the plaintiff to testify that she had three young children, and for the court to instruct the jury that "in determining the amount of damages you may take into consideration her family relations and her social standing, the injury, if any, to her feelings, her wounded sensibilities, and her sense of shame and dishonor." The court says: "The hurt by a libel is primarily to reputation, meaning the esteem in which the person libeled is held by others. Involved in this is the pain or suffering personal to the injured party, to wit, the consciousness of degradation attaching to himself and those whose lot in life is determined by his own. It is not the sense of this record that the children of defendant in error were to be compensated. The children were part of her environment. Her relation to them was such as might make the hurt to herself more acute and permanent, such as might render her more sensitive to and more helpless against the wrong done. This court cannot hold that the fact objected to was improperly brought to light, especially in view of the peculiar character of the publication in question."

Although Special Damages Are Not Alleged, evidence as to the nature of the plaintiff's business, and that he was a married man, is competent to show the circumstances surrounding the plaintiff as bearing upon the hurtful tendency of the libel and the general damage to which he was exposed. The libel in this case charged that the plaintiff was threatened with a breach of promise suit. Morey *v.* Morning Journal Ass'n, 123 N. Y. 207, 25 N. E. 161, 20 Am. St. Rep. 730, 9 L. R. A. 621.

76. Guy *v.* Gregory, 9 Car. & P. 584, 38 E. C. L. 236. See Couch *v.* Mining Journal, 130 Mich. 294, 89 N. W. 936.

77. Beehler *v.* Steever, 2 Whart. (Pa.) 313.

78. Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935; Walker *v.* Wickens, 49 Kan. 42, 30 Pac. 181; Morrison *v.* Press Pub. Co., 59 N. Y. Super. Ct. 216, 14 N. Y. Supp. 131, *affirmed* in 133 N. Y. 538, 30 N. E. 1148; Alliger *v.* Mail Print. Ass'n, 66 Hun 626, 20 N. Y. Supp. 763. But see Delaney *v.* Kaetel, 81 Wis. 353, 51 N. W. 559; Grace *v.* McArthur, 76 Wis. 641, 45 N. W. 518.

So far as exemplary damages are concerned, there is no distinction between implied malice and express malice, the only difference being in the method of proof, one being matter of inference and the other of proof, but either will support a verdict for exemplary damages. Callahan *v.* Ingram, 122 Mo. 355, 26 S. W.

evidence of malice to support a verdict for such damages, in the absence of a statute to the contrary.[79]

B. Necessity of Preliminary Proof. — Evidence in aggravation of damages is not competent until some evidence has been introduced to prove the charges.[80]

10. Social Standing of Parties. — A. Of Plaintiff. — As evidence of the nature and extent of the injury the plaintiff may show his social standing.[81] The evidence, however, should be general and not extend to the minute details of his life.[82] It has been held that the defendant may show the plaintiff's social standing whenever it will have a tendency to mitigate the damages.[83]

1020, 43 Am. St. Rep. 583 (*citing* Bergmann *v.* Jones, 94 N. Y. 51; Blocker *v.* Schoff, 83 Iowa 265, 48 N. W. 1079); Wagner *v.* Saline Co. Progress Print. Co., 45 Mo. App. 6. But see Nelson *v.* Wallace, 48 Mo. App. 193.

Under the Code Provision allowing exemplary damages after proof of actual or presumed malice, presumed malice is analogous to implied malice of the criminal law, and is an inference of fact to be drawn from the libelous character of the publication, and upon introduction in evidence of the libelous statement a *prima facie* case of malice in fact is established. Childers *v.* Mercury Print. & Pub. Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40.

79. The Connecticut Statute providing that "in every action for an alleged libel the defendant may give proof of intention, and unless the plaintiff shall prove malice in fact he shall recover nothing but his actual damage proved and specially alleged in the declaration," is only an extension of the previously existing rule admitting such evidence; and the provision that the plaintiff shall prove malice in fact was not intended to prescribe any new rule as to the kind and degree of malice to be proved, or as to the evidence by which the existence in fact of improper motives was to be shown, but only to require that it should be shown, by other evidence than mere legal presumption from the fact of publication, that the defendant's motives were not proper and justifiable. Hotchkiss *v.* Porter, 30 Conn. 414.

80. Winter *v.* Donovan, 8 Gill (Md.) 370.

81. Larned *v.* Buffinton, 3 Mass. 546; Smith *v.* Moore, 74 Vt. 81, 52 Atl. 320 (because it indicates the value of plaintiff's character and reputation); Fowler *v.* Chichester, 26 Ohio St. 9; Polston *v.* See, 54 Mo. 291.

Press Pub. Co. *v.* McDonald, 63 Fed. 238, 11 C. C. A. 155, 26 U. S. App. 167, 26 L. R. A. 531, distinguishing such evidence from evidence of general good character offered by the plaintiff, and explaining Prescott *v.* Tousey, 18 Jones & S. (N. Y.) 12, as being founded upon a misconception of previous New York cases. "We are of opinion that the weight of authority is clearly in support of the proposition that the condition in life of the plaintiff may properly be given in evidence in chief to aggravate damages. Of course if some peculiar and special damage is claimed it should be specially pleaded. While it is true that plaintiff's character and reputation morally are presumed to be good, and therefore need not be proved by him to be such unless attacked, there seems no sound reason for holding that he may not prove his station in society as part of his testimony in chief." But "when a plaintiff offers to prove his social standing to increase damages the testimony should be confined to his general social standing, and not extended to minute details of his life." *Contra,* Prescott *v.* Tousey, 18 Jones & S. (N. Y.) 12.

82. Press Pub. Co. *v.* McDonald, 63 Fed. 238, 11 C. C. A. 155, 26 U. S. App. 167, 26 L. R. A. 531.

83. In mitigation of damages the defendant may show the plaintiff's rank and condition in life whenever

B. Of Defendant. — The social standing and circumstances of the defendant may be shown by the plaintiff as evidence of the nature and extent of the injury, because it indicates the weight which may be attached to the defendant's words and his consequent power to inflict injury.[84]

11. Pecuniary Condition and Standing. — A. Of Defendant. a. *As Evidence of Extent of Injury.* — **(1.) Generally.** — Although there is some conflict in the authorities, the general rule supported by the weight of authority is that the plaintiff may show the defendant's wealth and financial standing as evidence of the nature and extent of the injury, on the theory that a man's rank and influence in society depend to some extent upon his wealth.[85] In some jurisdictions, however, such evidence is excluded on the ground that there is no necessary connection between the defendant's wealth and the weight and influence of his words.[86] And in some of those

it will have a legal tendency to mitigate the damages, and this may be done either on the general issue or on a traverse of the justification. Larned *v.* Buffinton, 3 Mass. 546.

84. Fowler *v.* Chichester, 26 Ohio St. 9; Polston *v.* See, 54 Mo. 291; Trimble *v.* Foster, 87 Mo. 49, 56 Am. Rep. 440; Buckley *v.* Knapp, 48 Mo. 152; Smith *v.* Moore, 74 Vt. 81, 52 Atl. 320 (holding competent evidence that for several years previous defendant had held certain town offices).

In aggravation of damages it is competent to show that the defendant was a person of influence in the community. Justice *v.* Kirlin, 17 Ind. 588.

85. *California.* — Barkly *v.* Copeland, 74 Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413.

Connecticut. — Bennett *v.* Hyde, 6 Conn. 24; Barber *v.* Barber, 33 Conn. 335; Case *v.* Marks, 20 Conn. 248.

Illinois. — Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935; Harbison *v.* Shook, 41 Ill. 141; Hosley *v.* Brooks, 20 Ill. 115, 71 Am. Dec. 252.

Indiana. — Miller *v.* Cook, 124 Ind. 101, 24 N. E. 577; Fowler *v.* Wallace, 131 Ind. 347, 31 N. E. 53.

Iowa. — Herzman *v.* Oberfelder, 54 Iowa 83, *following* Karney *v.* Paisley, 13 Iowa 92. But see Perrine *v.* Winter, 73 Iowa 645, 35 N. W. 679.

Maine. — Humphries *v.* Parker, 52 Me. 502.

Michigan. — Brown *v.* Barnes, 39 Mich. 211, 33 Am. Rep. 375; Botsford *v.* Chase, 108 Mich. 432, 66 N. W. 325 (*citing* Brown *v.* Barnes, 39 Mich. 211).

Missouri. — Taylor *v.* Pullen, 152 Mo. 434, 53 S. W. 1086.

New York. — Lewis *v.* Chapman, 19 Barb. 252 (*distinguishing* Myers *v.* Malcolm, 6 Hill 292).

Vermont. — Rea *v.* Harrington, 58 Vt. 181, 2 Atl. 475, 56 Am. Rep. 561; Kidder *v.* Bacon, 74 Vt. 263, 52 Atl. 322.

Virginia. — Harman *v.* Cundiff, 82 Va. 239.

The defendant's pecuniary condition may be shown to aid the jury in fixing the damages, and for this purpose evidence is competent showing the extent of his wealth, such as his own verified statement of his taxable property. Tolleson *v.* Posey, 32 Ga. 372.

Evidence as to the wealth of the defendant's deceased brother was held properly admitted where it was shown that defendant was his sole heir, on the ground that such evidence tended to prove the financial condition of the defendant. Binford *v.* Young, 115 Ind. 174, 16 N. E. 142.

The Business Standing of the Defendant may be shown to prove the influence his words would have in the community, but the jury should be cautioned against allowing such evidence to swell the damages on its own account. Ellis *v.* Whitehead, 95 Mich. 105, 54 N. W. 752.

86. Young *v.* Kuhn, 71 Tex. 645,

jurisdictions where the evidence has been held competent the reasoning on which it has been admitted has been questioned and criticised.[87] Also some cases hold that the wealth or pecuniary condition of the defendant cannot be shown for any purpose.[88] It seems, however, that the defendant cannot show his lack of wealth as evidence that his words carried no weight.[89]

(2.) Of Corporation Defendant. — When defendant publisher is a corporation, evidence of its reputed wealth is not admissible because a corporation has no social standing or influence.[90]

(3.) Reputation for Wealth. — When evidence of defendant's wealth is offered to show the extent of the injury it is his reputation for wealth and his financial standing in the community, rather than his actual financial condition, which is important,[91] consequently the

9 S. W. 860; Enos *v.* Enos, 135 N. Y. 609, 32 N. E. 123, *affirming* 58 Hun 45, 11 N. Y. Supp. 415; Palmer *v.* Haskins, 28 Barb. (N. Y.) 90.

In Ware *v.* Cartledge, 24 Ala. 622, 60 Am. Dec. 489, the court says: "It would seem that if such proof is allowable in order to aggravate the damages in such cases when the defendant is wealthy, common justice would require that a converse rule should prevail in the case of poor defendants, and they should be allowed to give their poverty in evidence to mitigate the damages. Yet nearly all the books declare that this is not the case, and common sense revolts at the idea of its adoption."

87. See Case *v.* Marks, 20 Conn. 248; Watson *v.* Watson, 53 Mich. 168, 18 N. W. 605; Randall *v.* Evening News Ass'n, 97 Mich. 136, 56 N. W. 361; Toledo W. & W. R. Co. *v.* Smith, 57 Ill. 517.

In Perrine *v.* Winter, 73 Iowa 645, 35 N. W. 679, the court says: "There are grave doubts whether this reasoning is correct, because it is not universally true that a man possessed of wealth has the confidence and respect of the community in which he lives."

88. Austin *v.* Bacon, 49 Hun 386, 3 N. Y. Supp. 587; Morris *v.* Barker, 4 Har. (Del.) 520; King *v.* Sassaman (Tex. Civ. App.), 64 S. W. 937; Young *v.* Kuhn, 71 Tex. 645, 9 S. W. 860.

89. Young *v.* Kuhn, 71 Tex. 645, 9 S. W. 860; Ware *v.* Cartledge, 24 Ala. 622, 60 Am. Dec. 489; Case *v.* Marks, 20 Conn. 248. *Contra*, Karney *v.* Paisley, 13 Iowa 89.

90. "An individual is a real entity, seen, known and felt. He possesses social rank and influence in the community where he is known, measured by his education, his known character, his position among his fellows, and to some extent, perhaps, his reputed wealth. His libelous words will sting and injure in proportion to his rank and influence. But a corporation has no social rank or social influence to be augmented by its wealth or diminished by its poverty. It is not a member of society. Its libelous utterances will sting and injure according to the extent of its circulation, the character of the paper published, as it is known by its publications, and the character of the party assailed." Randall *v.* Evening News Ass'n, 97 Mich. 136, 56 N. W. 361. But see Washington Gaslight Co. *v.* Lamsden, 172 U. S. 534; Robinson *v.* Eau Claire Book & Stationery Co., 110 Wis. 369, 85 N. W. 983.

91. Evidence offered by the plaintiff as to the defendant's wealth is relevant on the question of compensatory damages, because the extent of the injury depends in some degree on the defendant's rank and influence. "So far it is a question mainly of reputation for wealth." But when exemplary damages are claimed it is the defendant's actual means, and not his reputation, which is material, because his pecuniary ability must be considered in determining what would be a just punishment for *him*. Rea *v.* Harrington, 58 Vt. 181, 2 Atl. 475, 56 Am. Rep. 561.

evidence should be of a general character rather than an inquiry into the details of the defendant's finances.[92]

b. *In Aggravation or Mitigation of Exemplary Damages.* — Evidence of the defendant's wealth and pecuniary condition is also admissible in aggravation of exemplary damages because the severity of the punishment would depend to some extent upon the wealth or poverty of the person against whom the damages are assessed.[93] Some cases, however, exclude such evidence when offered for this purpose.[94] It has been held that the defendant may show his poverty or lack of wealth in mitigation of a claim of exemplary damages,[95] though the plaintiff has offered no evidence on the question.[96]

92. While it is competent to show the defendant's wealth in aggravation of damages it should be proved "by general evidence rather than by particular facts. It is the defendant's position in society which gives his slanderous statements character and weight. Reputation for wealth rather than its possession generally confers position. Therefore the more proper inquiry is as to the reputation of a defendant for wealth. Of course a presiding justice would have considerable discretion as to the form of the question in such a case to be exercised according to circumstances." Stanwood *v.* Whitmore, 63 Me. 209, *citing* as directly in point Humphries *v.* Parker, 52 Me. 502; Kniffen *v.* McConnell, 30 N. Y. 285.

Assessment Rolls Not Competent. To show the standing of the defendants in the community, the assessment rolls of the townships and wards in which they were assessed are not competent. "It is not competent to enter into the details of the finances of a defendant in a libel or slander suit. The inquiry should be directed to his financial standing in the community. Though he may be possessed of considerable wealth, yet if this be not generally known in the community no greater injury can on that account be said to flow from the publication of the libel or utterance of the slander. It is his reputed, not his actual standing that bears upon the injury." Farrand *v.* Aldrich, 85 Mich. 593, 48 N. W. 628. But see Tolleson *v.* Posey, 32 Ga. 372; Binford *v.* Young, 115 Ind. 174, 16 N. E. 142.

93. Jones *v.* Greeley, 25 Fla. 629, 642, 6 So. 448; Kidder *v.* Bacon, 74 Vt. 263, 52 Atl. 322; Barkly *v.* Copeland, 74 Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413; Buckley *v.* Knapp, 48 Mo. 152; Burckhalter *v.* Coward, 16 S. C. 435; M'Almont *v.* M'Clelland, 14 Serg. & R. (Pa.) 359; Adcock *v.* Marsh, 30 N. C. 360.

Where There Is Evidence Upon Which Exemplary Damages May Be Based, it is competent to show the pecuniary condition of the defendant, since the degree of his punishment would depend to some extent on his ability to pay the damages. Reeves *v.* Winn, 97 N. C. 246, 1 S. E. 448, 2 Am. St. Rep. 287; Fry *v.* Bennett, 4 Duer (N. Y.) 247.

In an Action Against Several Defendants in which a verdict for damages in a lump sum must be rendered, and there is no right of contribution among the defendants, evidence of the wealth of one of the defendants offered in aggravation of exemplary damages, if incompetent against the others, is inadmissible. Washington Gaslight Co. *v.* Lamsden, 172 U. S. 534. See Toledo W. & W. R. Co. *v.* Smith, 57 Ill. 517.

94. Harman *v.* Cundiff, 82 Va. 239; Lewis *v.* Chapman, 19 Barb. (N. Y.) 252; Young *v.* Kuhn, 71 Tex. 645, 9 S. W. 860.

95. Bennett *v.* Hyde, 6 Conn. 24 (*dictum*).

The defendant, in mitigation of damages, may show that his property is small and that he has a wife and children to maintain. McNutt *v.* Young, 8 Leigh (Va.) 542.

96. Where the plaintiff claims exemplary damages the defendant may show that he has no property, although the plaintiff has offered no evidence as to his pecuniary condi-

B. Of Plaintiff. — It has been held that the plaintiff's pecuniary condition cannot be shown,[97] at least not on the question of exemplary damages,[98] but it has also been held that the plaintiff may show his pecuniary condition as bearing upon the extent of the injury,[99] but he cannot show his poverty.[1]

12. Subsequent Admissions and Statements of Person Defamed. The plaintiff's own estimate of his damages as apparent from his subsequent statements may be shown by the defendant, except where actual damages are not claimed.[2] On a criminal prosecution, however, the manner in which the person defamed regarded the defamatory statement is not material, and his statements relating thereto are not competent, except, perhaps, to show the truth of the charge.[3]

tion. Rea *v.* Harrington, 58 Vt. 181, 2 Atl. 475, 56 Am. Rep. 561.

97. Pool *v.* Devers, 30 Ala. 672.

98. Reeves *v.* Winn, 97 N. C. 246, 1 S. E. 448, 2 Am. St. Rep. 287.

99. Peltier *v.* Mict, 50 Ill. 511.

1. Perrine *v.* Winter, 73 Iowa 645, 35 N. W. 679, in which evidence that the plaintiff, at the time the defamatory words were spoken, was engaged in aiding a needy sister, and that in so doing she performed manual labor and endured hardships, was held improperly admitted because immaterial and calculated to arouse the sympathies of the jury.

The plaintiff cannot prove in aggravation of damages that "he was a poor, hard-working and industrious man." Pool *v.* Devers, 30 Ala. 672, *cited* in Perrine *v.* Winter, 73 Iowa 645, 35 N. W. 679.

2. Richardson *v.* Barker, 7 Ind. 567; Evans *v.* Smith, 5 T. B. Mon. (Ky.) 363, 17 Am. Dec. 74.

In mitigation of damages the defendant may show conversations held by him with the plaintiff wherein the latter admitted that he had sustained no damage by reason of the libel, and would have withdrawn his suit were it not for his lawyers. Samuels *v.* Evening Mail Ass'n, 6 Hun (N. Y.) 5. But see McLaughlin *v.* Cowley, 127 Mass. 316.

Where no Special Damages Are Alleged, defendant cannot prove an admission by the plaintiff that the defamatory statement had done him no damage. "Where no special damages are alleged, the jury are left to determine the amount of damages according to the character and enormity of the injury; and they are assessed as retributory rather than compensatory. Consequently, although the plaintiff may have declared that the words did him no injury, yet the jury might have thought the conduct of the defendant such as to demand exemplary damages; and they would not be bound by such admission. Had the plaintiff claimed special damages, or that he sustained any special injury, so that damages might be said to be the sole object of the suit, . . . then, undoubtedly, his statement that he has sustained no special damage or injury would be competent evidence to go to a jury in mitigation of damages, and perhaps in bar of the action. But from the utterance of words actionable in themselves the law conclusively presumes some damage to have resulted. . . . But it was argued that the admission should be received as the declaration of a party against his own interest; and Richardson *v.* Barker, 7 Ind. 567, is relied upon in support of this proposition. To the authority of that case I do not yield. I do not well see how such an admission, if made, can be regarded as a declaration against a party's interest which would bind him. It is but an expression of opinion as to the effect of the grievance, and as such can have no binding force." Porter *v.* Henderson, 11 Mich. 20, 82 Am. Dec. 59, *distinguishing* Evans *v.* Smith, 5 T. B. Mon. (Ky.) 363, 17 Am. Dec. 74.

3. In a criminal prosecution, the

13. Special Damages Not Alleged. — Where special damages are not alleged, evidence is not admissible to prove[4] or disprove them.[5]

IX. RES GESTAE AND CIRCUMSTANCES ACCOMPANYING AND CONNECTED WITH PUBLICATION.

1. Generally. — All that was said and done by the defendant or the plaintiff at the time of the publication, forming part of one continuous transaction, is admissible as part of the *res gestae*.[6] So also statements of other persons forming part of the conversation or transaction in which the publication was made, and relating thereto, may be competent as part of the *res gestae*.[7] Slanderous statements made against other persons as a part of the same conversation in which the words charged were used are admissible as part of the *res gestae*,[8] though the contrary has been held.[9]

defendant, who has not pleaded the truth as a justification, cannot show that the person libeled, in a conversation with witnesses, treated some of the matters charged in the libel as a joke originated by himself, since in a criminal prosecution it is not material to inquire whether the person attacked has actually suffered from injured feelings, the public scandal and injury to the public being the same in either event. Com. *v.* Morgan, 107 Mass. 199.

4. Metcalf *v.* Collinson (Minn.), 103 N. W. 1022; Friedman *v.* Pulitzer Pub. Co., 102 Mo. App. 683, 77 S. W. 340; Shurtleff *v.* Stevens, 51 Vt. 501, 31 Am. Rep. 698.

The result of an election at which the plaintiff is a candidate is not competent evidence in the absence of an allegation of special damage. Jones *v.* Townsend, 21 Fla. 431, 58 Am. Dec. 676.

5. Bennett *v.* Salisbury, 78 Fed. 769.

6. Webber *v.* Vincent, 55 Hun 612, 9 N. Y. Supp. 101; Dalton *v.* Gill, 25 Hun (N. Y.) 120; Preston *v.* Frey, 91 Cal. 107, 27 Pac. 533; Coleman *v.* Playsted, 36 Barb. (N. Y.) 26; Rice *v.* Simmons, 2 Har. (Del.) 309.

The Whole Conversation in which the slander was uttered is admissible as part of the *res gestae*. Ellis *v.* Whitehead, 95 Mich. 105, 54 N. W. 752.

Assault by Plaintiff. — As part of the *res gestae* it is competent to show an assault and battery committed upon the defendant by the plaintiff. Young *v.* Bridges, 34 La. Ann. 333.

A part of the conversation in which the alleged slander was published charging the plaintiff with the commission of the same crime, but in different words, while not competent in proof of the words charged is admissible to show malice and as part of the *res gestae*. Ellis *v.* Whitehead, 95 Mich. 105, 54 N. W. 752.

Where the words counted upon were spoken in the English language, other words spoken in the same conversation in Dutch were held admissible as part of the *res gestae*. Keenholts *v.* Becker, 3 Denio (N. Y.) 346.

In Provost *v.* Brueck, 110 Mich. 136, 67 N. W. 1114, evidence as to an occurrence on the same day of the slander, and out of which it arose, was held properly admitted as part of the *res gestae*.

7. Walker *v.* Flynn, 130 Mass. 151; Gandy *v.* Humphries, 35 Ala. 617.

8. Although the state may show a slanderous statement against another person, where it was made as part of the slander charged, defendant cannot introduce evidence relating to the other slander. Collins *v.* State, 39 Tex. Crim. 30, 44 S. W. 846.

Words forming part of the speech in which the slander charged was spoken are admissible, though constituting an independent slander. Smith *v.* Moore, 74 Vt. 81, 52 Atl. 320.

9. On a criminal prosecution the

Difficulties Between the Parties immediately preceding the publication may be competent as part of the circumstances under which the publication occurred.[10]

2. Whole Conversation or Publication. — A. GENERALLY. — As bearing upon the *quo animo* of the defendant it is competent to show the whole conversation in which the slander was published,[11] or the complete writing or article in which the libelous statement was published.[12] Where the libelous article was published in a news-

utterance of other slanderous statements against other persons in the same conversation in which the words charged were used cannot be shown. Haley *v.* State, 63 Ala. 89.

What the defendant said in the same conversation in which the slander was uttered and with reference thereto is admissible, but not an offensive remark made to and concerning one of the bystanders. Walter *v.* Hoeffner, 51 Mo. App. 46.

10. In Jauch *v.* Jauch, 50 Ind. 135, 19 Am. Rep. 699, the exclusion of evidence as to a fight and quarrel between the parties immediately preceding the speaking of the slanderous words was held error. "It may be stated as a general principle that all the immediate circumstances under which the words were spoken are proper to be shown to the jury, as they define the true character of the speaking."

11. Scullin *v.* Harper, 78 Fed. 460 (in which a conversation which began in St. Louis and ended in East St. Louis was held to be one conversation because held upon the same subject); Whitehead *v.* State, 39 Tex. Crim. 89, 45 S. W. 10; Tottleben *v.* Blankenship, 58 Ill. App. 47; Stallings *v.* Newman, 26 Ala. 300, 62 Am. Dec. 723; Kidd *v.* Ward, 91 Iowa 371, 59 N. W. 279. See Georgia *v.* Bond, 114 Mich. 196, 72 N. W. 232.

Plaintiff may prove the whole conversation and all the words spoken by the defendant at the time the alleged slander was uttered, and this does not conflict with the rule requiring proof of the words as charged. Newman *v.* Stein, 75 Mich. 402, 42 N. W. 956, 13 Am. St. Rep. 447.

Expression of Disbelief. — Defendant's statements accompanying the slanderous publication, that he did not believe in its truth, are admissible only in mitigation of damages. Nicholson *v.* Merritt, 109 Ky. 369, 59 S. W. 25.

12. The whole writing is admissible although it contains matter which is not libelous, because it tends to explain the intent of the defendant and is part of the *res gestae* of the publication. Byrd *v.* State, 38 Tex. Crim. 630, 44 S. W. 521.

Where the libel is contained in a newspaper article, the plaintiff need not read the whole article in evidence, but the defendant may do so. Powers *v.* Cary, 64 Me. 9. See Thornton *v.* Stephen, 2 M. & R. (Eng.) 45; Rex *v.* Lambert, 2 Camp. (Eng.) 398.

The whole publication may be introduced in evidence although parts of it are not libelous. Evening Post Co. *v.* Richardson, 113 Ky. 641, 68 S. W. 665.

Where the libels charged were extracts from a pamphlet purporting to be a history of the life and adventures of the plaintiff under a fictitious and libelous name, it was held that the defendant was entitled to have the whole of the publication read. Cooke *v.* Hughes, R. & M. 112, 21 E. C. L. 393.

Where the libelous matter is contained in a letter, the whole letter may be considered although parts of it are not libelous. Seip *v.* Deshler, 170 Pa. St. 334, 32 Atl. 1032.

In judging of the malicious character of an alleged libel the jury may take into consideration the whole publication, and if it contains statements concerning other persons which are malicious they may determine therefrom whether what is said of the plaintiff is also malicious. Miller *v.* Butler, 6 Cush. (Mass.) 71. See also Perry *v.* Breed, 117 Mass. 155; Rex *v.* Dean of St. Asaph, 3 T. R. 428, note.

paper it is competent to show the surrounding head lines or articles which might tend to explain its meaning.[13]

B. Part of Conversation Not Overheard by Hearers. — It has been held that portions of the conversation in which the publication was made are admissible in defendant's behalf in explanation of the alleged defamatory words, although they were not heard by the hearers of the defamatory part of the statement.[14]

C. The Reply Made by the Plaintiff to the defamatory statement may also be shown.[15]

D. Contemporaneous Explanatory Statements. — Any statement or explanation made by the defendant at the time of the publication and as a part thereof, and in explanation of the defamatory words, is admissible to show how the words were understood by the hearers, but it must appear that such explanatory or qualifying statements were heard and understood by the hearers.[16] In case of a printed libel, statements made by the defendant to the printer or publisher through whom the publication was made, at the time the request for publication was made, are not admissible to show the defendant's meaning, nor are they competent as *res gestae* unless

13. Where the article in question was entitled "Still Another," it was held proper to show the caption of the preceding article as explanatory of these words. Gibson *v.* Cincinnati Enquirer, 2 Flip. 121, 10 Fed. Cas. No. 5392.

In determining whether a defamation published in a newspaper is libelous it is competent to introduce in evidence the column in the paper in which the defamation appeared, as the items surrounding it might give it a meaning which it would not otherwise have. Stafford *v.* Morning Journal Ass'n, 68 Hun 467, 22 N. Y. Supp. 1008, *affirmed* in 142 N. Y. 598, 37 N. E. 625.

14. Where the alleged slander charged the plaintiff with being a thief, and was made during the course of a wrangle over the plaintiff's mismanagement of the corporation of which he had been an officer, in the course of which charges and counter-charges of dishonesty had been made by both parties, it was held competent for the defendant to show that the words were used with reference to the plaintiff's mismanagement of the affairs of the corporation, and not in their ordinary sense, although the hearers heard only the last part of the quarrel in which the slanderous statements were made. "It is what is heard by those who heard a whole conversation which is to determine the question as to the slanderous character of the utterances, and not mere catch words heard by a passing witness. . . . It is essential that the connection in which the words were used should be taken into consideration in determining whether they are actionable." Kidd *v.* Ward, 91 Iowa 371, 59 N. W. 279.

15. **The Reply Made by the Plaintiff** to the alleged slanderous words spoken by the defendant is admissible as part of the *res gestae*, since it may tend to qualify or explain the words or may admit their truth. Bradley *v.* Gardner, 10 Cal. 371.

16. Simons *v.* Lewis, 51 La. Ann. 327, 25 So. 406; Eaton *v.* White, 2 Pinn. (Wis.) 42; Delaney *v.* Kaetel, 81 Wis. 353, 51 N. W. 559; Miller *v.* Johnson, 79 Ill. 58; Hagan *v.* Hendry, 18 Md. 177.

A statement made by the defendant at the time he uttered the words charged is admissible to show that the words used did not charge a criminal offense, but the truth or falsity of such explanatory statement is not material. Burke *v.* Miller, 6 Blackf. (Ind.) 155.

they throw some light upon the actual publication and the motive actuating the defendant.[17]

3. Subject-Matter of Defamation. — To arrive at a proper understanding of the meaning of the words written or spoken, and of the motive and purpose of the same, it is proper to show what was the subject-matter of the writing or speaking.[18]

X. DECLARATIONS AND ADMISSIONS.

1. Of Defendant. — A. In His Own Behalf. — The defendant's declarations and statements are not competent in his own behalf,[19] except as part of the *res gestae*[20] or part of the conversations or declarations introduced by the plaintiff.[21] He cannot show his own statements subsequent to the publication,[22] even though they are favorable to the plaintiff's integrity,[23] unless such statements are

17. In explanation of the meaning of the words of the libel the defendant cannot show what he said to the witness at the time he handed in the paper containing the libel with the request to publish it. "The slander complained of being written or printed (not oral or verbal), the explanatory words used by the defendant could not be known to all the readers of the libel and . . . should have been excluded; nor were they admissible as part of the *res gestae*, as though coincident in time with the order to print, they threw no light upon the publication nor tended to extenuate the legal malice implied in the act." Hagan *v.* Hendry, 18 Md. 177.

The defendant may show as part of the *res gestae*, and as indicating his good motives, the terms and conditions on which he requested the printing and publishing of the alleged libel to be made, and that he instructed the printer to do the printing in as private and confidential a way as possible. Taylor *v.* Church, 8 N. Y. 452.

18. Young *v.* Gilbert, 93 Ill. 595. In this case it appeared that the defendant's statement published in a newspaper was made in response to an attack upon himself published in the same paper. For the purpose of showing the true meaning of the defendant's statements, which on their face professed to quote phrases and extracts from some other publication, it was held competent to prove publications in such newspaper signed by the plaintiff, and also others purporting to have been written by him, although he was not proved to have been their author.

A check concerning which the libelous charge of perjury was made was held properly admitted. Ruble *v.* Bunting, 31 Ind. App. 654, 68 N. E. 1041. Papers referred to in a libel may, it seems, be read in evidence in explanation or for its proper construction. See Nash *v.* Benedict, 25 Wend. (N. Y.) 645.

19. See articles "Admissions" and "Declarations," and cases following.

20. See *supra*, "Res Gestae."

21. McArthur *v.* State, 41 Tex. Crim. 635, 57 S. W. 847.

22. Grace *v.* McArthur, 76 Wis. 641, 45 N. W. 518; Scott *v.* McKinnish, 15 Ala. 662.

Subsequent Statements as to Motive and Purpose in Publishing. McArthur *v.* State, 41 Tex. Crim. 635, 57 S. W. 847.

23. In an action for slander the defendant cannot show in mitigation of damages that at other times in other conversations he spoke of the plaintiff with respect to the crime charged against him in terms less offensive and more favorable to the latter's integrity. Bradford *v.* Edwards, 32 Ala. 628. Subsequent statements of the defendant qualifying the alleged defamatory statement are not admissible in his behalf. Lathan *v.* Berry, 1 Port. (Ala.) 110.

equivalent to a complete retraction of the defamation of plaintiff.[24]

B. Against Him. — The statements and declarations of the defendant, both before and after the defamatory publication, tending to show the motive and malice with which it was made, are competent evidence against him.[25]

24. See *infra*, "Retraction."

25. *California.* — Hearne *v.* De Young, 119 Cal. 670, 52 Pac. 150, 499.

Connecticut. — Mix *v.* Woodward, 12 Conn. 262.

Iowa. — State *v.* Conable, 81 Iowa 60, 46 N. W. 759.

Maryland. — Garrett *v.* Dickerson, 19 Md. 418, 450.

Massachusetts. — Com. *v.* Damon, 136 Mass. 441.

New York. — Fowles *v.* Bowen, 30 N. Y. 20; Fry *v.* Bennett, 28 N. Y. 324.

North Carolina. — Brittain *v.* Allen, 13 N. C. 120.

"Evidence of previous or subsequent declarations or conduct of the defendant, as well as of his conduct and language at the time of the slander, is received for the purpose of proving express malice in aggravation of damages." Faxon *v.* Jones, 176 Mass. 206, 57 N. E. 359.

Where the libelous publication consisted of a printed pamphlet, subsequent statements of the defendant relating to such pamphlet were held admissible to show his malice, motive and intent, and it is not necessary that the witness produce the identical pamphlet about which the defendant's statements were made, but any one of the printed copies may be used. Lockard *v.* State, 43 Tex. Crim. 61, 63 S. W. 566.

Where the slanderous statement charged the plaintiff with unchastity before her marriage, evidence of a statement by the defendant regarding plaintiff's husband, "if that man knew that I hold his domestic peace in my hand he would not feel so big as he does," was held properly admitted to show malice. Elliott *v.* Boyles, 31 Pa. St. 65.

Subsequent Conversations of Defendant. — In proof of malice it is competent to show conversations of the defendant relating to the defamatory statement charged subsequent to the commencement of the suit. Kennedy *v.* Gifford, 19 Wend. (N. Y.) 296. A conversation of the defendant a few days subsequent to the publication, showing a hostile feeling toward the plaintiff, was held properly admitted to show motive and malice. Knapp *v.* Fuller, 55 Vt. 311, 45 Am. Rep. 809. An admission by the defendant that the slanderous story would not have been started if plaintiff had dealt with him differently is admissible to show malice. Fowler *v.* Gilbert, 38 Mich. 292. The defendant's own declarations as to the motives which influenced him to make the defamatory statement are competent against him to show malice. Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935, *affirming* 37 Ill. App. 510.

Where the libel charged was an attack upon the plaintiff's credit as a merchant, a letter written by the defendant about the time of the publication stating that he would withhold his patronage from any house or firm accepting less than the full amount of its claim against the plaintiff, was held properly admitted to show motive and malice. Simons *v.* Burnham, 102 Mich. 189, 60 N. W. 476.

In Born *v.* Rosenow, 84 Wis. 620, 54 N. W. 1089, testimony as to what the witness had heard defendant say concerning the plaintiff three or four years prior to the trial was held properly admitted to show malice, and the fact that the defendant spoke in German, while the witness who understood both English and German testified to the statements in English, did not render the testimony incompetent.

Where the libel complained of was the publication by the defendant association in its list of bad debtors, a letter written by the manager of the defendant showing the writer's animus toward the plaintiff was held

2. Declarations, Statements and Admissions by Defendant's Agent. The statements of the defendant's agent subsequent to the publication may be competent to show malice.[26] Thus it is competent to show a repetition of the libel by such agent.[27] When, however, the libel was published without defendant's knowledge the subsequent statement of his agent is not admissible.[28] Where the libel was published by the defendant's agent without defendant's knowledge, the latter's previous statements showing malice and ill-will toward the plaintiff are not admissible.[29]

3. Declarations and Admissions of Injured Party. — A. In Civil Action. — The declarations and admissions of the injured party are competent against him in a civil action.[30] The plaintiff's own self-serving declarations are not admissible in his behalf.[31]

properly admitted. Brown *v.* Durham, 3 Tex. Civ. App. 244, 22 S. W. 868.

Where the libelous matter was contained in a letter it was held that prior letters written by the defendant to the plaintiff, not libelous in themselves, but exhibiting ill-will toward the latter, were admissible to show malice. Seip *v.* Deshler, 170 Pa. St. 334, 32 Atl. 1032.

Subsequent articles appearing in the newspaper in which the libel was published are admissible against the defendant to show his motive. State *v.* Heacock, 106 Iowa 191, 76 N. W. 654. But see Mix *v.* Woodward, 12 Conn. 262.

Threats by the Defendant to ruin the plaintiff's reputation are admissible to show malice. Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845.

Subsequent to Commencement of Action. — Brown *v.* Durham, 3 Tex. Civ. App. 244, 22 S. W. 868.

See *infra*, "Repetitions and other Defamatory Publications."

26. O'Toole *v.* Post Print. and Pub. Co., 179 Pa. St. 271, 36 Atl. 288.

27. Letters written by defendant's agent containing a repetition of similar libelous matter were held admissible to show malice. Borley *v.* Allison, 181 Mass. 246, 63 N. E. 260.

28. Subsequent Declarations of Defendant's Agents are not competent evidence of defendant's malice where the publication was made without his knowledge. Edsall *v.* Brooks, 33 How. Pr. (N. Y.) 191.

In an action against a corporation for libel, the admission by the general manager of the defendant company several weeks after the publication of the libelous letter as to the defendant's bad purpose in writing it was held properly excluded, because not part of the *res gestae* and not competent against the defendant company. Reusch *v.* Roanoke Cold Storage Co., 91 Va. 534, 22 S. E. 358, *citing* Virginia & T. R. Co. *v.* Sayers, 26 Gratt. (Va.) 328.

29. In an action against the owner of a newspaper for a libel of which he knew nothing, his previous statements showing malice and ill-will toward the plaintiff are not admissible, since they could have no connection with the libelous publication, not being known to the editor at the time he published it. Krug *v.* Pitass, 162 N. Y. 154, 56 N. E. 526.

30. The Plaintiff's Admission That He Was Not Injured by the alleged slander is competent against him. Richardson *v.* Barker, 7 Ind. 567. But see Porter *v.* Henderson, 11 Mich. 20, 82 Am. Dec. 59, *supra* VIII, 12, note.

In an action by a husband and wife for a slander spoken of the wife, the declarations of the husband subsequent to the commencement of the action that he did not believe the defendant originated the report against his wife, but had merely related what he had heard, was held improperly excluded, being competent on behalf of the defendant to reduce the degree of malice and therefore mitigate the damages. Evans *v.* Smith, 5 T. B. Mon. (Ky.) 363, 17 Am. Dec. 74.

31. Where the slander charged

B. On Criminal Prosecution. — On a criminal prosecution the declarations and statements of the prosecuting witness are not competent as the admissions of a party,[32] but they may be admissible as bearing upon the *quo animo* of the defendant.[33]

XI. CHARACTER AND REPUTATION.

1. Of Plaintiff. — A. Presumption of Good Character. — The plaintiff's character is presumed to be good, and the burden is upon the defendant to show the contrary.[34]

B. As Evidence of Extent of Injury. — Since the injury resulting from libel or slander is in general one to the plaintiff's character or reputation, in mitigation of damages and as evidence of the extent of the injury the defendant may show that previous to the publication the plaintiff's general reputation was bad.[35]

was a statement accusing plaintiff of the theft of certain cattle, entries made by the plaintiff in his own books showing that they had been purchased by him were held properly excluded as self-serving, not being part of the *res gestae*. Barkly *v.* Copeland, 86 Cal. 483, 25 Pac. 1.

32. State *v.* Butman, 15 La. Ann. 166.

Conversations, admissions or declarations of the prosecuting witness are not competent evidence against the people to establish a justification unless forming part of the *res gestae*. Barthelemy *v.* People, 2 Hill (N. Y.) 248.

33. On a criminal prosecution for charging the prosecutrix with having been an inmate of a bawdy house at a particular place, it was held that her previous declaration of her intention to enter such a house at that place was competent, if not to show truth of the charge, at least as bearing upon the good faith of the defendant. McMahan *v.* State, 13 Tex. App. 220.

34. Whitney *v.* Janesville Gazette, 5 Biss. 330, 29 Fed. Cas. No. 17,590; Clark *v.* North American Co., 203 Pa. St. 346, 53 Atl. 237; Lotto *v.* Davenport, 50 Minn. 99, 52 N. W. 130; Times Pub. Co. *v.* Carlisle Journal Co., 94 Fed. 762; Howland *v.* Blake Mfg. Co., 156 Mass. 543, 568, 31 N. E. 656.

35. *England.* — Scott *v.* Sampson, L. R. 8 Q. B. Div. 491.

United States. — Cunningham *v.* Underwood, 116 Fed. 803; Whitney *v.* Janesville Gazette, 5 Biss. 330, 29 Fed. Cas. No. 17,590.

Alabama. — Fuller *v.* Dean, 31 Ala. 654.

California. — Hearne *v.* De Young, 132 Cal. 357, 64 Pac. 576.

Colorado. — Republican Pub. Co. *v.* Mosman, 15 Colo. 399, 24 Pac. 1051.

Connecticut. — Brunson *v.* Lynde, 1 Root 354; Seymour *v.* Merrills, 1 Root 459.

Illinois. — Sheahan *v.* Collins, 20 Ill. 325, 71 Am. Dec. 271; Welker *v.* Butler, 15 Ill. App. 209.

Indiana. — Tracy *v.* Hacket, 19 Ind. App. 133, 49 N. E. 185.

Kansas. — See Haag *v.* Cooley, 33 Kan. 387, 6 Pac. 585.

Kentucky. — Campbell *v.* Bannister, 79 Ky. 205; Ratcliffe *v.* Louisville Courier-Journal, 99 Ky. 416, 36 S. W. 177. See Eastland *v.* Caldwell, 2 Bibb 21, 4 Am. Dec. 668.

Maine. — Ridley *v.* Perry, 16 Me. 21.

Massachusetts. — Howland *v.* Blake Mfg. Co., 156 Mass. 543, 568, 31 N. E. 656; Com. *v.* Snelling, 15 Pick. 337; Parkhurst *v.* Ketchum, 6 Allen 406; Peterson *v.* Morgan, 116 Mass. 350.

Michigan. — Georgia *v.* Bond, 114 Mich. 196, 72 N. W. 232.

Minnesota. — Davis *v.* Hamilton, 88 Minn. 64, 92 N. W. 512.

New York. — Root *v.* King, 7 Cow. 613; Stiles *v.* Comstock, 9 How. Pr. 48.

North Carolina. — Vick *v.* Whit-

C. On Question of Malice. — Evidence of the plaintiff's bad reputation in the respect in which he has been maligned by the slander or libel is competent on the question of malice.[36]

D. Nature of the Reputation Which May Be Shown — The cases are in considerable conflict as to whether evidence as to plaintiff's character must be confined to his general character for integrity and moral worth, or may extend to his reputation for the particular trait involved in the charge, or his reputation for having committed the specific act charged against him. Some cases hold that only evidence of his general reputation is admissible;[37] while others hold

field, 2 Hayw. 222; Smith *v.* Smith, 30 N. C. 29; Sowers *v.* Sowers, 87 N. C. 303.

Pennsylvania. — Neeb *v.* Hope, 111 Pa. St. 145, 155, 2 Atl. 568; Henry *v.* Norwood, 4 Watts 347.

Rhode Island. — Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6.

South Carolina. — Sawyer *v.* Eifert, 2 Nott. & McC. 511, 10 Am. Dec. 633; Buford *v.* M'Luny, 1 Nott & McC. 268; Freeman *v.* Price, 2 Bail. L. 115; Anonymous, 1 Hill 251.

Tennessee. — Hackett *v.* Brown, 2 Heisk. 264.

Virginia. — See Adams *v.* Lawson, 17 Gratt. 250.

Character Among Majority of Neighborhood. — A witness testifying to the general reputation of the plaintiff need not have talked with a majority or any other particular number of persons in the community in which the plaintiff lives. Cunningham *v.* Underwood, 116 Fed. 803. Evidence as to the plaintiff's character among the majority of her neighbors with whom the witness had conversed was held not competent to show her general character. Adams *v.* Hannon, 3 Mo. 222. A witness testifying to the plaintiff's bad character for chastity need not first be asked whether he knows the plaintiff's general character in this respect. Senter *v.* Carr, 15 N. H. 351.

The Defendant May Cross-Examine the Plaintiff as to the latter's reputation and character before the time of the speaking of the slanderous words, as bearing upon the credibility of the witness and the amount of damages. Bernstein *v.* Singer, 1 App. Div. 63, 36 N. Y. Supp. 1093.

Where the slander charged the plaintiff with being a murderer, it was held competent, under the plea of not guilty in mitigation of damages, to show the plaintiff's general bad character. Anthony *v.* Stephens, 1 Mo. 254, 13 Am. Dec. 497.

General Talk in Community. The defendant cannot show, in mitigation of damages, that sometime previous to the filing of the petition the people of the community in which the plaintiff lived were in the habit of speaking in opprobrious language of him. Evidence of general character would, however, be admissible. Hendrick *v.* Kemp, 6 Mart. (N. S.) (La.) 500.

36. See *infra* this article, "Rumors, Reports and Suspicions."

The plaintiff's previous bad reputation in respect to the crime charged by the slanderous words may be considered in mitigation of *punitive* as well as compensatory damages. Maxwell *v.* Kennedy, 50 Wis. 645, 7 N. W. 657.

Evidence of the plaintiff's bad character is admissible to disprove malice by showing that the defendant merely repeated rumors that were in circulation, but in this case the evidence should be confined to the particular trait of character involved in the defamatory statement. Sayre *v.* Sayre, 25 N. J. L. 235. *Contra.* — Campbell *v.* Bannister, 79 Ky. 205.

37. Dewit *v.* Greenfield, 5 Ohio 225; Steinman *v.* McWilliams, 6 Pa. St. 170.

In reduction of compensatory damages, the plaintiff's general bad character may be shown, and when offered for this purpose the evidence should be confined to his general character. "The question is not what may have been his character in any

that it is competent also to show his general reputation for the particular trait involved in the charge;[38] and some cases go to the extent

given particular, but what was the estimation in which he was held among his neighbors and acquaintances." Sayre *v.* Sayre, 25 N. J. L. 235. (This case contains a lengthy discussion of the English authorities.)

38. *United States.* — Wright *v.* Schroeder, 2 Curt. 548, 30 Fed. Cas. No. 18,091.

Kentucky. — Eastland *v.* Caldwell, 2 Bibb 21, 4 Am. Dec. 668.

Maine. — Sickra *v.* Small, 87 Me. 493, 33 Atl. 9, 47 Am. St. Rep. 344.

Maryland. — Shilling *v.* Carson, 27 Md. 175, 92 Am. Dec. 632.

Massachusetts. — Leonard *v.* Allen, 11 Cush. 241.

Michigan. — Randall *v.* Evening News Ass'n, 97 Mich. 136, 56 N. W. 361 (reputation for bribing legislature).

New Hampshire. — Lamos *v.* Snell, 6 N. H. 413; Wetherbee *v.* Marsh, 20 N. H. 561, 51 Am. Dec. 244.

Pennsylvania. — Conroe *v.* Conroe, 47 Pa. St. 198 (*distinguishing* Steinman *v.* McWilliams, 6 Barr 170; Long *v.* Brougher, 5 Watts 439, and limiting these cases to their own peculiar facts).

Texas. — Schulze *v.* Jalonick, 18 Tex. Civ. App. 296, 44 S. W. 580; Knapp *v.* Campbell, 14 Tex. Civ. App. 199, 36 S. W. 765.

Utah. — Lowe *v.* Herald Co., 6 Utah 175, 21 Pac. 991.

Vermont. — Bowen *v.* Hall, 20 Vt. 232.

Virginia. — Dillard *v.* Collins, 25 Gratt. 343.

Wisconsin. — Wilson *v.* Noonan, 35 Wis. 321; Maxwell *v.* Kennedy, 50 Wis. 645, 7 N. W. 657; Candrian *v.* Miller, 98 Wis. 164, 73 N. W. 1004; B. *v.* I., 22 Wis. 372, 94 Am. Dec. 604.

The defendant may show the plaintiff's general bad reputation, and also his bad reputation in those respects in which it has been assailed by the alleged slander. "As he is expected to be always ready to defend his general character, so also he should be ready to defend it in reference to that matter wherein he alleges it to have been wrongfully assailed." Clark *v.* Brown, 116 Mass. 504, *distinguishing* Peterson *v.* Morgan, 116 Mass. 350.

Where the slanderous words charged dishonesty in the handling of defendant's horses by plaintiff as trainer, defendant may show the bad reputation of plaintiff resulting from his conduct in similar transactions with other persons. Finley *v.* Widner, 112 Mich. 230, 70 N. W. 433.

Where the Charge Imputes Unchastity, the defendant, in mitigation, may show that the plaintiff's reputation in that respect was bad. Fletcher *v.* Burroughs, 10 Iowa 557; Hallowell *v.* Guntle, 82 Ind. 554; Duval *v.* Davey, 32 Ohio St. 604.

Where the defamatory statement charges the plaintiff with adultery it is competent to show that he was commonly reported to be unchaste and licentious. The evidence as to the plaintiff's character cannot be confined to his general character with reference to the crime of adultery. Bridgman *v.* Hopkins, 34 Vt. 532.

When the alleged slander is an accusation of perjury, the defendant, in mitigation of damages, may show the plaintiff's general bad character for truth and veracity, as he may, where the charge is dishonesty, immorality or want of chastity, give evidence of general bad reputation for any one of these vices. Moyer *v.* Moyer, 49 Pa. St. 210.

Where the plaintiff had been charged with being a thief, evidence that he was generally reputed to be a thief was held competent in reduction of damages. Drown *v.* Allen, 91 Pa. St. 393, *overruling* in so far as *contra,* Long *v.* Brougher, 5 Watts (Pa.) 439, and Steinman *v.* McWilliams, 6 Barr (Pa.) 170.

Where the slander charged among other things that the plaintiff was insolvent and would not pay his debts, it was held proper, in mitigation of damages, for the defendant to show the plaintiff's general reputation for want of punctuality in the payment of his debts. Turner *v.* Foxall, 2 Cranch C. C. 324, 24 Fed. Cas. No. 14,255.

Where the charge was corrupt

of permitting proof that previous to the publication the plaintiff was generally reputed to be guilty of the charge subsequently made against him by the defendant,[39] though the contrary is likewise held.[40] Evidence of traits of character not involved in the charge is not admissible,[41] and some cases hold that evidence of reputation must be confined to the particular trait involved in the charge,[42] though

conduct as a state senator, it was held proper to show the plaintiff's bad reputation for honesty and integrity in that office. Wilson *v.* Noonan, 27 Wis. 598.

Where the defamatory charge was larceny it was held proper for the defendant, in mitigation of damages, to show the plaintiff's bad reputation for honesty and integrity. Warner *v.* Lockerby, 31 Minn. 421, 18 N. W. 145, 821, leaving it undecided whether evidence of general bad character might be shown. Where the defamatory charge was perjury it was held competent for the defendant, in mitigation of damages, to show the plaintiff's general bad character for veracity when on oath. McNutt *v.* Young, 8 Leigh (Va.) 542.

39. Strader *v.* Snyder, 67 Ill. 404; Schulze *v.* Jalonick, 18 Tex. Civ. App. 296, 44 S. W. 580; *s. c.*, 14 Tex. Civ. App. 656, 38 S. W. 264. See Drown *v.* Allen, 91 Pa. St. 393.

40. Reputation as to Particular Act Incompetent. — Where the alleged slander charged the plaintiff with stealing from his employer it was held that the defendant could not, in mitigation of damages, prove that the plaintiff was generally reputed to have stolen from his employer. "Evidence may be given of the general reputation of the plaintiff in those respects in which it has been assailed by alleged slander. Where one has been charged with theft it may be shown that he was generally reputed a thief, in order thus to show that no serious injury can have been inflicted on him. Clark *v.* Brown, 116 Mass. 504. But what the defendant sought to prove was not the plaintiff's general reputation, which was the general character he had gained in the community by his course of life, but what was the common rumor as to a particular transaction, namely, his having stolen from Weld. The defendant sought to show, not that the plaintiff's general reputation was bad, but that in a single instance he was generally reputed to have behaved badly. This would have been to have proved the common talk as to an individual subject of scandal. A general report that the plaintiff is guilty of the particular crime with which he was charged cannot be received in evidence in mitigation of damages." Mahoney *v.* Belford, 132 Mass. 393. See also Sickra *v.* Small, 87 Me. 493, 33 Atl. 9, 47 Am. St. Rep. 344.

41. Lamberrt *v.* Pharis, 3 Head (Tenn.) 622.

Where the slanderous charge was unchastity, evidence that the plaintiff was reputed to be a thief was held properly excluded, since the plaintiff's character cannot be attacked by proof of his reputation as to crimes not imputed by the defamatory statement. Smith *v.* Buckecker, 4 Rawle (Pa.) 295. Where the alleged slander was a charge of unchastity, proof of the plaintiff's quarrelsomeness is not admissible in mitigation of damages. Hosley *v.* Brooks, 20 Ill. 115, 71 Am. Dec. 252. Where the defamatory charge is perjury, evidence of the plaintiff's general bad character for veracity is admissible in mitigation, but his character in other respects is not in issue and cannot be shown. Bell *v.* Farnsworth, 11 Humph. (Tenn.) 608.

42. Dillard *v.* Collins, 25 Gratt. (Va.) 343; Lamberrt *v.* Pharis, 3 Head (Tenn.) 622. See Wilson *v.* Noonan, 27 Wis. 598.

While the plaintiff's bad reputation may be shown in mitigation of damages, such evidence must be confined to the reputation for that particular trait of character which is involved in the libelous charge. Post Pub. Co. *v.* Hallam, 59 Fed. 530, which, while enunciating this general rule, holds that after evidence by the de-

this is not the general rule,[43] at least when such evidence is offered in reduction of compensatory damages.[44]

Character as an Insulting, Provoking or Malicious Man. — The defendant, in mitigation of damages, cannot show plaintiff's general character as an insulting, provoking and quarrelsome man,[45] nor that he was generally reputed to be a malicious man.[46]

E. Evidence by Plaintiff. — a. *Necessity of Attack.* — The plaintiff cannot offer evidence as to his good character until it has been put in issue in some manner by the defendant, but must rest on the presumption of his innocence and good character.[47] In some

fendant attacking the plaintiff's reputation for integrity in politics, to which the libel related, the plaintiff was properly allowed to show that his general reputation for integrity was good, integrity in politics having no distinctive feature differentiating it from integrity in any other relation in life.

Where the slanderous charge imputes perjury to the plaintiff, evidence of his general character is not admissible except in so far as it relates to his reputation for veracity. Birchfield *v.* Russell, 3 Cold. (Tenn.) 228. See also Bell *v.* Farnsworth, 11 Humph. (Tenn.) 608.

When Specific Instance of Misconduct Is Charged. — On a criminal prosecution for the utterance of a slander charging a particular person with a specific crime, evidence of such person's general reputation is not admissible, but the evidence must be confined to the specific trait of character involved in the charge. This rule does not apply, however, where the slanderous charge is a general one involving the slandered person's general reputation. Leader *v.* State, 4 Tex. App. 162.

Evidence by Plaintiff in His Own Behalf. — Where the plaintiff, in rebuttal of defendant's evidence in support of a plea of the truth of the criminal charge made against the plaintiff, seeks to show his good character, his evidence must be confined to those traits of character which the imputed offense involves. "The question presented is the same as if he were on trial for the offense and sought to adduce evidence of character in his defense. In such case the character to be proved must not be general, but such as would make it unlikely that the accused would be guilty of the particular crime with which he is charged." McBee *v.* Fulton, 47 Md. 403, 431.

43. Lamos *v.* Snell, 6 N. H. 413; Wetherbee *v.* Marsh, 20 N. H. 561, 51 Am. Dec. 244; Eastland *v.* Caldwell, 2 Bibb (Ky.) 21, 4 Am. Dec. 668; Sickra *v.* Small, 87 Me. 493, 33 Atl. 9.

In Adams *v.* Lawson, 17 Gratt. (Va.) 250, the court says that the reasoning in the cases of McNutt *v.* Young, 8 Leigh (Va.) 542, and Lincoln *v.* Chrisman, 10 Leigh (Va.) 338, seems to show that the defendant will not be confined to the character of the plaintiff in reference to the particular subject of the slander, but may offer evidence of his general bad character.

44. See *supra* "On the Question of Malice."

45. McAlexander *v.* Harris, 6 Munf. (Va.) 465.

46. Forshee *v.* Abrams, 2 Iowa 571.

47. *England.* — Cornwall *v.* Richardson, R. & M. 305, 21 E. C. L. 446.

United States. — Wright *v.* Schroeder, 2 Curt. 548, 30 Fed. Cas. No. 18,091.

Alabama. — Rhodes *v.* Ijames, 7 Ala. 574, 42 Am. Dec. 604.

Delaware. — Parke *v.* Blackiston, 3 Har. 373.

Illinois. — Harbison *v.* Shook, 41 Ill. 141.

Iowa. — Mayo *v.* Sample, 18 Iowa 306.

Massachusetts. — Howland *v.* Blake Mfg. Co., 156 Mass. 543, 568, 31 N. E. 656.

Missouri. — Stark *v.* Publishers: George Knapp & Co., 160 Mo. 529, 61 S. W. 669.

jurisdictions, however, this rule does not obtain, the courts holding that there is no reason in compelling the plaintiff to rely on a presumption of good character.[48] Although the plaintiff cannot show his good character until it has been attacked by the defendant, for until then the law presumes it to be good and the defendant admits it, the jury in estimating the damages may take into consideration

New Hampshire. — Dame *v.* Kenney, 25 N. H. 318; Severance *v.* Hilton, 24 N. H. 147.

New York. — Inman *v.* Foster, 8 Wend. 602.

Pennsylvania. — Chubb *v.* Gsell, 34 Pa. St. 114.

Texas. — Houston Print. Co. *v.* Moulden (Tex. Civ. App.), 41 S. W. 381; Young *v.* Sheppard (Tex. Civ. App.), 40 S. W. 62.

Where the alleged slander charges the plaintiff with criminal conduct, his general character is not put in issue, and he cannot prove as part of his main case his general good character and reputation until it has been otherwise attacked by the defendant, and the mere fact that the plaintiff on cross-examination has been questioned as to specific acts which may tend to weaken his good character and lessen his good reputation does not constitute an attack on his character within this rule. Hitchcock *v.* Moore, 70 Mich. 112, 37 N. W. 914, 14 Am. St. Rep. 474.

The plaintiff's good reputation will be presumed until there is evidence to the contrary, and the fact that the complaint alleges and the answer denies plaintiff's good reputation does not make it necessary for him to give evidence of it until there is evidence to the contrary. Lotto *v.* Davenport, 50 Minn. 99, 52 N. W. 130.

The Fact Rather Than Manner of Attack Governs. — In Clark *v.* North American Co., 203 Pa. St. 346, 53 Atl. 237, the court, after laying down the general rule and reconciling the apparently conflicting decisions in Petrie *v.* Rose, 5 Watts & S. (Pa.) 364, and Chubb *v.* Gsell, 34 Pa. St. 114, says: "But the attack may be just as direct and just as damaging by slurs and insinuations thrown into the jury box by abuse of cross-examination as by calling witnesses under a definite offer. In such cases the result is the same, and the plaintiff should have the same opportunity to protect himself. How far there has been a direct attack may depend on manner and emphasis as well as on the words used, and therefore it is a matter to be left largely in the discretion of the trial judge. But he should bear in mind that it is the fact of the attack, rather than the manner of it, that entitles plaintiff to protect himself. Defendant, in mitigation of damages, may show that plaintiff's reputation is bad; but he should accept the responsibility with the privilege, and should not be permitted, under guise of cross-examination, to make what is, in effect, a direct attack, without affording plaintiff the opportunity of reply."

Reputation in Other Places. Where the plaintiff's bad reputation at a particular place was shown by the defendant in mitigation of damages, it was held proper for the plaintiff to show her good reputation in an adjoining town in which she had lived both previous and subsequent to her residence in the place concerning her reputation in which defendant's witnesses had testified. Hanners *v.* McClelland, 74 Iowa 318, 37 N. W. 389.

48. Bennett *v.* Hyde, 6 Conn. 24; Shroyer *v.* Miller, 3 W. Va. 158. See Buford *v.* M'Luny, 1 Nott & McC. (S. C.) 268.

"As injury to character is the gravamen of slander, goodness of character may be proved in aggravation as badness of character may be shown in mitigation of damages," and the former is true even though no evidence has been offered by defendant attacking plaintiff's character. Williams *v.* Greenwade, 3 Dana (Ky.) 432.

Plaintiff Need Not Rely on Mere Presumption of Innocence and Good Character. — Williams *v.* Haig, 3 Rich. L. (S. C.) 362.

"It being thus important to the

the fact that the character and standing of the plaintiff are unimpeached.[49]

b. *What Is an Attack.* — **(1.) Plea of Truth and Evidence Thereunder.** A plea of the truth and evidence in support thereof is not an attack on the plaintiff's character within the meaning of this general rule.[50] Some cases, however, hold that an attempt to prove the truth of the defamatory charge justifies the admission of evidence of the plaintiff as to his good character on the same theory that the defendant may show his good character in a criminal prosecution.[51] And it has

decision of the case that the jury should hear evidence as to the character of the plaintiff, either generally or in reference to the particular subject-matter of the slander or libel, can any good reason be assigned why it should depend on the option of the defendant whether they shall hear such evidence or not? Such a one-sided rule would not be fair and equal as between the parties, would often defeat the justice of the case, and might operate great hardship upon a plaintiff who is unknown to the jury. . . . It does not appear to me to be a satisfactory answer to say that the plaintiff ought to stand upon the presumption which the law makes, in the absence of evidence to the contrary, that his character is good. Why should the plaintiff be compelled to rely upon such a general presumption when he offers to prove that the presumption, in his particular case, is in accordance with the fact? And what right has the defendant to complain, since the evidence is only offered to establish with more certainty what the law would presume to be true in the absence of all evidence? I am not aware of any case in which a mere presumption that a fact exists, which is liable to be rebutted, is held to preclude a party in whose favor the presumption is made from introducing evidence to prove that the fact is really so. And besides, the character of the plaintiff is always impeached when the slander or libel imputes crime or moral delinquency, and the charge moreover may proceed from a person whose known position and character give it weight with the jury." Adams *v.* Lawson, 17 Gratt. (Va.) 250.

49. "The position in life and the family of the plaintiff are always important circumstances as bearing upon the question of damages, and have always been held to be admissible in evidence for that purpose." Klumph *v.* Dunn, 66 Pa. St. 141, 5 Am. Rep. 355.

50. Severance *v.* Hilton, 24 N. H. 147; Houghtaling *v.* Kilderhouse, 1 N. Y. 530; Matthews *v.* Huntley, 9 N. H. 146. See Cornwall *v.* Richardson, R. & M. 305, 21 E. C. L. 446.

Proof of specific acts of misconduct by the plaintiff in support of a plea of justification does not put the plaintiff's character in issue so as to entitle him to show his general good reputation. Hall *v.* Elgin Dairy Co., 15 Wash. 542, 46 Pac. 1049.

In rebuttal of evidence tending to establish the truth of specific charges against the plaintiff of official misconduct, the latter cannot show that he has always sustained the character of an honest man, since such charge attacks the conduct and not the character of the plaintiff, the rule in criminal cases allowing such evidence being an exception to the general rule. Stow *v.* Converse, 3 Conn. 325.

Where the defendant in justification of a charge of unchastity proves specific instances, plaintiff cannot in rebuttal show her good reputation for chastity. Prescott *v.* Tousey, 18 Jones & S. (N. Y.) 12.

51. Stowell *v.* Beagle, 79 Ill. 525; Harbison *v.* Shook, 41 Ill. 141; McBee *v.* Fulton, 47 Md. 403, 431; Burton *v.* March, 51 N. C. 409; Dewit *v.* Greenfield, 5 Ohio 225. See Byrket *v.* Monohon, 7 Blackf. (Ind.) 83, 41 Am. Dec. 212; Balcom *v.* Michels, 49 Ill. App. 379; Romayne *v.* Duane, 3 Wash. C. C. 246, 20 Fed. Cas. No. 12,028.

been held that a mere plea of the truth unsupported by evidence is an attack on the plaintiff's character.[52] Where the evidence offered in support of a plea of the truth has a tendency to reflect upon the plaintiff's good character in the particular in question, and thus to reduce the damages, the plaintiff may rebut it by evidence of his general good character in that respect.[53]

(2.) When Charge Is of a Criminal Nature. — Some cases have drawn a distinction between an attempt to prove the truth of a charge which is and one which is not criminal, holding that such an attempt is an attack upon the plaintiff's character in the former case, but not in the latter.[54]

(3.) Imputation of Lack of Chastity. — It has been held that where the defamatory statement imputes a lack of chastity the plaintiff's character is directly involved, and she may show her good reputation in this respect.[55]

Under a plea justifying a charge of perjury the plaintiff may show his own good character. "As the testimony was somewhat conflicting as to what the appellant [plaintiff] swore, and as to his constructive intent, proof of his high character might have tended to rebut a criminal construction of the facts or of his intent; and, moreover, as the issue involved his character, and the measure of damages depended essentially on its grade, he had a right to the testimony offered and rejected as to his character." Smith *v.* Lovelace, 1 Duv. (Ky.) 215.

52. Where the defendant pleads justification, the plaintiff, in aggravation of damages, may prove his good character although no evidence has been introduced to impeach it. Scott *v.* Peebles, 2 Smed. & M. (Miss.) 546.

53. In rebuttal of evidence of the truth of the charge, the plaintiff cannot prove his general good character, but where the evidence offered in support of this plea, though insufficient to establish it, has a tendency to prove the general bad character of the plaintiff in the particular in question, and so to reduce the damages, the plaintiff may rebut it by evidence of his general good character in that particular, although no direct evidence of general bad character has been offered by the defendant. Wright *v.* Schroeder, 2 Curt. 548, 30 Fed. Cas. No. 18,091.

54. Howland *v.* Blake Mfg. Co., 156 Mass. 543, 31 N. E. 656, *explaining* Harding *v.* Brooks, 5 Pick. (Mass.) 244, on this ground.

Where the truth of a charge of crime is pleaded in justification, and evidence is given to sustain this plea, the plaintiff may prove his general character in the same manner as if he were on trial for the alleged crime. Downey *v.* Dillon, 52 Ind. 442, *following* Byrket *v.* Monohon, 7 Blackf. (Ind.) 83, 41 Am. Dec. 212, and *distinguishing* Miles *v.* Vanhorn, 17 Ind. 245, 79 Am. Dec. 477, on the ground that in this case the slanderous charge imputed unchastity, but not criminal conduct, and that therefore the exclusion of the plaintiff's evidence as to general character was proper.

55. King *v.* Sassaman (Tex. Civ. App.), 64 S. W. 937. But see Miles *v.* Vanhorn, 17 Ind. 245, 79 Am. Dec. 477.

Where the defamatory statement charged the plaintiff with being a whore, and the defendant, in support of the truth of the charge, had proved only unchaste conduct between the plaintiff and her affianced husband, it was held proper for the plaintiff in rebuttal to prove her good reputation for chastity. "The charge against plaintiff, that she is a whore, involves the idea that her offenses against chastity were public and notorious. The charge is sought to be established by proof of moral delinquencies, which, however much they are to be condemned, do not

(4.) Evidence of Grounds of Suspicion. — Evidence as to circumstances showing grounds for suspicion of the plaintiff's guilt of the charge, offered to show the defendant's lack of malice, is not an attack upon plaintiff's character, and does not justify evidence of his good character.[56]

c. *When Directly Attacked by Defendant.* — Where the defendant has offered evidence of the plaintiff's bad character in mitigation of damages the latter may in rebuttal show his good character.[57]

F. On Criminal Prosecution. — On a criminal prosecution, however, evidence of the prosecuting witness' bad character is not material, because the question of damages is not in issue,[58] though the contrary is also held.[59]

G. Method of Proof. — a. *Particular Instances of Misconduct.* The plaintiff's general bad reputation cannot be shown by evidence of particular instances of his misconduct, either of the same or of a

necessarily lead to the conclusion that her character was such as was charged, but from which the jury, perhaps, might infer it to be such. Proof, then, that her general reputation for chastity was good would tend to show that, of whatever indiscretions she had been guilty, her irregularities had not been of such a nature as to impress upon her the character of a whore, and would thus tend to rebut any presumption that she was such which might otherwise arise from the circumstances proved by defendant. True, the plaintiff may have been a whore without having established the reputation of being such. And, if she had been proved to be such, proof that her reputation for chastity was good would not be admissible. But when the proof is directed simply to facts from which the inference that she is a whore may be drawn, but which at the same time are not inconsistent with the conclusion that her character is not such, she may, we think, throw into the scale her general reputation for chastity." Sheehey *v.* Cokley, 43 Iowa 183, *distinguishing* Houghtaling *v.* Kilderhouse, 2 Barb. (N. Y.) 149; *s. c.,* 1 N. Y. 530.

56. "Nor does the proof which, under the general issue, may be given, of circumstances that may have awakened in the mind of the defendant a suspicion of the plaintiff's guilt, open the door for testimony in support of his good character. Evidence of such circumstances is received in mitigation of damages, not because it shows that the injury inflicted upon the plaintiff's reputation is any the less, but because it tends to disprove the existence of malice in the defendant. It is, of course, no answer to this to prove that the plaintiff was of good repute. His reputation may have been untarnished, and yet the circumstances under which the actionable words were spoken may have been such as to indicate that there was very little malice in the defendant. It is therefore only where evidence has been given directly attacking the character of the plaintiff that he is at liberty to introduce proof of his good reputation." Chubb *v.* Gsell, 34 Pa. St. 114, *disapproving* Petrie *v.* Rose, 5 Watts & S. (Pa.) 364.

57. Howland *v.* Blake Mfg. Co., 156 Mass. 543, 568, 31 N. E. 656; Cooper *v.* Francis, 37 Tex. 445; Holley *v.* Burgess, 9 Ala. 728; Dame *v.* Kenney, 25 N. H. 318; Willey *v.* Carpenter, 65 Vt. 168, 26 Atl. 488.

Where the defendant's evidence casts an imputation upon the character of the plaintiff for honesty, it may be rebutted by evidence of his general good character. Petrie *v.* Rose, 5 Watts & S. (Pa.) 364.

58. Com. *v.* Snelling, 15 Pick. (Mass.) 337; McArthur *v.* State, 41 Tex. Crim. 635, 57 S. W. 847.

59. In a criminal prosecution for libel the bad character of the prosecuting witness is competent not only to affect his credibility as a witness

different nature from that charged in the defamatory statement.[60] Notwithstanding the rule excluding particular instances of misconduct, the defendant may show the plaintiff's misconduct forming part of the transaction with reference to which the defamatory charge was made.[61]

but in mitigation of punishment; but it is not evidence of the defendant's innocence. State *v.* Bush, 122 Ind. 42, 23 N. E. 677.

By Statute in Texas in Prosecutions for Imputing Unchastity to a virtuous woman the latter's reputation for chastity may be inquired into. Shaw *v.* State, 28 Tex. App. 236, 12 S. W. 741.

60. *England* — Scott *v.* Sampson, L. R. 8 Q. B. Div. 491.

Connecticut. — Swift *v.* Dickerman, 31 Conn. 285.

Georgia. — Tolleson *v.* Posey, 32 Ga. 372.

Indiana. — Robertson *v.* Hamilton, 16 Ind. App. 328, 45 N. E. 46; Hallowell *v.* Guntle, 82 Ind. 554; Indianapolis Journal News Co. *v.* Pugh, 6 Ind. App. 510, 33 N. E. 991.

Iowa. — Hanners *v.* McClelland, 74 Iowa 318, 37 N. W. 389; Fountain *v.* West, 23 Iowa 9, 92 Am. Dec. 405; Forshee *v.* Abrams, 2 Iowa 571; Marker *v.* Dunn, 68 Iowa 720, 28 N. W. 38.

Kentucky. — Campbell *v.* Bannister, 79 Ky. 205; Ratcliffe *v.* Louisville Courier-Journal Co., 99 Ky. 416, 36 S. W. 177.

Maine. — Sickra *v.* Small, 87 Me. 493, 33 Atl. 9, 47 Am. St. Rep. 344; Ridley *v.* Perry, 16 Me. 21.

Massachusetts. — Parkhurst *v* Ketchum, 6 Allen 406; McLaughlin *v.* Cowley, 131 Mass. 70; Chapman *v.* Ordway, 5 Allen 593.

Michigan. — McGee *v.* Baumgartner, 121 Mich. 287, 80 N. W. 21; Proctor *v.* Houghtaling, 37 Mich. 41.

Minnesota. — Davis *v.* Hamilton, 88 Minn. 64, 92 N. W. 512; Dennis *v.* Johnson, 47 Minn. 56, 49 N. W. 383.

New Hampshire. — Pallet *v.* Sargent, 36 N. H. 496; Lamos *v.* Snell, 6 N. H. 413, 25 Am. Dec. 468.

North Carolina. — Vick *v.* Whitfield, 2 Hayw. 222.

Rhode Island. — Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6.

South Carolina. — Sawyer *v.* Eifert, 2 Nott & McC. 511, 10 Am. Dec. 633.

Tennessee. — Bell *v.* Farnsworth, 11 Humph. 608; Hackett *v.* Brown, 2 Heisk. 264 (holding incompetent evidence that the plaintiff, charged with unchastity, was living in a house reputed to be a house of ill-fame).

Vermont. — Bowen *v.* Hall, 20 Vt. 232.

Wisconsin. — Wilson *v.* Noonan, 27 Wis. 598.

Where the libel in substance charges the plaintiff with being unworthy of credit, defendant, in mitigation of damages, cannot show how many persons the plaintiff owed, since particular acts are not competent in proof of general character or reputation. Muetz *v.* Tuteur, 77 Wis. 236, 46 N. W. 123, 20 Am. St. Rep. 115, 9 L. R. A. 86; State *v.* Armstrong, 106 Mo. 395, 16 S. W. 604, 27 Am. St. Rep. 361, 13 L. R. A. 419.

In mitigation of damages it is not competent to show that the plaintiff has been guilty of other offenses than the one imputed to him, or offenses of a similar character. Tribune Ass'n *v.* Follwell, 46 C. C. A. 526, 107 Fed. 646; Sun Print. & Pub. Co. *v.* Schenck, 98 Fed. 925.

Under a plea of not guilty the defendant cannot show the plaintiff's admissions several years previous of his having been guilty of an offense similar to the one imputed to him by the defendant. Long *v.* Brougher, 5 Watts (Pa.) 439.

The Plaintiff's General Reputation for Particular Acts of misconduct cannot be shown, since the particular act itself cannot be proved. Fisher *v.* Patterson, 14 Ohio 418. See Hanners *v.* McClelland, 74 Iowa 318, 37 N. W. 389; Lamberrt *v.* Pharis, 3 Head (Tenn.) 622.

61. "It is well settled that a defendant cannot show, in mitigation of damages for a specific libel, other and disconnected immoralities, but can show only the plaintiff's general

b. *Cross-Examination.* — The plaintiff on cross-examination of witnesses testifying to his bad character may ask what misconduct is generally imputed to him,[62] and what the defendant has said to others on the subject.[63]

c. *Certificates.* — The plaintiff cannot show his good character by means of certificates or petitions signed by his neighbors.[64]

d. *Foundation of Witness' Knowledge.* — While the witness testifying to the plaintiff's reputation must know what such reputation is, his knowledge need not be founded upon express statements of the plaintiff's associates, but may be based upon the manner in which the plaintiff is received and regarded in society as apparent from the conduct of his associates.[65]

H. Reputation Must Be Previous to Publication. — Evidence of the plaintiff's bad reputation must be confined to a time previous to the publication.[66]

I. Plea Under Which Competent. — a. *Generally.* — In the absence of some plea attacking the plaintiff's character or putting it in issue, evidence reflecting upon his character should be excluded.[67] Such evidence, however, is competent under the general issue.[68]

b. *Under General Issue Joined With Justification.* — The fact that a plea of justification has been joined with the general issue does not

character." But it was held that in this case the two charges were made concerning the same transaction and were not disconnected and independent, and that "the conduct of both parties in the whole matter should have been permitted to be shown so as to aid the jury in determining the extent of the injury suffered by the plaintiff." Holmes *v.* Jones, 147 N. Y. 59, 41 N. E. 409.

62. Leonard *v.* Allen, 11 Cush. (Mass.) 241.

63. Binford *v.* Young, 115 Ind. 174, 16 N. E. 142 (such evidence might tend to show that the defendant himself had created the bad reputation).

64. Shurtleff *v.* Stevens, 51 Vt. 501, 31 Am. Rep. 698.

Petitions for the plaintiff's appointment to office are not competent evidence to show his good character and reputation. Sanford *v.* Rowley, 93 Mich. 119, 52 N. W. 1119.

65. Peters *v.* Bourneau, 22 Ill. App. 177.

66. Bathrick *v.* Detroit Post & Tribune Co., 50 Mich. 629, 16 N. W. 172, 45 Am. Rep. 63; Scott *v.* McKinnish, 15 Ala. 662; Simmons *v.* Holster, 13 Minn. 249; Tolleson *v.* Posey, 32 Ga. 372; Haag *v.* Cooley, 33 Kan. 387, 6 Pac. 585. See Miller *v.* Cook, 124 Ind. 101, 24 N. E. 577.

Evidence of plaintiff's general bad reputation ten years previous was held properly admitted in Parkhurst *v.* Ketchum, 6 Allen (Mass.) 406, on the ground that it would be presumed to continue in the absence of evidence to the contrary.

67. Henderson *v.* Fox, 80 Ga. 479, 6 S. E. 164.

Where the defendant pleads a justification of the alleged slander, which charged the plaintiff with dishonesty in his profession, he cannot show the plaintiff's general bad character, but must confine his evidence to proof of the specific act charged. Parke *v.* Blackiston, 3 Har. (Del.) 373.

68. Paddock *v.* Salisbury, 2 Cow. (N. Y.) 811; Vick *v.* Whitfield, 2 Hayw. (N. C.) 222; Sickra *v.* Small, 87 Me. 493, 33 Atl. 9, 47 Am. St. Rep. 344; Bodwell *v.* Swan, 3 Pick. (Mass.) 376; Sayre *v.* Sayre 25 N. J. L. 235; Root *v.* King, 7 Cow. (N. Y.) 613. But see Foot *v.* Tracy, 1 Johns. (N. Y.) 46.

serve to exclude evidence of the plaintiff's character, which would still be competent upon the question of damages.[69]

2. Defendant's Character and Habits. — In a civil action the defendant cannot show his own bad character in mitigation of damages,[70] nor his own notorious habit of slandering people.[71] And on a criminal prosecution he cannot show his good reputation until it has been questioned by the state.[72]

XII. RUMORS, REPORTS AND SUSPICIONS.

1. Generally. — There is considerable conflict in the cases as to the admissibility of evidence as to previous rumors, reports or suspicions of the truth of the defamatory charge. Such evidence may be offered for two distinct purposes: First, in reduction of compensatory damages because tending to show that the plaintiff's character was already impaired and the injury from the defamatory charge correspondingly less, and, second, as bearing upon the animus of the defendant in making the charge. Some cases hold that rumors and reports of the plaintiff's guilt of the offense charged against him are not admissible for any purpose.[73]

69. Sayre *v.* Sayre, 25 N. J. L. 235; Howland *v.* Blake Mfg. Co., 156 Mass. 543, 569, 31 N. E. 656; Pope *v.* Welsh, 18 Ala. 631; Wolcott *v.* Hall, 6 Mass. 514, 4 Am. Dec. 173; Sickra *v.* Small, 87 Me. 493, 33 Atl. 9, 47 Am. St. Rep. 344.

General evidence of the bad character of the plaintiff is admissible, although the defendant has justified that the imputation is true, for if the justification should fail the question as to the *quantum* of damages would still remain. Young *v.* Bennett, 5 Ill. 43.

"The reasons which authorize the admission of this species of evidence, under the plea of general issue, seem alike to exist, and to require its admission, where a justification has been pleaded, but the defendant has failed in sustaining it. It is not offered, in either case, as sustaining the justification, or making out a defense, but is solely applicable to the question of damages." Stone *v.* Varney, 7 Metc. (Mass.) 86, 39 Am. Dec. 762.

70. Hastings *v.* Stetson, 130 Mass. 76.

Contra. — Where the defendant in his answer alleged his incompetency to make a malicious charge against any one on account of drunkenness, the exclusion of evidence that at the time of speaking the words complained of "the defendant's mind was so besotted by a long course of dissipation and his character so depraved that no one who knew him would pay any attention to what he might utter or give any credence whatever to any slanderous charge he might make," was held error on the ground that the evidence was competent upon the question of malice and damages. Gates *v.* Meredith, 7 Ind. 440.

71. Young *v.* Slemons, Wright (Ohio) 125.

In mitigation of damages the defendant cannot show that he was in the habit of talking much about persons and things, and that what he said was not regarded by the community as worthy of notice and seldom occasioned remark. Howe *v.* Perry, 15 Pick. (Mass.) 506.

72. State *v.* Heacock, 106 Iowa 191, 76 N. W. 654.

73. Sun Print. & Pub. Co. *v.* Schenck, 98 Fed. 925; Dame *v.* Kenney, 25 N. H. 318; Pease *v.* Shippen, 80 Pa. St. 513; Chamberlin *v.* Vance, 51 Cal. 75; Wilson *v.* Fitch, 41 Cal. 363; Stone *v.* Varney, 7 Metc. (Mass.) 86, 39 Am. Dec. 762; Sickra *v.* Small, 87 Me. 493, 33 Atl. 9, 47

2. Mitigation of Damages. — In some cases it is held that evidence of previous *rumors* to the same effect as the defamatory charge is admissible in mitigation of damages.[74] In other jurisdictions previous *common* and *general* reports and rumors of the truth of the charge are admissible in mitigation of damages.[75]

3. Malice and Exemplary Damages. — A. GENERALLY. — Previous general reports to the same effect as the defamatory charge are

Am. St. Rep. 344. But see Clark *v.* Brown, 116 Mass. 564.

"The fact that others besides the defendant have defamed the plaintiff is a wholly irrelevant matter. And so is the fact that on such former occasions the plaintiff did not sue the publisher or take steps to contradict the charges made against him. And when the falsehood thus unchallenged grows to a persistent rumor or general report, which the defendant hears, believes, and repeats, it is not regarded in law as a mitigating circumstance. Evidence of any such rumor is altogether inadmissible." Preston *v.* Frey, 91 Cal. 107, 27 Pac. 533, *quoting* Newell on Defamation, Slander and Libel, p. 893, § 70.

74. Skinner *v.* Powers, 1 Wend. (N. Y.) 451. See Bourreseau *v.* Detroit Evening Journal Co., 63 Mich. 425, 30 N. W. 376, 6 Am. St. Rep. 320, *per* Campbell, C. J.; Mapes *v.* Weeks, 4 Wend. (N. Y.) 659.

The defendant, on cross-examination of the plaintiff's witnesses, may show that rumors and reports of the same tenor as the libel were current prior to its publication. Barr *v.* Hack, 46 Iowa 308.

In ——— *v.* Moore, 1 M. & S. (Eng.) 284, it was held that the defendant, in mitigation of damages, could ask a witness whether he had not heard reports in the neighborhood that the plaintiff had been guilty of practices similar to that charged in the alleged libel.

75. *Connecticut.* — Case *v.* Marks, 20 Conn. 248.

Indiana. — Heilman *v.* Shanklin, 60 Ind. 424.

Kentucky. — Nicholson *v.* Rust, 21 Ky. L. Rep. 645, 52 S. W. 933.

Michigan. — Fowler *v.* Gilbert, 38 Mich. 292.

New Hampshire. — Wetherbee *v.* Marsh, 20 N. H. 561, 51 Am. Dec. 244.

North Carolina. — Knott *v.* Burwell, 96 N. C. 272, 2 S. E. 588; Nelson *v.* Evans, 12 N. C. 9.

Tennessee. — Lamberrt *v.* Pharis, 3 Head 622.

Common reports and rumors to the same effect as the defamatory publication complained of, if circulated before such publication and without the agency of the defendant, are competent on the question of damages, but not in justification. Republican Pub. Co. *v.* Mosman, 15 Colo. 399, 24 Pac. 1051.

A current report of the truth of the defamatory statement occasioned by facts connected with the plaintiff may be shown in mitigation of damages. Young *v.* Slemons, Wright (Ohio) 125.

Where the defamatory statement charges the plaintiff with unchastity, a general report and belief of the loose morals and prostitution of the plaintiff may be given in evidence to mitigate damages. Sowers *v.* Sowers, 87 N. C. 303. As may a general rumor as to the plaintiff's unchastity in circulation at the time of the alleged slander. Nicholson *v.* Merritt, 109 Ky. 369, 59 S. W. 25.

Prior reports of the plaintiff's guilt of the act charged by the defendant, if generally current and not mere idle rumor, may be admissible in mitigation of damages. Rodgers *v.* Kline, 56 Miss. 808, *citing* Binns *v.* Stokes, 27 Miss. 239. In mitigation of damages it is competent to show a current rumor to the same effect as the slander charged, and that the defendant believed it to be true. Ledgerwood *v.* Elliott (Tex. Civ. App.), 51 S. W. 872.

competent to disprove malice and thus reduce exemplary damages,[76] though it has been held to the contrary.[77]

B. Must Have Been Known to Defendant. — Such rumors or reports are not competent to negative express malice where it does not appear that they were known to the defendant at the time of the publication.[78]

C. When Malice Otherwise Disproved. — Where the circumstances are such as to completely negative the existence of express

76. *Delaware.* — Morris *v.* Barker, 4 Har. 520 (*citing* Leicester *v.* Walter, 2 Camp. [Eng.] 251, and ——— *v.* Moore, 1 M. & S. [Eng.] 284).

Kentucky. — Hart *v.* Reed, 1 B. Mon. 166, 35 Am. Dec. 179; Calloway *v.* Middleton, 2 A. K. Marsh. 372, 12 Am. Dec. 409.

Maryland. — Shilling *v.* Carson, 27 Md. 175, 92 Am. Dec. 632.

Michigan. — Farr *v.* Rasco, 9 Mich. 353, 80 Am. Dec. 88 (attributing the conflict on this question to a misapprehension of the purpose of the evidence, which is not to show either the truth of the words or to lessen the extent of the injury, but as bearing upon the *quo animo* of the defendant).

Minnesota. — Davis *v.* Hamilton, 88 Minn. 64, 92 N. W. 512.

Mississippi. — Binns *v.* Stokes, 27 Miss. 239. See Hubbard *v.* Rutledge, 52 Miss. 581.

Missouri. — Arnold *v.* Jewett, 125 Mo. 241, 28 S. W. 614.

See Knott *v.* Burwell, 96 N. C. 272, 2 S. E. 588.

"Under the plea of the general issue, in an action for a libel, it is competent for the defendant, with a view of mitigating damages, to give evidence of a general or common report in circulation in the neighborhood where the plaintiff is living, prior to the publication complained of, that the plaintiff was guilty of the charge imputed to him. If a slanderous report so far gains credence or belief as to be relied on as a general or common report in the neighborhood where a man is living at the time, it affects his character, and is calculated to mislead persons not having a personal knowledge of the facts. Evidence of such reports, however, is only competent to rebut the presumption of malice, and not to affect the right to the recovery of compensatory damages, or by way of attacking the general character of the plaintiff." Van Derveer *v.* Sutphin, 5 Ohio St. 293.

Where a witness called by the prosecution to show the speaking of the words by the defendant testified on cross-examination that she had previously heard the same story from others, it was held proper to ask her on re-examination from whom she heard the story, the purpose of the defendant being to show that he only repeated a common rumor and did not originate the slander; it would be competent for the plaintiff to show the extent and prevalence of the rumor and to trace it back to the defendant himself. Burt *v.* McBain, 29 Mich. 260.

Evidence that before the publication it was the general opinion and common talk in the community that the plaintiff was guilty of the misconduct imputed to him is admissible to show good faith and lack of malice, if it appears that this was known to the defendant at the time of the publication complained of. Larrabee *v.* Minnesota Tribune Co., 36 Minn. 141, 30 N. W. 462.

77. Gray *v.* Elzroth, 10 Ind. App. 587, 37 N. E. 551, 53 Am. St. Rep. 400; Swan *v.* Thompson, 124 Cal. 193, 56 Pac. 878; Long *v.* Brougher, 5 Watts (Pa.) 439. See Edwards *v.* San Jose Print. & Pub. Soc., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70.

78. Harrison *v.* Garrett, 132 N. C. 172, 43 S. E. 594; Hanners *v.* McClelland, 74 Iowa 318, 37 N. W. 389; Lothrop *v.* Adams, 133 Mass. 471, 43 Am. Rep. 528 (declining to determine the competency of reports known to the defendant); Larrabee *v.* Minnesota Tribune Co., 36 Minn. 141, 30 N. W. 462.

malice it has been held that evidence of such reports is inadmissible.[79]

4. As Affecting Plaintiff's Reputation and Reducing Compensatory Damages. — A. GENERALLY. — Some cases, while recognizing that evidence of the plaintiff's general character or reputation is admissible in mitigation of damages, exclude evidence of previous current or general reports of the truth of the charge, on the ground that it has no bearing upon the plaintiff's general reputation.[80] But in other

79. Evidence that the defendant had heard similar reports previous to the publication is not admissible to rebut the presumption of malice in law where malice in fact has already been fully and absolutely negatived and disproved. "Indeed, evidence of general reports that the defendant is guilty of the imputed offense is inadmissible as well in mitigation as in justification." Powers *v.* Cary, 64 Me. 9, in which it appeared that the defendant, the publisher of the paper in which the libel appeared, had no actual knowledge of its publication.

80. *United States.* — Sun Print. & Pub. Co. *v.* Schenck, 98 Fed. 925.

Massachusetts. — Stone *v.* Varney, 7 Metc. 86, 39 Am. Dec. 762; Alderman *v.* French, 1 Pick. 1, 11 Am. Dec. 114 (*distinguishing* Earl of Leicester *v.* Walter, 2 Camp. [Eng.] 251, and ——— *v.* Moore, 1 M. & S. [Eng.] 284). See Bodwell *v.* Swan, 3 Pick. 376.

New Hampshire. — Dame *v.* Kenney, 25 N. H. 318.

New York. — Matson *v.* Buck, 5 Cow. 499.

Ohio. — Van Derveer *v.* Sutphin, 5 Ohio St. 293.

Wisconsin. — Haskins *v.* Lumsden, 10 Wis. 302.

While the plaintiff's general character may be proved in mitigation of damages, reports of his guilt of the crime with which the defendant charges him cannot be shown. Wolcott *v.* Hall, 6 Mass. 514, 4 Am. Dec. 173. A current report of the truth of the charge is not admissible to show the plaintiff's character, since a current report and general character are not equivalent. Luther *v.* Skeen, 53 N. C. 356.

"The reports themselves prove nothing as to general character. They may be entirely discredited and disbelieved where the party assailed is known. The point of inquiry in relation to general character is not whether a man has been attacked, but how does he stand now when rumor has spent its force upon him. A jury can form no opinion upon this point from the fact that reports have been in circulation." Dame *v.* Kenney, 25 N. H. 318.

Evidence as to rumors and suspicions to the same effect as the defamatory matter complained of is not admissible in reduction of damages. Cave, J., after reviewing the English authorities, says: "From this review of the authorities it will be seen that there is a considerable conflict of opinion. . . . It would seem that in principle such evidence is not admissible, as only indirectly tending to affect the plaintiff's reputation. If these rumors and suspicions have, in fact, affected the plaintiff's reputation, that may be proved by general evidence of reputation. If they have not affected it they are not relevant to the issue. . . . Unlike evidence of general reputation, it is particularly difficult for the plaintiff to meet and rebut such evidence; for all that those who know him best can say is that they have not heard anything of these rumors. Moreover, it may be that it is the defendant himself who has started them. Turning to the authorities, it will be seen that while such evidence appears to have been admitted by Lord Ellenborough, C. J., in Eamer *v.* Earle (not reported), and by Cresswell, J., with the approbation of Wightman, J., in Richards *v.* Richards, 2 Mood. & Rob. 557, and while its admissibility was supported by Pigot, C. B., in Bell *v.* Parke, 11 Ir. C. L. Rep. 413, it was doubted by Abbott, C. J., in Waithman *v.* Weaver, 11 Price 257*n*, and by Coleridge, J., in Nye *v.* Thompson, 16 Q. B. 175, and it was held inadmissible by Fitzgerald and Hughes, B. B., in Bell *v.* Parke, 11

jurisdictions evidence of such general rumors, reports and suspicions of the plaintiff's guilt of the defamatory charge is admitted on the theory that it shows that the plaintiff's general reputation was bad and his injury correspondingly less.[81]

B. General Rumors and Reports Distinguished From Particular Reports. — Even where general rumors are admissible in reduction of compensatory damages, particular rumors, reports or suspicions not shown to be in general circulation are not competent for this purpose, since they have no bearing upon the plaintiff's general reputation.[82]

Ir. C. L. Rep. 413, and by the whole Court of Exchequer in Jones *v.* Stevens, 11 Price 235. In Leicester *v.* Walter, 2 Camp. 251, evidence of rumors and suspicions was admitted by Sir James Mansfield against his own judgment; but in that case it was proposed to prove that the plaintiff's relations and former acquaintances had ceased to visit him on account of these rumors and suspicions, so that the evidence would seem really to have amounted to evidence of general reputation." Scott *v.* Sampson, L. R. 8 Q. B. Div. 491.

The mere prevalence of a common report or rumor is not the same thing as a general bad reputation and loss of character. "The existence of unfavorable and defamatory rumors and reports is one thing and a real loss of character or standing in the community quite another. Everybody knows that such rumors and reports may be afloat without real injury or detriment to the person against whom they are circulated." Haskins *v.* Lumsden, 10 Wis. 302.

81. Kelley *v.* Dillon, 5 Ind. 426; Sanders *v.* Johnson, 6 Blackf. (Ind.) 50, 36 Am. Rep. 564; Gray *v.* Elzroth, 10 Ind. App. 587, 37 N. E. 551, 53 Am. St. Rep. 400; Nelson *v.* Wallace, 48 Mo. App. 193; Hart *v.* Reed, 1 B. Mon. (Ky.) 166, 35 Am. Dec. 179; Shilling *v.* Carson, 27 Md. 175, 92 Am. Dec. 632.

General rumors and reports prevailing at the time the defamatory matter was published which affect the plaintiff's general character may be shown in mitigation of damages. Wallace *v.* Homestead Co., 117 Iowa 348, 90 N. W. 835, and cases cited.

General Suspicion. — Evidence that plaintiff had been generally suspected of the charge is competent in reduction of damages because it shows the injury to plaintiff's reputation to be less. McGee *v.* Sodusky, 5 J. J. Marsh. (Ky.) 185, 20 Am. Dec. 251; Commons *v.* Walters, 1 Port. (Ala.) 323; Henson *v.* Veatch, 1 Blackf. (Ind.) 369; Fuller *v.* Dean, 31 Ala. 654 (*distinguishing* Bradley *v.* Gibson, 9 Ala. 406, on the ground that there is a difference between being generally suspected and a general report that he had been suspected or accused); Dewit *v.* Greenfield, 5 Ohio 225. See also Freeman *v.* Price, 2 Bail. L. (S. C.) 115.

In Earl of Leicester *v.* Walter, 2 Camp. (Eng.) 251, it was held that under the general issue the defendant might show in mitigation of damages that before and at the time of the publication of the libel there was a general suspicion of the plaintiff's character and habits; that it was generally rumored that such charge had been brought against him, and that his relations and former acquaintances had on this ground ceased to visit him.

82. *Indiana.* — Kelley *v.* Dillon, 5 Ind. 426; Gray *v.* Elzroth, 10 Ind. App. 587, 37 N. E. 551, 53 Am. St. Rep. 400. See Sanders *v.* Johnson, 6 Blackf. 50, 36 Am. Rep. 564.

Iowa. — Marker *v.* Dunn, 68 Iowa 720, 28 N. W. 38.

Michigan. — Proctor *v.* Houghtaling, 37 Mich. 41.

Mississippi. — Rodgers *v.* Kline, 56 Miss. 808; Powers *v.* Presgroves, 38 Miss. 227.

New York. — Inman *v.* Foster, 8 Wend. 602.

Pennsylvania. — Fitzgerald *v.* Stewart, 53 Pa. St. 343.

Vermont. — Bowen *v.* Hall, 20 Vt.

5. Report of Guilt Distinguished From Report of Accusation. A rumor or report merely to the effect that the plaintiff had been suspected or accused of the charge subsequently made by the defendant cannot be shown, because it does not amount to a report or suspicion of the plaintiff's guilt of the charge.[83]

6. When Not Referred to at Time of Publication. — It has been held that evidence of such rumors and reports is not admissible if not referred to by the defendant as his authority at the time of the publication.[84] But this would seem to be true only where such evidence is offered to show good faith.

7. When Defendant the Originator. — Where it appears that defendant was the originator of such report, evidence of it is inadmissible.[85] And when evidence of it has been introduced the plaintiff may show that it originated with the defendant himself.[86]

8. Under General Issue. — Some cases hold that under the general issue evidence of previous reports or rumors of the plaintiff's guilt of the libelous charge is not admissible ;[87] while others hold that it is.[88]

9. As Evidence of the Truth. — Such previous general reports are

232 (containing a lengthy discussion of the authorities).

Evidence that it has been "currently reported in the neighborhood" that the plaintiff is guilty of the offense imputed by the defendant's statement does not come within the rule admitting general rumors or general suspicions. Gray *v.* Elzroth, 10 Ind. App. 587, 37 N. E. 551, 53 Am. St. Rep. 400; Blickenstaff *v.* Perrin, 27 Ind. 527.

Mere Gossip, not amounting to general reputation of the plaintiff's guilt of the charges made against him by the defendant, is not competent. Bourreseau *v.* Detroit Evening Journal Co., 63 Mich. 425, 30 N. W. 376, 6 Am. St. Rep. 320, *per* Campbell, C. J.

In Hancock *v.* Stephens, 11 Humph. (Tenn.) 507, evidence "that there was a report and rumor in the neighborhood" that the plaintiff was guilty of the offenses imputed to him, offered in mitigation of damages under the general issue, was held properly excluded on the ground that although the defendant might show under the general issue in mitigation of damages that at the time of publication it was generally reported and suspected that the plaintiff was guilty of the offense imputed to him, the evidence in question did not show that the report was a general one.

83. Fuller *v.* Dean, 31 Ala. 654; Bradley *v.* Gibson, 9 Ala. 406. See also Smith *v.* Buckecker, 4 Rawle (Pa.) 295. But see Brewer *v.* Chase, 121 Mich. 526, 80 N. W. 575.

84. Haskins *v.* Lumsden, 10 Wis. 302.

Public report of a fact stated in a libel cannot be given in evidence in mitigation of damages when the libel expressly disavows all reliance upon report and professes to go on the ocular observation of the author. Root *v.* King, 7 Cow. (N. Y.) 613.

85. Binns *v.* Stokes, 27 Miss. 239.

86. Burt *v.* McBain, 29 Mich. 260.

87. Young *v.* Bennett, 5 Ill. 43; Knight *v.* Foster, 39 N. H. 576; Pease *v.* Shippen, 80 Pa. St. 513, 21 Am. Rep. 116; Kennedy *v.* Gifford, 19 Wend. (N. Y.) 296; Inman *v.* Foster, 8 Wend. (N. Y.) 602.

General Suspicion. — Evidence that the plaintiff was suspected by his neighbors of the act charged is not admissible under the general issue. Sheahan *v.* Collins, 20 Ill. 325, 71 Am. Dec. 271; Lehning *v.* Hewett, 45 Ill. 23.

88. Nicholson *v.* Merritt, 109 Ky. 369, 59 S. W. 25; Van Derveer *v.* Sutphin, 5 Ohio St. 293; Dewit *v.* Greenfield, 5 Ohio 225 (in mitigation of damages); McGee *v.* Sodusky, 5 J. J. Marsh. 185, 20 Am. Dec. 251; Hart *v.* Reed, 1 B. Mon. (Ky.) 166,

not competent as evidence showing the truth of the statement.[89]

Under Plea of Justification. — Evidence of such rumor or suspicion is not admissible under a plea of justification.[90]

10. On Criminal Prosecution. — On a prosecution for criminal libel or slander it seems that evidence of previous general reports of the truth of the libelous charge is not admissible to negative malice,[91] though the contrary has been held.[92]

11. Rebuttal. — Contrary Rumors. — The plaintiff in rebuttal may show other equally general rumors containing a different account of the plaintiff's conduct concerning which the defamatory statement was made.[93]

12. Method of Proving General Rumors and Reports. — While it has been held that in proof of general rumors and reports it is competent to show the declarations of particular persons,[94] yet in most

35 Am. Dec. 179; Morris *v.* Barker, 4 Har. (Del.) 520.

89. Treat *v.* Browning, 4 Conn. 408; Fowler *v.* Gilbert, 38 Mich. 292. Although the defendant may prove the truth of the accusations against plaintiff, yet evidence of common reports or publications in the newspapers upon the subject is inadmissible for this purpose. State *v.* Butman, 15 La. Ann. 166.

90. Commons *v.* Walters, 1 Port. (Ala.) 323; Brewer *v.* Chase, 121 Mich. 526, 80 N. W. 575.

91. In a criminal prosecution the defendant cannot show that the facts stated in the libelous publication had been for a long time currently reported and believed in the community, and that these facts had been so reported to him. "The law does not permit persons to publish that one has been guilty of criminal, infamous or degrading acts, based upon public rumors or current belief." People *v.* Jackman, 96 Mich. 269, 55 N. W. 809.

On a criminal prosecution for imputing unchastity to an innocent woman the defendant cannot show in disproof of malice a previous general report of unlawful relations between the prosecutrix and another, the making of which charge is the defamatory matter specified in the indictment. State *v.* Hinson, 103 N. C. 374, 9 S. E. 552, *distinguishing* Nelson *v.* Evans, 12 N. C. 9; McCurry *v.* McCurry, 82 N. C. 296; Sowers *v.* Sowers, 87 N. C. 303; McDougald *v.* Coward, 95 N. C. 368; Knott *v.* Burwell, 96 N. C. 272, 2 S. E. 588, on the ground that these were civil actions in which proof of general reports of the truth of the charge was received in mitigation of damages. The evidence offered in the principal case would, however, be competent after verdict to aid the court in ascertaining the punishment to be inflicted.

92. In a criminal prosecution for imputing a lack of chastity, the defendant, in disproof of malice, may show that for three years prior to the publication the report was current in the neighborhood that a criminal intimacy had existed between the parties involved in the slanderous imputation. Humbard *v.* State, 21 Tex. App. 200, 17 S. W. 126.

93. The defendant having opened the door to evidence of rumors, could not object to the same kind of evidence in rebuttal which tended to show that he had not acted in good faith, since he must have known of both inconsistent rumors. Post Pub. Co. *v.* Hallam, 59 Fed. 530.

94. In Wier *v.* Allen, 51 N. H. 177, it was held competent to show the declarations of a third person to the same effect as the alleged slander, although prefaced by the words "they say." Such evidence is competent, not to show the truth of the rumor, but merely to show that such a declaration had been made. "In order to show the existence of common report it is not to be required that every individual, whose sayings in connection with those of others go to make up common report, should him-

jurisdictions the general rule seems to be that such evidence is incompetent.[95]

13. Subsequent Reports. — Even where evidence of rumors, reports and suspicions of the plaintiff's guilt of the charge is admissible it must be confined to reports existing at or prior to the time of the publication.[96]

XIII. REPETITIONS AND OTHER DEFAMATORY PUBLICATIONS.

1. Repetitions. — As evidence of express malice it is competent to show that the defendant repeated the defamatory charge.[97]

self be called to testify either as to facts within his knowledge upon which his assertions have been predicated, or that he has made assertions concerning the subject-matter, whether founded in truth or not. The inquiry is not whether common report tells the truth, but whether, concerning a certain matter, common report prevails. And since common report is but the aggregate of individual speech, it must be competent to show what this, that and the other man has said. In such a case the declarations of third persons, communicated through the medium of a second, are not within the meaning of hearsay evidence, but are original, independent facts, admissible in proof of the issue."

Declarations Subsequent to Commencement of Action. — While the declarations of a third person charging the plaintiff with the offense imputed in the defamatory statement, if made after the commencement of the action, are not admissible to show the grounds of the defendant's statement, in connection with evidence of previous reports originating with such third person, they may be relevant, either as confirming, contradicting or qualifying his former statements. Jeter *v.* Askew, 2 Spears L. (S. C.) 531.

95. Proctor *v.* Houghtaling, 37 Mich. 41; Poppenheim *v.* Wilkes, 1 Strob. L. (S. C.) 275.

Where the slander consists in circulating a slanderous report concerning the plaintiff, the defendant may in mitigation of damages show that the report was in general circulation throughout the neighborhood, but witnesses cannot testify in detail as to their conversations with other persons in the neighborhood with regard to the alleged report. Nicholson *v.* Rust, 21 Ky. L. Rep. 645, 52 S. W. 933; Sheahan *v.* Collins, 20 Ill. 325, 71 Am. Dec. 271.

96. Thompson *v.* Nye, 16 Q. B. 175, 71 E. C. L. 175; Blackwell *v.* Landreth, 90 Va. 748, 19 S. E. 791.

97. *England.* — Finden *v.* Westlake, 1 M. & M. 461, 22 E. C. L. 356.

Connecticut. — Ward *v.* Dick, 47 Conn. 300, 36 Am. Rep. 75.

Illinois. — Stowell *v.* Beagle, 79 Ill. 525; Ransom *v.* McCurley, 140 Ill. 626, 31 N. E. 119; Dexter *v.* Harrison, 146 Ill. 169, 34 N. E. 46; Harbison *v.* Shook, 41 Ill. 141.

Indiana. — Burson *v.* Edwards, 1 Ind. 164; Shoulty *v.* Miller, 1 Ind. 544; Meyer *v.* Bohlfing, 44 Ind. 238.

Iowa. — Halley *v.* Gregg, 74 Iowa 563, 38 N. W. 416; Prime *v.* Eastwood, 45 Iowa 640.

Kentucky. — Smith *v.* Lovelace, 1 Duv. 215; Campbell *v.* Bannister, 79 Ky. 205.

Michigan. — Ellis *v.* Whitehead, 95 Mich. 105, 54 N. W. 752; Thompson *v.* Bowers, 1 Doug. 321.

Missouri. — Krup *v.* Corley, 95 Mo. App. 640, 69 S. W. 609.

Nebraska. — McCleneghan *v.* Reid, 34 Neb. 472, 51 N. W. 1037.

New Hampshire. — Symonds *v.* Carter, 32 N. H. 458.

South Carolina. — Miller *v.* Kerr, 2 McCord 285, 13 Am. Dec. 722; Morgan *v.* Livingston, 2 Rich. L. 573.

Texas. — Whitehead *v.* State, 39 Tex. Crim. 89, 45 S. W. 10; Behee *v.* Missouri Pac. R. Co., 71 Tex. 424, 9 S. W. 449.

The jury, on the question of damages, may take into consideration the

2. Other Defamatory Publications. — A. GENERALLY. — Other defamatory publications concerning the same person and of similar import to the one charged are competent to show malice.[98]

B. TIME WHEN MADE. — a. *Generally.* — Other similar publications made either before or after those relied on are competent on the question of malice.[99]

fact that the defendant has reiterated the defamatory statement and attempted to justify it as true. Cavanaugh *v.* Austin, 42 Vt. 576. The defendant's statement subsequent to the publication in reference to his defamatory statement, "I admit I have used hard words, but I won't take back anything; I won't apologize," was held properly admitted to show actual malice. Klewin *v.* Bauman, 53 Wis. 244, 10 N. W. 398. A subsequent publication by the defendant in the same paper affirming the truth of the libel is admissible to show the defendant's intention in publishing the libel declared on. Barwell *v.* Adkins, 1 M. & G. 807, 39 E. C. L. 666.

Repetition in Foreign Language. Evidence as to a repetition of the slanderous words in a foreign language, while not admissible in proof of the libel charged unless it is alleged to have been spoken in the foreign tongue, is nevertheless competent to show malice. Grotius *v.* Ross, 24 Ind. App. 543, 57 N. E. 46.

Whole Conversation May Be Shown. — Where the plaintiff in an action for slander introduces evidence tending to show that the defendant repeated the same slander in another conversation, the defendant may prove the whole of that conversation. Perry *v.* Breed, 117 Mass. 153.

Other Statements in Same Conversation. — A substantial repetition of the libel and other statements made at the same time in connection therewith expressing gratification at plaintiff's removal from office was held properly admitted to show malice. Mix *v.* Woodward, 12 Conn. 262.

The Conduct and Words of the Defendant toward the plaintiff in the presence of third persons subsequent to the publication charged, in effect repeating his previous defamatory statements, were held properly admitted to show express malice. Ware *v.* Cartledge, 24 Ala. 622, 60 Am. Dec. 489.

98. *California.* — Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845.

Illinois. — Schmisseur *v.* Kreilich, 92 Ill. 347.

Indiana. — Casey *v.* Hulgan, 118 Ind. 590, 21 N. E. 322; Logan *v.* Logan, 77 Ind. 558.

Massachusetts. — Harriott *v.* Plimpton, 166 Mass. 585, 44 N. E. 992; Hastings *v.* Stetson, 130 Mass. 76.

Minnesota. — Gribble *v.* Pioneer Press Co., 34 Minn. 342, 25 N. W. 710; Larrabee *v.* Minnesota Tribune Co., 36 Minn. 141, 30 N. W. 462.

New Jerscy. — Bartow *v.* Brands, 15 N. J. L. 248.

Texas. — Collins *v.* State, 39 Tex. Crim. 30, 44 S. W. 846.

Vermont. — Cavanaugh *v.* Austin, 42 Vt. 576.

Evidence of the speaking of words of similar import to a person other than the one named in the petition is admissible to show malice. Cushing *v.* Hederman, 117 Iowa 637, 91 N. W. 940 (*citing* Bailey *v.* Bailey, 94 Iowa 598, 63 N. W. 341); Reitan *v.* Goebel, 33 Minn. 151, 22 N. W. 291.

Evidence as to the utterance or publication of other words of similar import, while competent to show malice, should be clearly restricted to that purpose by the court, who should caution the jury that such evidence cannot be considered for any purpose in establishing the damages. Letton *v.* Young, 2 Metc. (Ky.) 558.

99. Hansbrough *v.* Stinnett, 25 Gratt. (Va.) 495; Harman *v.* Cundiff, 82 Va. 239; State *v.* Mills, 116 N. C. 1051, 21 S. E. 563; Evening Journal Ass'n *v.* McDermott, 44 N. J. L. 430, 43 Am. Rep. 392; Bailey *v.* Bailey, 94 Iowa 598, 63 N. W. 341; Hanners *v.* McClelland, 74 Iowa 318, 37 N. W. 389; Swindall *v.* Harper,

b. *With Reference to Commencement of Action.* — **(1.) Previous.** Publications of similar import made previous to the commencement of the action are competent to show malice.[1]

(2.) Subsequent. — In some cases it has been held that other defamatory publications subsequent to the commencement of the action are not competent to show malice.[2] But the almost universal rule

51 W. Va. 381, 41 S. E. 117. See Conant *v.* Leslie, 85 Me. 257, 27 Atl. 147; Symonds *v.* Carter, 32 N. H. 458.

Publication Made Before the One Relied On. — Preston *v.* Frey, 91 Cal. 107, 27 Pac. 533; Adkins *v.* Williams, 23 Ga. 222; Markham *v.* Russell, 12 Allen (Mass.) 573; Fredrickson *v.* Johnson, 60 Minn. 337, 62 N. W. 388; Gribble *v.* Pioneer Press Co., 34 Minn. 342, 25 N. W. 710; Saunders *v.* Baxter, 6 Heisk. (Tenn.) 369.

"**Squibs or Dodgers Published in Advance** of the libelous publication and calling attention to it are admissible to show malice." Com. *v.* Place, 153 Pa. St. 314, 26 Atl. 620.

Seven Years Previous. — A publication of the same import is admissible to show express malice, though made seven years previous to the one sued upon. Barrett *v.* Long, 3 H. L. Cas. 395.

Publication Made Subsequent to the One Relied On. — *Connecticut.* Williams *v.* Miner, 18 Conn. 464.

Maryland. — McBee *v.* Fulton, 47 Md. 403, 427; Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500.

Massachusetts. — Robbins *v.* Fletcher, 101 Mass. 115.

Michigan. — Whittemore *v.* Weiss, 33 Mich. 348.

New Jersey. — King *v.* Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622.

Pennsylvania. — O'Toole *v.* Post Print. & Pub. Co., 179 Pa. St. 271, 36 Atl. 288.

Vermont. — Kidder *v.* Bacon, 74 Vt. 263, 52 Atl. 322.

Wisconsin. — Hacker *v.* Heiney, 111 Wis. 313, 87 N. W. 249; Grace *v.* McArthur, 76 Wis. 641, 45 N. W. 518.

Subsequent Justification of Libel. Where the alleged libel was published by the defendant's agent in defendant's absence, and without his knowledge or consent, plaintiff may give in evidence an article published in a subsequent number of the same newspaper with defendant's knowledge and consent justifying the publication of the article complained of as libelous. Goodrich *v.* Stone, 11 Metc. (Mass.) 486.

1. *Alabama.* — Scott *v.* McKinnish, 15 Ala. 662.

Maryland. — Duvall *v.* Griffith, 2 Har. & G. 30.

Massachusetts. — Baldwin *v.* Soule, 6 Gray 321.

Michigan. — Beneway *v.* Thorp, 77 Mich. 181, 43 N. W. 863.

Minnesota. — Reitan *v.* Goebel, 33 Minn. 151, 22 N. W. 291.

New York. — Ward *v.* Dean, 57 Hun 585, 10 N. Y. Supp. 421; Cruikshank *v.* Gordon, 118 N. Y. 178, 23 N. E. 457; Bassell *v.* Elmore, 48 N. Y. 561; Distin *v.* Rose, 69 N. Y. 122; Daly *v.* Byrne, 77 N. Y. 182. See Cassidy *v.* Brooklyn Daily Eagle, 138 N. Y. 239, 33 N. E. 1038.

North Dakota. — Lauder *v.* Jones, 101 N. W. 907.

The defendant's statements regarding the plaintiff three or four years prior to the trial were held properly admitted to show malice, notwithstanding the fact that they were spoken in German, and that the witness, who understood both English and German, testified to them in English. Born *v.* Rosenow, 84 Wis. 620, 54 N. W. 1089.

2. Distin *v.* Rose, 69 N. Y. 122; Daly *v.* Byrne, 77 N. Y. 182; Frazier *v.* McCloskey, 60 N. Y. 337; Eccles *v.* Radam, 75 Hun 535, 27 N. Y. Supp. 486; Howell *v.* Cheatham, Cooke (Tenn.) 247; Swindall *v.* Harper, 51 W. Va. 381, 41 S. E. 117, *citing* Howell *v.* Cheatham, Cooke (Tenn.) 247, and *disapproving* Morgan *v.* Livingston, 2 Rich. L. (S. C.) 573.

Limitation and Reason of Rule. "It is the prevailing doctrine that the reiteration of a libel or slander

now is that such other publications of similar import to the one relied on are admissible whether made before or after the commencement of the action.[3] But such other publications should not be so remote

after suit brought may be proved on the question of malice and damages, probably with this qualification, however, that the cause of action for the reiteration has been barred by the statute of limitations, or that the language subsequently reiterated is, for some other reason, not actionable. The authorities upon this point are not harmonious. . . . No case holds that a repetition of a libel or slander after suit brought is, in its nature, not competent evidence on the question of malice and damage; and whenever it has been excluded as evidence it has always been upon the ground that it was an independent cause of action, and thus, if such evidence were received, that there would be danger of a double recovery." Turton *v.* New York Recorder Co., 144 N. Y. 144, 38 N. E. 1009.

In Holmes *v.* Brown, Kirby (Conn.) 151, similar libelous words spoken after the commencement of the suit were held inadmissible to show malice because a recovery in the present action would not bar a recovery in another action for such words.

3. *England.* — McLeod *v.* Wakley, 3 Car. & P. 311, 14 E. C. L. 322.

Alabama. — Parmer *v.* Anderson, 33 Ala. 78; Teague *v.* Williams, 7 Ala. 844; Scott *v.* McKinnish, 15 Ala. 662; Sonneborn *v.* Bernstein, 49 Ala. 168.

California. — Chamberlin *v.* Vance, 51 Cal. 75; Hearne *v.* De Young, 119 Cal. 670, 52 Pac. 150, 499 (*distinguishing* Stern *v.* Loewenthal, 77 Cal. 340, 19 Pac. 579, and *disapproving* Frazier *v.* McCloskey, 60 N. Y. 337); Norris *v.* Elliott, 39 Cal. 72.

Georgia. — Craven *v.* Walker, 101 Ga. 845, 29 S. E. 152.

Illinois. — Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935; Halsey *v.* Stillman, 48 Ill. App. 413.

Indiana. — Barker *v.* Prizer, 150 Ind. 4, 48 N. E. 4; Hesler *v.* Degant, 3 Ind. 501; Scott *v.* Mortsinger, 2 Blackf. 454.

Iowa. — Hinkle *v.* Davenport, 38 Iowa 355; Schrimper *v.* Heilman, 24 Iowa 505.

Kentucky. — Taylor *v.* Moran, 4 Metc. 127.

Maine. — Smith *v.* Wyman, 16 Me. 13.

Maryland. — Garrett *v.* Dickerson, 19 Md. 418, 450.

Massachusetts. — Bodwell *v.* Swan, 3 Pick. 376; Morasse *v.* Brochu, 151 Mass. 567, 25 N. E. 74, 21 Am. St. Rep. 474, 8 L. R. A. 524.

Michigan. — Welch *v.* Tribune Pub. Co., 83 Mich. 661, 47 N. W. 562, 21 Am. St. Rep. 629, 11 L. R. A. 233.

Minnesota. — Larrabee *v.* Minnesota Tribune Co., 36 Minn. 141, 30 N. W. 462; Gribble *v.* Pioneer Press Co., 34 Minn. 342, 25 N. W. 710.

Missouri. — Noeninger *v.* Vogt, 88 Mo. 589; Williams *v.* Harrison, 3 Mo. 412.

Nebraska. — Bee Pub. Co. *v.* Shields, 94 N. W. 1029.

North Carolina. — State *v.* Mills, 116 N. C. 1051, 21 S. E. 563.

Ohio. — Stearns *v.* Cox, 17 Ohio 590.

Pennsylvania. — M'Almont *v.* M'Clelland, 14 Serg. & R. 359; Kean *v.* M'Laughlin, 2 Serg. & R. 469.

South Carolina. — Morgan *v.* Livingston, 2 Rich. L. 573; Miller *v.* Kerr, 2 McCord 285, 13 Am. Dec. 722.

Tennessee. — Witcher *v.* Richmond, 8 Humph. 473.

Texas. — Behee *v.* Missouri Pac. R. Co., 71 Tex. 424, 9 S. W. 449; Zeliff *v.* Jennings, 61 Tex. 458.

Vermont. — Rea *v.* Harrington, 58 Vt. 181, 2 Atl. 475, 56 Am. Rep. 561.

The Defendant's Statement Made During the Course of the Trial to the plaintiff's attorney that he would make the plaintiff smart for it if the persecution continued, referring to the continuance of the suit, was held not admissible to show malice. Scougale *v.* Sweet, 124 Mich. 311, 82 N. W. 1061.

Publication Containing New Libelous Matter. — If a defendant after the commencement of the suit

or disconnected from the one charged as to have no legitimate bearing upon the state of the defendant's mind at the time in question.[4]

C. Character of Publication. — a. *Similarity or Identity of Charge.* — While evidence of other defamatory publications on a different occasion from that charged is admissible to show malice, the general rule supported by the great weight of authority is that such other publications must be of similar import to the one relied upon and contain substantially the same defamatory charge,[5]

issues a new publication, mingling the matter for which he has been sued with new libelous matter, he cannot call upon the court to analyze the publication and separate what refers to the former libel from the new slanderous matters, but the whole publication may be read in evidence. Schenck *v.* Schenck, 20 N. J. L. 208.

4. Symonds *v.* Carter, 32 N. H. 458; Severance *v.* Hilton, 32 N. H. 289.

5. *Alabama.* — Commons *v.* Walters, 1 Port. 323; Parmer *v.* Anderson, 33 Ala. 78.

Connecticut. — Ward *v.* Dick, 47 Conn. 300, 36 Am. Rep. 75.

Iowa. — Bailey *v.* Bailey, 94 Iowa 598, 63 N. W. 341.

Massachusetts. — Watson *v.* Moore, 2 Cush. 133.

Minnesota. — Jacobs *v.* Cater, 87 Minn. 448, 92 N. W. 397.

Nevada. — Thompson *v.* Powning, 15 Nev. 195.

New Jersey. — Schenck *v.* Schenck, 20 N. J. L. 208.

North Dakota. — Lauder *v.* Jones, 101 N. W. 907.

Ohio. — Dewit *v.* Greenfield, 5 Ohio 225.

Oregon. — Upton *v.* Hume, 24 Or. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493.

Pennsylvania. — Shock *v.* M'Chesney, 2 Yeates 473.

Vermont. — Bowen *v.* Hall, 20 Vt. 232.

Distinct and Different Defamation Incompetent. — Evidence of a charge of a different nature, or of a different and distinct calumny at a different time from that alleged, is not admissible for any purpose. Conant *v.* Leslie, 85 Me. 257, 27 Atl. 147; Bodwell *v.* Swan, 3 Pick (Mass.) 376. See Com. *v.* Damon, 136 Mass. 441.

Other libelous statements made at a different time and of a different nature are not admissible. "It has sometimes been argued that proof of this character shows general malice upon the part of the defendant, which may properly enhance the damages against him. So would evidence that he had set fire to the house of the plaintiff, or committed a battery upon his person, furnish stronger proof of general malice than mere words, however opprobrious. The principle does not stop with proof of different words, but extends to the whole conduct of the defendant. Some of the adjudged cases certainly seem to go this length. (2 Campb. 73; 2 Stark. Ev. 635, n. a.) And if the proposition we are considering is sound they were rightly decided. But the modern, and I think the better, doctrine is, that the action for slander was not designed to punish the defendant for general ill-will to his neighbor, but to afford the plaintiff redress for a specific injury. To constitute that injury, malice must be proved, not mere general ill-will, but malice in the special case set forth in the pleadings, to be inferred from it, and the attending circumstances. The plaintiff may show a repetition of the charge for which the action is brought, but not a different slander for any purpose; and if such evidence is received without objection, with a view to establish malice, the plaintiff may, notwithstanding, bring a subsequent action for the same words, and recover." Howard *v.* Sexton, 4 N. Y. 157.

Articles reflecting on the plaintiff, whether in themselves libelous or not, published by defendant subsequent to the libel, but which have no reference

although there are cases apparently to the contrary.[6] But it is not essential that they be *verbatim* repetitions of the charges relied on if they are of substantially the same nature and calculated to produce the same impression.[7] Some cases, however, seem to limit proof of other actionable publications to evidence merely of repetitions of the charge relied upon.[8]

to it, are not admissible to show malice or enhance the damages. Mix *v.* Woodward, 12 Conn. 262, and commenting on the lack of harmony in the cases; especially in England, where such evidence had been held admissible in Charlter *v.* Barrett, Peake's Cas. 22; Lee *v.* Huson, *id.* 166; Rustell *v.* Macquister, 1 Camp. 49 note; and inadmissible in Mead *v.* Daubigny, Peake's Cas. 125; Stuart *v.* Lovall, 2 Stark. Cas. 93; Finnerty *v.* Tipper, 2 Camp. 72.

Must Explain or Refer to Publication Charged. — "The plaintiff in an action of libel cannot introduce in evidence, for any purpose, a publication of the defendant made subsequent to that sued on, unless the subsequent one be an explanation or confession of the former, or contain an express admission of the malicious intent in the first publication." Russell *v.* Farrell, 102 Tenn. 248, 52 S. W. 146; Saunders *v.* Baxter, 6 Heisk. (Tenn.) 369. See also Finnerty *v.* Tipper, 2 Camp. (Eng.) 72.

6. Other and Different Defamatory Publications. — Some cases seem to hold that different defamatory charges are admissible to show malice. Roberts *v.* Ward, 8 Blackf. (Ind.) 333; Freeman *v.* Sanderson, 123 Ind. 264, 24 N. E. 239; Casey *v.* Hulgan, 118 Ind. 590, 21 N. E. 322; Smith *v.* Lovelace, 1 Duv. (Ky.) 215; Symonds *v.* Carter, 32 N. H. 458 (requiring, however, that such words be so connected with those charged as to have a legitimate bearing upon the disposition of the defendant's mind at the time of the publication complained of); Stearns *v.* Cox, 17 Ohio 590 (in this case the defamatory charge was perjury, and evidence that the defendant had also charged the plaintiff with stealing was held competent to show malice); Van Derveer *v.* Sutphin, 5 Ohio St. 293. See Wabash Print. & Pub. Co. *v.* Crumrine, 123 Ind. 89, 21 N. E. 904; State *v.* Jeandell, 5 Har. (Del.) 475.

Defamatory statements subsequent to the commencement of the action which tend to evince a wish to vex, annoy or injure the plaintiff are admissible to show malice, but not as a basis for extra compensation. Paxton *v.* Woodward (Mont.), 78 Pac. 215.

7. Downs *v.* Hawley, 112 Mass. 237; Enos *v.* Enos, 135 N. Y. 609, 32 N. E. 123; Brown *v.* Barnes, 39 Mich. 211, 33 Am. Rep. 375; Sharp *v.* Bowlar, 103 Ky. 282, 45 S. W. 90; Westerfield *v.* Scripps, 119 Cal. 607, 51 Pac. 958.

Where one cause of action has been taken from the jury because the evidence shows that it was not spoken in the language alleged to have been used, the words used may nevertheless be proved to show actual malice. Hocks *v.* Sprangers, 113 Wis. 123, 87 N. W. 1101.

Where the libel charged was bribing the legislature while the defendant was a member thereof, a previous publication that the defendant had hired a house for entertaining during his stay at the capital to aid him in carrying a certain scheme through the legislature was held properly admitted to show malice in the publication charged. Randall *v.* Evening News Ass'n, 97 Mich. 136, 56 N. W. 361.

Previous publications, although in some respects different from the one sued upon, are nevertheless admissible where they refer to the same transaction as the publication relied upon. Sanford *v.* Rowley, 93 Mich. 119, 52 N. W. 1119.

8. A repetition of the slander or libel on another occasion than that alleged is admissible, but other actionable words or statements not alleged cannot be proved even to show malice, because if the words are defamatory malice is implied and

b. *Other Privileged Publications.* — When, however, such other similar publications were made on a privileged occasion they are not competent as evidence of malice,[9] though the contrary has also been held.[10]

c. *Other Actionable Publications.* — The general rule is that such other defamatory publications may be shown notwithstanding the fact that they are themselves actionable.[11] Some cases, however, hold that owing to the danger of the jury's allowing damages for such other publications they are not competent if an action on them is still maintainable.[12]

no extrinsic evidence is necessary, and if such other defamatory publications were proved the jury would be likely to misapply them and give damages therefor. Root *v.* Lowndes, 6 Hill (N. Y.) 518, 41 Am. Dec. 762, limiting Inman *v.* Foster, 8 Wend. (N. Y.) 602, to the specific proposition therein held, saying: "In actions for libel the plaintiff may give in evidence other publications which are not libelous, and in cases for verbal slander the plaintiff may prove other slanderous words where the statute of limitations has run as to those words."

9. Shinglemeyer *v.* Wright, 124 Mich. 230, 82 N. W. 887 (holding incompetent defendant's statements made to police authorities and detectives charging the plaintiff with having stolen his wheel). See Evening Journal Ass'n *v.* McDermott, 44 N. J. L. 430, 43 Am. Rep. 392; King *v.* Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622; Watson *v.* Moore, 2 Cush. (Mass.) 133.

An affidavit made in a judicial proceeding is not admissible to show malice, the presumption being that it was made in good faith. Lauder *v.* Jones (N. D.), 101 N. W. 907. In Thompson *v.* Powning, 15 Nev. 195, the exclusion of a subsequent article in defendant's newspaper containing merely the complaint in the libel suit offered to show malice and aggravate the damages was held no error, such publication being privileged, and there being nothing in the head notes of a defamatory or malicious character.

Partially Privileged. — A repetition of the libelous charge, although partially privileged, is not inadmissible so long as there are statements in it not covered by the privilege. Westerfield *v.* Scripps, 119 Cal. 607, 51 Pac. 958.

10. Davis *v.* Starrett, 97 Me. 568, 55 Atl. 516.

11. Stearns *v.* Cox, 17 Ohio 590; Brittain *v.* Allen, 13 N. C. 120; Hendrick *v.* Kemp, 6 Mart. (N. S.) (La.) 500; Pearson *v.* Lemaitre, 5 M. & G. 704, 719, 44 E. C. L. 366 (*citing* Rustell *v.* Macquister, 1 Camp. 49, and *distinguishing* Pearce *v.* Ornsby, 1 M. & R. 455, and Symmons *v.* Blake, 1 M. & R. 477); Symonds *v.* Carter, 32 N. H. 458.

Other Publication on Which Action Is Pending. — Prior and contemporaneous publications by the defendant of the same libelous charge are competent evidence of malice, although an action is pending thereon. The danger of a double recovery in such cases is to be avoided by a cautionary instruction to the jury. Post Pub. Co. *v.* Hallam, 59 Fed. 530.

12. *Maryland.* — Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500.

New York. — Doyle *v.* Levy, 89 Hun 350, 35 N. Y. Supp. 434; Frazier *v.* McCloskey, 60 N. Y. 337. See Thomas *v.* Croswell, 7 Johns. 264; Rundell *v.* Butler, 7 Barb. 260; Turton *v.* New York Recorder Co., 144 N. Y. 144, 38 N. E. 1009.

Pennsylvania. — Eckart *v.* Wilson, 10 Serg. & R. 44.

South Carolina. — Randall *v.* Holsenbake, 3 Hill 175.

Words spoken by the defendant after the commencement of the suit are not admissible to show malice, unless they expressly refer to those which are the subject-matter of the action and do not constitute a distinct defamation for which the plaintiff would have a separate right of ac-

When Malice Otherwise Appears.— It has been suggested that where malice is otherwsie sufficiently shown similar actionable publications are not competent because of the danger that damages will be given therefor.[13] But this rule is not followed, and such other publications are competent although the words relied upon are themselves actionable *per se*.[14]

d. *Publications on Which Action Has Been Barred.* — Evidence of such other publications is not rendered incompetent by the fact that an action thereon has been barred by the statute of limitations.[15]

e. *Other Criminal Publications.* — The fact that such other publications offered to show actual malice are criminally libelous will not affect their competency if otherwise admissible.[16]

f. *Publications Relied on in Same Action.* — Such other publications are competent although they are themselves relied upon in another count in the same declaration.[17]

g. *Publications for Which Damages Have Been Recovered.* — The fact that an action has already been brought on such previous publications and damages recovered therefor is no objection to their competency when offered to show malice.[18]

tion. Taylor *v.* Kneeland, 1 Doug. (Mich.) 67.

Publications on Which an Action Has Been Barred by Statute of Limitations are competent evidence of malice. Inman *v.* Foster, 8 Wend. (N. Y.) 602; Titus *v.* Sumner, 44 N. Y. 266; Distin *v.* Rose, 69 N. Y. 122; Randall *v.* Holsenbake, 3 Hill (S. C.) 175; Lincoln *v.* Chrisman, 10 Leigh (Va.) 338.

Publication on Which Action Has Been Dismissed. — Notwithstanding the rule excluding evidence of other actionable publications, a publication of similar import upon which an action has been brought by the plaintiff and dismissed upon a settlement by the defendant may be shown. Flanders *v.* Groff, 25 Hun (N. Y.) 553.

13. McIntire *v.* Young, 6 Blackf. (Ind.) 496 (*citing* Stuart *v.* Lovell, 2 Stark. 93); Fisher *v.* Patterson, 14 Ohio 418.

Subsequent repetitions of the same slander are admissible to show malice, but not to aggravate the damages. "As such evidence is merely to be used in proof of the *quo animo*, it has been held by high authority that when there is no doubt as to the intention it ought not to be admitted, but as it is gererally impossible for the plaintiff or the court to pronounce *a priori* whether, independently of the proposed evidence, the jury will be satisfied on the point of malice, there are few cases, perhaps, where it can be excluded." Lanter *v.* McEwen, 8 Blackf. (Ind.) 494.

14. Bailey *v.* Bailey, 94 Iowa 598, 63 N. W. 341; Hinkle *v.* Davenport, 38 Iowa 355.

15. Teague *v.* Williams, 7 Ala. 844; Flamingham *v.* Boucher, Wright (Ohio) 746; Throgmorton *v.* Davis, 4 Blackf. (Ind.) 174; Harmon *v.* Harmon, 61 Me. 233; Botelar *v.* Bell, 1 Md. 173; Evening Journal Ass'n *v.* McDermott, 44 N. J. L. 430, 43 Am. Rep. 392.

16. Com. *v.* Damon, 136 Mass. 441.

17. Dellegall *v.* Highley, 8 Car. & P. 444, 34 E. C. L. 472, 5 Scott 154, 3 Bing. (N. C.) 950.

Where the declaration in an action for slander charges two distinct utterings of similar words in separate counts, the first of which is a privileged communication, evidence of the words charged in the second count is competent to show express malice under the first count. Peterson *v.* Morgan, 116 Mass. 350.

18. Swift *v.* Dickerman, 31 Conn. 285.

h. *Remoteness.* — The mere fact that such subsequent publications are somewhat remote from the one relied upon does not render them incompetent.[19]

i. *Other Statements Known Only to Plaintiff.* — Other slanderous charges of the same import as the one relied on, although made to the plaintiff alone and not in the presence of witnesses, are competent to show malice.[20] So also similar libelous statements written to the plaintiff, and consequently unpublished, are competent for the same purpose.[21]

D. Purpose for Which Competent. — a. *Generally.* — Evidence of such other publications is not competent in proof of the publication charged, but only to show malice,[22] and it has been held that such evidence is not admissible until the publication relied upon has been proved.[23]

b. *Aggravation of Exemplary Damages.* — Such other publications are competent in aggravation of exemplary damages,[24] though it has been frequently said that they can be considered only on the question of malice and motive, and no damages can be allowed on

19. Austin *v.* Remington, 46 Conn. 116, holding competent a substantial repetition of the libel two years after the publication charged.

In Barrett *v.* Long, 3 H. L. Cas. 395, evidence of other libelous publications by the defendant concerning the plaintiff, some of them more than six years before the publication complained of, was held properly admitted to show malice. "A long practice of libeling the plaintiff may show in the most satisfactory manner that the defendant was actuated by malice in the particular publication, and that it did not take place through carelessness or inadvertence; and the more the evidence approaches to the proof of a systematic practice the more convincing it is. The circumstance that the other libels are more or less frequent, or more or less remote from the time of the publication of that in question merely affects the weight, not the admissibility, of the evidence." See also Lincoln *v.* Chrisman, 10 Leigh (Va.) 338.

20. Fowler *v.* Gilbert, 38 Mich. 292; Fredrickson *v.* Johnson, 60 Minn. 337, 62 N. W. 388.

21. Seip *v.* Deshler, 170 Pa. St. 334, 32 Atl. 1032; Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500; Beals *v.* Thompson, 149 Mass. 405, 21 N. E. 959.

Letters written to the plaintiff by the defendant tending to show that the libel was published with hypocritical and vicious motives are admissible to show malice. Cheritree *v.* Roggen, 67 Barb. (N. Y.) 124. Other letters containing similar libelous charges and much abusive and shameful language addressed to the plaintiff, and written about the time of the alleged libel, are admissible to show malice, at least after the defendant has introduced evidence to establish privilege. Mielenz *v.* Quasdorf, 68 Iowa 726, 28 N. W. 41.

22. State *v.* Riggs, 39 Conn. 498; Bassell *v.* Elmore, 48 N. Y. 561; Botsford *v.* Chase, 108 Mich. 432, 66 N. W. 325; Cavanaugh *v.* Austin, 42 Vt. 576.

23. Hansbrough *v.* Stinnett, 25 Gratt. (Va.) 495; Abrams *v.* Smith, 8 Blackf. (Ind.) 95. But see Throgmorton *v.* Davis, 4 Blackf. (Ind.) 174.

24. Kidder *v.* Bacon, 74 Vt. 263, 52 Atl. 322; Williams *v.* Harrison, 3 Mo. 412; Kean *v.* M'Laughlin, 2 Serg. & R. (Pa.) 469; Fredrickson *v.* Johnson, 60 Minn. 337, 62 N. W. 388; Ransom *v.* McCurley, 140 Ill. 626, 31 N. E. 119.

their account.[25] While it is true that such evidence is not admissible as a distinct ground of recovery,[26] yet being competent to show express malice it necessarily affects the measure of exemplary damages.[27]

25. *United States.* — McDonald *v.* Woodruff, 2 Dill. 244, 16 Fed. Cas. No. 8770.

Indiana. — Barker *v.* Prizer, 150 Ind. 4, 48 N. E. 4 (the court should caution the jury not to give any damages on account of such words, since they are not admissible in aggravation of damages); Meyer *v.* Bohlfing, 44 Ind. 238; Lanter *v.* McEwen, 8 Blackf. 495; M'Glemery *v.* Keller, 3 Blackf. 488; Throgmorton *v.* Davis, 4 Blackf. 174.

Iowa. — Ellis *v.* Lindley, 38 Iowa 461.

Kentucky. — Campbell *v.* Bannister, 79 Ky. 205.

Maine. — True *v.* Plumley, 36 Me. 466.

Ohio. — Van Derveer *v.* Sutphin, 5 Ohio St. 293.

26. Botsford *v.* Chase, 108 Mich. 432, 66 N. W. 325; Cavanaugh *v.* Austin, 42 Vt. 576.

27. Bassell *v.* Elmore, 48 N. Y. 561; Van Derveer *v.* Sutphin, 5 Ohio St. 293; Zeliff *v.* Jennings, 61 Tex. 458.

Although damages cannot in strictness be given for such other words, nevertheless as malice is a material part of the plaintiff's case it would be absurd to say that the quantum of damages should not be affected by such evidence. Merrill *v.* Peaslee, 17 N. H. 540.

In Leonard *v.* Pope, 27 Mich 145, Campbell, J., says: "While there is a conflict concerning proof in aggravation of distinct slanders, there is no considerable authority excluding evidence of any number of repetitions of the same slander. In some cases it is admitted to show malice, and it is said the jury must be cautioned not to give damages for the repetition. In others it is admitted broadly in aggravation of damages. It would be a useless labor to enumerate the many varying decisions. There has been a great confusion in reasoning, but the idea underlying the better considered cases seems to be that, inasmuch as a separate action will lie for each slander, a plaintiff might multiply actions and get the same damages repeated if he could use in each case slanders not declared on by way of aggravation. There is reason in this. But it is nevertheless manifest that if testimony is allowed to prove malice its necessary tendency will be to aggravate damages. And some cases, upon this very principle, hold that when a charge is in itself malicious (as most slanderous charges must be), no other proof should be allowed to show what is already beyond dispute. It seems better and more reasonable, if this testimony is admitted at all, to receive it in such a way and on such conditions as will prevent injustice to either party. And we think, where the proof is given of repetitions of the same slander, there is no lack of authority to permit this. The English cases, where such evidence of repeated slander has been received, allow it to have its full force in the enlargement of the damages. . . . In Bodwell *v.* Swan, 3 Pick. 376, a repetition of the same slander was admitted, and it was held different slanders could not be proved, on the express ground that damages would be given for them if admitted. This case implies what is more distinctly declared in some cases in New York, that the repetitions of the same charge are really the same slander, as the multiplied copies of a newspaper libel are the same libel. . . . This principle appears just and sensible, and avoids the difficulty of drawing intangible distinctions, which no jury can appreciate, between allowing testimony of repetition of wrongs to bear upon an important element in a case, and yet not allowing damages except for the original wrongful act independent of the wrong done by the repetition. Such niceties are not to be favored, and should not be introduced where they can be avoided."

E. On Criminal Prosecution. — On a criminal prosecution a repetition of the same words or other publications of like import or referring to the charge relied upon may be admissible to show actual malice,[28] though evidence of a distinct and different calumny is not admissible.[29]

28. Manning *v.* State, 37 Tex. Crim. 180, 39 S. W. 118; Com. *v.* Damon, 136 Mass. 441; Com. *v.* Place, 153 Pa. St. 314, 26 Atl. 620; West *v.* State, 44 Tex. Crim. 417, 71 S. W. 967, *following* Collins *v.* State, 39 Tex. Crim. 30, 44 S. W. 846.

Other Statements Not Libelous. In State *v.* Conable, 81 Iowa 60, 46 N. W. 759, upon a trial under an indictment for libel based upon a specific portion of an article published during a political campaign concerning a candidate for office, the balance of such article and other disparaging articles published by the defendant during the same campaign, and concerning the same candidate, though not of a libelous nature, may be given in evidence by the state, if, taken in connection with the alleged libel, they will assist in determining the motive with which the publication was made.

Remoteness. — Other statements made by the defendant shortly before and after the one in question are competent to show intent, but statements made at a considerable time after the alleged offense would not be admissible. Stayton *v.* State (Tex. Crim.), 78 S. W. 1071.

Repetitions of the Defamatory Statement Made Subsequent to the Indictment are admissible to show malice. Riley *v.* State, 132 Ala. 13, 31 So. 730.

Defendant's Previous Utterances of the Same Import as the slander charged are admissible to show malice. Grant *v.* State (Ala.), 37 So. 420, *citing* Riley *v.* State, 132 Ala. 13, 31 So. 731.

Some Connection Must Be Shown. On a prosecution for criminal libel, where the libel charged was published in the defendant's newspaper, evidence of a publication seven days later in which the former publication was referred to, as well as the fact that plaintiff had succeeded in having defendant indicted therefor, and which reiterated the defendant's intention of telling the truth concerning plaintiff regardless of consequences, was held competent to show malice. The court says, quoting from Com. *v.* Damon, 136 Mass. 441: "We think that in criminal prosecutions for libel the reasonable doctrine is that some connection must be shown between the publication complained of and the publications admitted in evidence to prove actual malice; but if these tend to show ill-will toward the person concerning whom the publication complained of is made, and are of such a nature as to indicate a persistent disposition of hatred or ill-will toward him, or if they appear to be a part of a settled purpose to bring him into public hatred, contempt or ridicule, and are sufficiently near in time to afford a natural inference that the same state of mind existed when the publication complained of was made, they are admissible, although they are subsequent to the publication complained of, and do not expressly refer to it." Eldridge *v.* State, 27 Fla. 162, 9 So. 448.

29. Com. *v.* Damon, 136 Mass. 441.

Subsequent Unfriendly Tone of Defendant's Paper. — Where the defendant in a criminal prosecution for libel offered himself as a witness, it was held competent on cross-examination to ask him whether from the time of the publication of the alleged libel his paper contained articles which were unfriendly to the person alleged to have been libeled, or whether the paper pursued an unfriendly tone toward him, and whether the paper had since contained anything unfriendly to or in commendation of such person. "The questions put to the defendant, . . . if put to any other witness, might perhaps be held incompetent, as calling for an opinion upon the character of articles published in a

F. Understanding of Hearers. — Evidence as to how similar words were understood by the hearers is not competent, since the only purpose of such words is to show the defendant's state of mind.[30]

G. Rebuttal of Such Publications. — Where evidence of subsequent defamatory charges has been introduced, the defendant in rebuttal may show their truth and all the facts and circumstances surrounding their publication,[31] and the plaintiff may show that they were published maliciously.[32]

H. Best and Secondary Evidence. — The best evidence of other printed publications is the writing which contains them, which must be produced or properly accounted for.[33]

I. Defamation of Other Persons. — Evidence that the defendant has libeled other persons is not admissible either to show malice or to corroborate evidence of the libel charged.[34]

XIV. RETRACTION AND OFFER TO RETRACT.

1. Generally. — Evidence of a retraction may be offered for two distinct purposes: to negative malice in the publication charged and to reduce the compensatory damages by showing reparation of the injury. In some cases it has been held relevant for the first purpose,[35] but in others such evidence is said to have no bearing on the

newspaper, when, so far as appears, the articles themselves could be obtained, and were the best evidence of what they contained. But the intention or state of mind of the defendant toward Hart [the prosecuting witness], in making the publication with which he was charged, was material; and for this purpose his opinion or understanding of the articles published by him in his newspaper as friendly or unfriendly toward Hart would be relevant upon the question of good or ill-will." Com. *v.* Damon, 136 Mass. 441.

30. Cresinger *v.* Reed, 25 Mich. 450; Shaw *v.* Shaw, 49 N. H. 533.

31. Wagner *v.* Holbrunner, 7 Gill (Md.) 296; Negley *v.* Farrow, 60 Md. 158, 45 Am. Rep. 715; Tatlow *v.* Jaquett, 1 Har. (Del.) 333.

Under General Issue. — Where slanderous words not alleged in the indictment are proved as evidence of malice, the defendant may show their truth under a plea of the general issue. Burke *v.* Miller, 6 Blackf. (Ind.) 155. But this rule allowing proof of the truth of such publication under the general issue has no application to a mere repetition. Teagle *v.* Deboy, 8 Blackf. (Ind.) 134.

Where the plaintiff, for the purpose of showing malice, offers in evidence parts of the libel not set out in the declaration, it is competent for the defendant to show the truth of such parts, although he has not pleaded a justification. Henry *v.* Norwood, 4 Watts (Pa.) 347.

32. Negley *v.* Farrow, 60 Md. 158, 45 Am. Rep. 715.

33. Evidence of similar publications subsequently published in the defendant's newspaper is not competent without producing or accounting for the paper containing such publications. Barr *v.* Moore, 87 Pa. St. 385.

34. Cochran *v.* Butterfield, 18 N. H. 115, 45 Am. Dec. 363.

35. A prompt publication of a retraction is admissible to show lack of malice. Samuels *v.* Evening Mail Ass'n, 6 Hun (N. Y.) 5; Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129. See Turton *v.* New York Recorder Co., 144 N. Y. 144, 38 N. E. 1009.

quo animo of the defendant.[36] In some cases such evidence has been held competent in mitigation of damages without any attempt to distinguish between compensatory and exemplary damages.[37] When offered to show a partial reparation of the injury the retraction to be competent must have been made publicly.[38] The evidence must, however, show an actual retraction.[39]

In Rebuttal the plaintiff may show that the retraction was not voluntary.[40]

2. Offer To Retract. — A mere offer to publish a retraction cannot be shown in mitigation of damages.[41]

3. Time of Retraction. — Some cases seem to indicate that the retraction must be promptly made.[42] As to whether a retraction

36. A published retraction of the libel, though not competent evidence of the circumstances under which the original publication was made, or of its good faith, is admissible in mitigation of damages. Davis *v.* Marxhausen, 103 Mich. 315, 61 N. W. 504.

37. Cass *v.* New Orleans Times, 27 La. Ann. 214; Kent *v.* Bonzey, 38 Me. 435; White *v.* Sun Pub. Co. (Ind.), 73 N. E. 890; Tresca *v.* Maddox, 11 La. Ann. 206, 66 Am. Dec. 198; Taylor *v.* Hearst, 107 Cal. 262, 40 Pac. 392; Perret *v.* New Orleans Times Newspaper Co., 25 La. Ann. 170.

When Part of the Res Gestae. A retraction of the slander made so immediately thereafter as to become a part of the *res gestae,* and which is intended as a reparation, and not merely to shield the defendant from the consequences of his act, is admissible in evidence in mitigation of damages. Owen *v.* McKean, 14 Ill. 459.

A retraction of the slander in the presence of all the hearers may be shown. Trabue *v.* Mays, 3 Dana (Ky.) 138, 28 Am. Dec. 61, holding competent evidence that after the utterance of the alleged slanderous words by the defendant another person in the presence of the hearers explained the matter in such a way as to do away with the slanderous imputation and practically revoke the statement, there being slight evidence tending to show that the defendant adopted the explanation and was understood by the hearers to retract the charge.

38. Kent *v.* Bonzey, 38 Me. 435, holding that a retraction by the defendant merely in the presence of his own family could not be shown.

39. An unqualified retraction may be shown in mitigation of damages, but not a mere attempt to explain the defamatory publication, in which attempt other libelous charges are made. Hotchkiss *v.* Oliphant, 2 Hill (N. Y.) 510.

Evidence of an agreement between the defendant and the plaintiff's next friend, in a former action for the same slander, that in consideration of the dismissal of the action the defendant would go upon the stand and under oath disclaim all belief in the slanderous report, and that such agreement had been carried out, was held not to amount to a retraction and not admissible as such. Burt *v.* McBain, 29 Mich. 260.

40. Evening Post Pub. Co. *v.* Voight, 72 Fed. 885, 19 C. C. A. 224, 38 U. S. App. 394.

41. Turton *v.* New York Recorder Co., 144 N. Y. 144, 38 N. E. 1009. But see Blohm *v.* Bamber, 31 N. Y. St. 816, 10 N. Y. Supp. 98.

An offer by the defendant, the publisher of the newspaper in which the libel appeared, to open the columns of his paper to the plaintiff for any explanation or statement he might desire to make cannot be shown, since such an offer would not be a retraction by the defendant. Constitution Pub. Co. *v.* Way, 94 Ga. 120, 21 S. E. 139.

42. See cases cited in note 35 *supra.*

Delay in Publishing Retraction. Where the court had instructed the jury that any hesitancy or refusal by

published after the commencement of the action can be shown there is a conflict in the authorities.[43]

4. Demand for Retraction and Refusal. — The plaintiff, as evidence of malice, may show his demand for a retraction of the defamatory charge[44] and the defendant's refusal to publish any explanation or retraction.[45] The fact that the plaintiff never

the publisher to retract or correct the libelous article, when fully advised of his error, could be considered as evidence of premeditated wrong, and would make the case a proper one for exemplary damages, the court on appeal said: "We are not prepared to hold that such mere hesitancy or refusal was evidence of premeditated wrong. Subsequent affirmative acts and publications might be such as tended to prove actual malice or ill-will in the original publication, but mere silence would not. The delay in publishing the retraction could only weaken its effect in mitigating punitive damages in a case where the evidence would justify such damages." Bradley *v.* Cramer, 66 Wis. 297, 28 N. W. 372. But see Hotchkiss *v.* Oliphant, 2 Hill (N. Y.) 510.

43. Retraction Subsequent to Action. — Competent. — Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129.

"We are not prepared to say that a retraction published in good faith after the commencement of an action for libel can under no circumstances be proved in mitigation of damages. Where the suit was commenced, as this was, without any request for the retraction of the libelous charge, if the defendant, promptly after the suit was commenced, had published a fair and full retraction, we see no reason to doubt that such publication could have been proved and submitted to the jury to be considered by them upon the question of exemplary damages. Under such circumstances a retraction after suit brought may be as valuable and effective as one published before, and there is the same reason for the submission to the jury of the one as the other. . . . If the plaintiff can give in evidence language published or uttered subsequently to the commencement of the action, for the purpose of aggravating damages, it seems quite reasonable that the defendant ought to be permitted to give in evidence a fair and honest retraction of the charges promptly made subsequently to the commencement of the action, in mitigation of damages." Turton *v.* New York Recorder Co., 144 N. Y. 144, 38 N. E. 1009, *distinguishing* and *disapproving* Evening News Ass'n *v.* Tyron, 42 Mich. 549, 4 N. W. 267, 36 Am. Rep. 450.

Incompetent. — McAlexander *v.* Harris, 6 Munf. (Va.) 465; Evening News Ass'n *v.* Tyron, 42 Mich. 549, 4 N. W. 267, 36 Am. Rep. 450. "If such a retraction may be so considered, then there can be no limitation well fixed as to the time within which it should be made, or beyond which it ought not to be so considered."

Incompetent by Statute in Alabama. — Bradford *v.* Edwards, 32 Ala. 628.

44. Lanius *v.* Druggist Pub. Co., 20 Mo. App. 12. See Welch *v.* Tribune Pub. Co., 83 Mich, 661, 47 N. W. 562, 21 Am. St. Rep. 629, 11 L. R. A. 233.

Request for Correction. — The plaintiff cannot introduce in his behalf letters written by him to the defendant requesting a correction in the alleged libelous publication, in compliance with which a correction was published, though not in the way desired by the plaintiff. Newbold *v.* Bradstreet, 57 Md. 38.

45. Klewin *v.* Bauman, 53 Wis. 244, 10 N. W. 398; Barnes *v.* Campbell, 60 N. H. 27 (refusal to publish any explanation or retraction of the libelous article, except as a paid advertisement). See Clark *v.* North American Co., 203 Pa. St. 346, 53 Atl. 237.

Where the libel was published in a newspaper, a subsequent publication in the same paper of a letter from plaintiff requesting a retraction, and a refusal to retract, was held competent evidence of malice. Thi-

demanded a retraction of the defamatory charge, however, is not material.[46]

XV. PREVIOUS PUBLICATIONS BY PLAINTIFF.

1. Generally. — There is considerable confusion and apparent conflict in the cases relating to the admissibility of previous publications by the plaintiff defamatory of the defendant. This is probably due to a confusion of the purposes for which such evidence may be competent, namely, as showing provocation and as explanatory of the defendant's reply thereto.[47]

2. As Provocation. — When such publications are offered as evidence of provocation it must appear that the defendant's action was taken under the influence of the passion provoked thereby before a sufficient cooling time had intervened.[48]

bault *v.* Sessions, 101 Mich. 279, 59 N. W. 624.

Offer to Accept Apology. — Plaintiff may show that on the trial he expressed his willingness to accept an apology and nominal damages if the defendant would not persist in his plea of the truth, but that the defendant refused, and though he offered no evidence in support of the justification did not withdraw the charge. Simpson *v.* Robinson, 12 Q. B. 511, 64 E. C. L. 509.

Refusal of Defendant's Agents. Where it appeared that the defendant, the publisher of the newspaper in which the libel appeared, had no actual knowledge of the publication charged, the declarations of his city editor refusing to publish a retraction or explanation of the libelous article were held improperly admitted to show malice on the part of the defendant. Edsall *v.* Brooks, 33 How. Pr. (N. Y.) 191.

46. Tribune Ass'n *v.* Follwell, 107 Fed. 646, 46 C. C. A. 526.

It is not material whether plaintiff had ever made any complaint in writing to the defendant before commencing suit. Graybill *v.* De Young, 140 Cal. 323, 73 Pac. 1067.

47. Previous publications by the plaintiff may be shown by the defendant when they tend to explain the purport and object of the alleged libel or slander, or tend to give it character by softening its asperity or mitigating its severity. But such publications are not competent to show provocation unless of so recent a date as to afford a fair presumption that the defendant's statement was made under the influence of passion excited by them. Gould *v.* Weed, 12 Wend. (N. Y.) 12; Maynard *v.* Beardsley, 7 Wend. (N. Y.) 560.

48. Gould *v.* Weed, 12 Wend. (N. Y.) 12; Maynard *v.* Beardsley, 7 Wend. (N. Y.) 560.

Newspaper Publication on Preceding Day. — "The principle . . . which allows proof of provocation in mitigation of damages is the same as that which is applicable in the case of a provoked personal assault; and if there has been time and opportunity for hot blood to cool, and calm reason to resume its ordinary control, a mere provocation, not connected with the wrong complained of, cannot be shown. . . . If in this respect there is any distinction between cases of personal encounter and assault and cases of libel, it would seem that the rule should be applied with at least as great strictness in the latter class as in the former, since the composition and publication of a written libel in general involves necessarily some degree of deliberation and opportunity for reflection." Quinby *v.* Minnesota Tribune Co., 38 Minn. 528, 38 N. W. 623, 8 Am. St. Rep. 693.

Publications by the plaintiff three days before were held incompetent to show provocation, being too remote. To be competent such provo-

Some Connection Must Be Shown between the plaintiff's publication and the libel or slander charged.[49] But it has been held that the only connection necessary is that the latter must appear to have been provoked by the former,[50] and that no express reference need have been made by the defendant to the provoking publication.[51]

3. Publications to Which Defendant's Was a Reply. — Previous publications by the plaintiff to which the libel charged was a reply are admissible on behalf of the defendant, because tending to explain his statement and to show the circumstances under which it was made.[52] There must, however, be some connection between the

cation must have occurred immediately preceding the libel or slander. Beardsley *v.* Maynard, 4 Wend. (N. Y.) 336, 355. But see Patton *v.* Cruce (Ark.), 81 S. W. 380.

"The rule with respect to letting in evidence of this description is well laid down in Maynard *v.* Beardsley, 7 Wend. 560, where it is said slanderous publications by the plaintiff against the defendant may be shown, to extenuate the offense, provided there is a fair presumption that the libel charged was written in the heat of blood, *and in consequence of the provocation.* To the same effect is Child *v.* Homer, 13 Pick. 503. If, however, there is no connection between the libelous matter published, it is said such evidence ought not to be admitted (May *v.* Brown, 3 B. & C. 113). It is difficult to say what precise length of time will operate to exclude such evidence, and it may be that time alone will furnish no aid in settling the rule." Graves *v.* State, 9 Ala. 447.

The defendant cannot prove in mitigation of damages a distinct and independent libel on himself published by the plaintiff, but where the publication by the plaintiff is so recent as to afford a reasonable presumption that the defendant's libel was published under the influence of passion excited by it such publication may be proved. Child *v.* Homer, 13 Pick. (Mass.) 503.

49. Porter *v.* Henderson, 11 Mich. 20, 82 Am. Dec. 59; May *v.* Brown, 3 B. & C. (Eng.) 113.

50. In Palmer *v.* Lang, 7 Daly (N. Y.) 33, as evidence that the words were spoken in the heat of passion it was held competent for the defendant to show that the plaintiff had two months before been discharged by the defendant from his employ, and that since then he had gone about among defendant's customers warning them against the defendant and making statements derogatory to him, where it appeared that the quarrel in the course of which the slanderous words were spoken began by the defendant calling the plaintiff to account for his statements. "The only connection that need be shown between the libel uttered by the defendant and that uttered by the plaintiff is that the libel published by the plaintiff provoked the libel published by the defendant." The court explains and distinguishes Lister *v.* Wright, 2 Hill (N. Y.) 320; Underhill *v.* Taylor, 2 Barb. (N. Y.) 348; Richardson *v.* Northrup, 56 Barb. (N. Y.) 105.

51. Child *v.* Homer, 13 Pick. (Mass.) 503.

52. Beardsley *v.* Maynard, 4 Wend. (N. Y.) 336, 355; Smurthwaite *v.* News Pub. Co., 124 Mich. 377, 83 N. W. 116; Massuere *v.* Dickens, 70 Wis. 83, 35 N. W. 349; Brewer *v.* Chase, 121 Mich. 526, 80 N. W. 575; Thomas *v.* Dunaway, 30 Ill. 373. See Hartford *v.* State, 96 Ind. 461, 49 Am. Rep. 185 (in which a provoking article published a week previous was held competent); Young *v.* Gilbert, 93 Ill. 595.

A previous publication by the plaintiff libeling the defendant is not admissible in evidence as a justification, but if the defendant's libel was made in answer to it such publication is competent to explain the defendant's libel. Hotchkiss *v.* Lothrop, 1 Johns. (N. Y.) 285. The defendant, in mitigation of damages, may introduce in evidence a previous publication by

subject-matter of the two publications, so that the defendant's statement may be deemed a reply and not a mere retort.[53]

XVI. PLAINTIFF'S HABIT OF LIBELING.

While the defendant may show that the plaintiff was a common libeler or slanderer by evidence of his general reputation in this respect,[54] he cannot show in mitigation of damages that the plaintiff was in the habit of libeling or slandering him,[55] though there are cases to the contrary.[56]

the defendant to which his own referred and was a reply. Thompson *v.* Boyd, 1 Mill's Const. (S. C.) 80.

Whole Controversy May Be Shown. — Where the alleged libel consists of a newspaper publication the defendant may show publications by the plaintiff which constitute part of the whole controversy and tend to show its character. Child *v.* Homer, 13 Pick. (Mass.) 503.

Where the article complained of is one of a series or forms part of a discussion pertaining to the same subject-matter, the defendant may introduce in evidence all the articles for the purpose of showing his good faith, since the series when examined may show some reason for the publication of the defamatory article which may not appear from the latter standing by itself. Scripps *v.* Foster, 41 Mich. 742, 3 N. W. 216.

53. West *v.* Grand Rapids Pub. Co., 128 Mich. 375, 87 N. W. 258; Whittemore *v.* Weiss, 33 Mich. 348; Brewer *v.* Chase, 121 Mich. 526, 80 N. W. 575.

Previous publications by the plaintiff to which the alleged libel was a reply are admissible in evidence because they tend to explain the subject-matter, occasion and intent of the libel. There must, however, be "some relation, some perceptible connection between the subject-matter of the publications." The defamatory statement must be more than a mere retort having no other relation to the plaintiff's statements. Beardsley *v.* Maynard, 4 Wend. (N. Y.) 336, 355.

The defendant cannot, either in bar of the action or in mitigation of damages, give evidence of other libels previously published of him by the plaintiff which do not relate to the same subject. May *v.* Brown, 3 B. & C. 113, 10 E. C. L. 24.

54. The defendant may show that the plaintiff was a common libeler, as this would tend to show the extent of the injury, since one who is a common libeler has but little claim to damages when attacks are made on his own character; but this fact can be proved only by evidence of general reputation, and not by particular publications. Maynard *v.* Beardsley, 7 Wend. (N. Y.) 560, *citing* Dole *v.* Lyon, 10 Johns. (N. Y.) 447.

55. Porter *v.* Henderson, 11 Mich. 20, 82 Am. Dec. 59, *citing* May *v.* Brown, 3 B. & C. (Eng.) 113; Cornwall *v.* Richardson, R. & M. (Eng.) 305.

The defendant cannot show that previous to the publication charged the plaintiff was in the habit of libeling, vilifying, insulting or provoking him. Beardsley *v.* Maynard, 4 Wend. (N. Y.) 336.

"Evidence of the plaintiff's habit of libeling the defendant would cause confusion by inquiring into collateral issues, and further such conduct would be no justification or excuse." Goodbread *v.* Ledbetter, 18 N. C. 12.

56. In mitigation of damages the defendant may show that the plaintiff has been in the habit of vilifying him without further showing that he acted immediately upon such provocation. Botelar *v.* Bell, 1 Md. 173, in which the exclusion of evidence that plaintiff had for a long time preceding the publication imputed insolvency to the defendant, once within the same month in which the slanderous words were spoken, was held error. See Bigney *v.* Benthuy-

XVII. PUBLICATIONS BY THIRD PERSONS.

1. Generally. — Previous publications by third persons defamatory of the defendant are not admissible in his behalf in explanation of the libel charged, or to show provocation, unless the plaintiff was responsible therefor.[57]

2. Similar Publications in Other Newspapers. — As evidence of his good faith and lack of actual malice the defendant may show that the libel in question was copied by him from similar publications in other newspapers,[58] though some cases apparently hold the contrary.[59] Such evidence, however, is competent only upon the

sen, 36 La. Ann. 38; Finnerty *v.* Tipper, 2 Camp. (Eng.) 72.

57. Hotchkiss *v.* Oliphant, 2 Hill (N. Y.) 510.

An article previously published in another newspaper, reflecting on the defendant, is not admissible in mitigation of damages as furnishing a provocation, unless it is shown that the plaintiff caused, or had some part in causing, its preparation or publication. Dressel *v.* Shipman, 57 Minn. 23, 58 N. W. 684.

In Haws *v.* Standford, 4 Sneed (Tenn.) 520, it appeared that plaintiff had given to a third person, not a party to the suit, but engaged in a newspaper controversy with the defendant, a sworn certificate charging the latter with forgery, which certificate was incorporated in an article published by such third person, and that the defendant in answer to this article charged the plaintiff with forgery in making the certificate. The article in which plaintiff's certificate appeared was held incompetent because plaintiff was not the author thereof, although defendant contended that it should be admissible in explanation of the libel and to show the provocation under which it was written. The plaintiff's certificate, however, would have been admissible.

58. *England.* — Saunders *v.* Mills, 6 Bing. 213, 19 E. C. L. 60.

Connecticut. — Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865; Arnott *v.* Standard Ass'n, 57 Conn. 86, 17 Atl. 361, 3 L. R. A. 69.

Florida. — Hoey *v.* Fletcher, 39 Fla. 325, 22 So. 716.

Minnesota. — Davis *v.* Hamilton, 88 Minn. 64, 92 N. W. 512, *citing* Curtis *v.* Mussey, 6 Gray (Mass.) 261.

New York. — Witcher *v.* Jones, 43 N. Y. St. 151, 17 N. Y. Supp. 491; Palmer *v.* Matthews, 162 N. Y. 100, 56 N. E. 501.

Oregon. — Upton *v.* Hume, 24 Or. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493.

Previous publications in other papers of the same libelous statement, known to the defendant at the time of the publication complained of, are admissible to show his reasonable belief in the truth of the statement and the source of his information. Hewitt *v.* Pioneer Press Co., 23 Minn. 178.

Where Punitive Damages Are Not Allowed, evidence that the same libelous charge was previously published by others is not competent, except perhaps where damages for injury to the feelings are claimed, in which case the defendant's motive or malice at the time might be material because a manifestation of malevolent motives might enhance the damages for injuries to the feelings, or where the publication professes on its face to be based on other publications which are referred to. Burt *v.* Advertiser Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97.

59. Clark *v.* North American Co., 203 Pa. St. 346, 53 Atl. 237 (*citing* Pease *v.* Shippen, 80 Pa. St. 513, 21 Am. Rep. 116); Sheahan *v.* Collins, 20 Ill. 325, 71 Am. Dec. 271; Wilson *v.* Fitch, 41 Cal. 363. See also Preston *v.* Frey, 91 Cal. 107, 27 Pac. 533.

While the defendant may show the sources of his information and explain in detail the reasons which actuated him in publishing the libel, he cannot show that the same libelous statement was published in other

question of actual malice and exemplary damages; and the defendant cannot show in reduction of compensatory damages that the same libelous charge was published in other papers.[60] Similar publications in other papers subsequent to the one charged cannot be shown.[61]

XVIII. FORMER ACTIONS AND JUDGMENTS.

1. Generally. — Former actions at law between the parties having no relation to the defamatory publication are not admissible to show malice.[62] A former judgment acquitting the plaintiff in a prosecution for the offense charged in the libel is not competent evidence for either party.[63] It seems, however, that a judgment in a former action between the parties for malicious prosecution based on the same false accusation will be competent on the question of damages.[64]

2. Other Actions and Judgments for Publication of Same or Similar Charge. — The fact that the plaintiff has commenced an action[65] or has recovered a judgment against another person for

papers. Hearne *v.* De Young, 132 Cal. 357, 64 Pac. 576.

"Evidence of previous publications by others of the libelous matter charged by the defendant is upon principle clearly inadmissible in reduction or standing alone in mitigation of damages, and it was so held in Lawson *v.* Tucker, 2 Times L. R. 593; Gray *v.* Publishing Co., 89 N. Y. St. 35, 55 N. Y. Supp. 35. It is inadmissible even when coupled with evidence that on such former occasions the plaintiff did not sue the publisher or take any steps to contradict the charges made against him. Rex *v.* Holt, 5 Term R. 436; Ingram *v.* Lawson, 9 Car. & P. 333." Sun Print. & Pub. Co. *v.* Schenck, 98 Fed. 925.

60. Palmer *v.* Matthews, 162 N. Y. 100, 56 N. E. 501; Saunders *v.* Mills, 6 Bing. 213, 19 E. C. L. 60.

The publication of the same matter by other papers on the same date cannot be shown as evidence that whatever injury plaintiff sustained to his reputation was not caused by the defendant alone. Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6. See Van Ingen *v.* Mail & Express Pub. Co., 156 N. Y. 376, 50 N. E. 979.

Evidence that similar libels had been previously published by others is not competent in mitigation of damages. "No one can say which of many defamations has destroyed or materially impaired a reputation, or whether but for the last the earlier ones would have made any grave impression upon the opinion of the public. It would be idle to submit such an inquiry to a jury." Sun Print. & Pub. Co. *v.* Schenck, 98 Fed. 925.

61. Enquirer Co. *v.* Johnston, 72 Fed. 443, 18 C. C. A. 628, 34 U. S. App. 607.

62. Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500.

63. McBee *v.* Fulton, 47 Md. 403, 430.

The record of the trial and acquittal of the plaintiff for the crime charged against him by the defendant is not competent on behalf of the plaintiff, even to show malice. Corbley *v.* Wilson, 71 Ill. 209, 22 Am. Rep. 98, *disapproving* a *dictum* in Abrams *v.* Smith, 8 Blackf. (Ind.) 95.

64. Since in an action for malicious prosecution the plaintiff is entitled to recover for the injury to his fame and character by reason of the false accusation, in an action for libel or slander based on the same charge the defendant may introduce in evidence the judgment of recovery in the action for malicious prosecution. Sheldon *v.* Carpenter, 4 N. Y. 579.

65. The fact that the defendant has commenced suits against other newspapers for the publication of the

another contemporaneous publication[66] of the defamatory charge is not competent in mitigation of damages. Nor can the defendant show that the plaintiff has recovered judgment against him in another action for a previous publication of the same defamatory charge.[67]

XIX. PLAINTIFF'S ANIMUS IN BRINGING THE ACTION.

Evidence as to the plaintiff's animus in bringing the action is not admissible.[68]

XX. PLAINTIFF'S DELAY OF ACTION OR FAILURE TO SUE FOR PREVIOUS DEFAMATION.

The defendant cannot show that the plaintiff failed to bring an action against him for the previous publication of the same or similar defamatory charges, either as an implied admission of the truth of the charge or as evidence of the plaintiff's bad character.[69] Nor can he show that the plaintiff delayed bringing suit.[70]

XXI. CRIMINAL PROSECUTION FOR CHARGING UNCHASTITY.

1. Generally.— On a criminal prosecution for charging an innocent or virtuous woman with unchastity, evidence of alleged

same libelous charge is not material. Smith *v.* Sun Pub. Co., 55 Fed. 240; Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6.

66. Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6 *citing* Harrison *v.* Pearce, 1 F. & F. (Eng.) 567; Creevy *v.* Carr, 7 Car. & P. (Eng.) 64.

The fact that the plaintiff has recovered judgment against another newspaper for the publication of the same libelous charge is not material. Bennett *v.* Salisbury, 78 Fed. 769; Palmer *v.* Matthews, 162 N. Y. 100, 56 N. E. 501.

67. In Tillotson *v.* Cheetham, 3 Johns. (N. Y.) 56, 3 Am. Dec. 459, a record of a former action for a libel published two weeks previous to the one charged, and assessing damages in favor of the plaintiff against the defendant, offered by the defendant in mitigation of damages, was held properly excluded, although the defendant proposed to show that the libelous words charged in the former and the pending action were a part of one series of publications relating to identically the same subject-matter. Such evidence would not be competent either to mitigate the actual or the exemplary damages, since they were separate and distinct publications, regardless of their nearness in point of time. But see dissenting opinion.

68. Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845.

Evidence as to the plaintiff's statements after the publication of the libel, showing his reasons for bringing the suit, is not admissible. Dole *v.* Lyon, 10 Johns. (N. Y.) 447.

69. Davis *v.* Hamilton, 88 Minn. 64, 92 N. W. 512.

70. It is not competent to show that the action was not commenced until the last day in which it could be brought under the statute of limitations, nor is it relevant or material why the plaintiff delayed filing his suit. Graybill *v.* De Young, 140 Cal. 323, 73 Pac. 1067.

previous unchaste conduct with the same[71] or different persons[72] is competent.

2. Where the Charge of Unchastity Is a General One without reference to particular instances it is competent in justification to show specific acts of unchastity.[73]

3. General Reputation. — By statute in one state the general reputation of the prosecutrix may be inquired into.[74]

XXII. CHARGES OF FALSE SWEARING AND PERJURY.

In support of a plea of the truth of a charge of perjury the burden is upon the defendant to prove the same facts as would be necessary to sustain an indictment for perjury.[75] It is only necessary, how-

71. Wood *v.* State, 32 Tex. Crim. 476, 24 S. W. 284 (because tending to show the truth of the charge).

72. Evidence as to her misconduct at some former period is competent upon the question of her subsequent good character, although it may not be sufficient to show that she was not an innocent woman at the time of the defamatory publication. State *v.* Grigg, 104 N. C. 882, 10 S. E. 684.

On a criminal prosecution for charging a woman with unchastity in a particular instance, evidence of other acts of unchastity between such woman and different men is admissible as bearing upon the intent of the defendant and the truth of the charge. Since unchastity is the gravamen of the charge "any evidence that would show a want of chastity in the female alleged to have been slandered would be competent evidence. If she had had intercourse recently with other men and that fact could be shown, it would render her unchaste and so not the subject of a slanderous accusation." The fact that the statute merely provides that in such a case the defendant may show in justification the truth of the imputation and the general reputation of the female for chastity does not render other evidence inadmissible. Van Dusen *v.* State, 34 Tex. Crim. 456, 30 S. W. 1073, *disapproving* Patterson *v.* State, 12 Tex. App. 458. *Contra,* see Wood *v.* State, 32 Tex. Crim. 476, 30 S. W. 1073; Wagner *v.* State, 17 Tex. App. 554.

Unchaste Conduct Subsequent to Publication Incompetent. — Jackson *v.* State, 42 Tex. Crim. 437, 60 S. W. 963.

73. On a criminal prosecution for charging a woman with being a prostitute, evidence of particular acts of prostitution is admissible as tending to establish the truth of the general charge, and also to disprove malice by showing a reasonable ground for the defendant's belief in the truth of the charge. Duke *v.* State, 19 Tex. App. 14.

74. Shaw *v.* State, 28 Tex. App. 236, 12 S. W. 741; Patterson *v.* State, 12 Tex. App. 458.

Reputation in Place of Previous Residence. — On a criminal prosecution for charging the prosecutrix with unchastity, evidence as to her general reputation for unchastity in another county from which she had removed to the place of trial six months previous was held improperly excluded on the ground that the inquiry should not be limited to the county in which she resided at the time of the trial, since she might not have resided there long enough to have established a general reputation. Crane *v.* State, 30 Tex. App. 464, 17 S. W. 939. To the same effect, Ballew *v.* State (Tex. Crim.), 85 S. W. 1063.

Good Character Subsequent to Publication Cannot Be Shown. Gipson *v.* State (Tex. Crim.), 77 S. W. 216; Bowers *v.* State (Tex. Crim.), 75 S. W. 299.

75. Dwinells *v.* Aikin, 2 Tyl. (Vt.) 75; McClaugherty *v.* Cooper,

ever, to establish these facts by a preponderance of the evidence.[76] The materiality of the testimony concerning which the charge of perjury was made is presumed,[77] but it has been held that where the charge relates to a particular fact sworn to by the plaintiff its materiality is not presumed, but must be shown by the plaintiff.[78] Where the charge is false swearing in a judicial proceeding,[79] while the defendant may show that his words had relation to the plaintiff's testimony on immaterial points, and so did not import a charge of

39 W. Va. 313, 19 S. E. 415. See also Chandler *v.* Robison, 29 N. C. 480.

Where the Defendant Justifies the Charge of Perjury the evidence must be the same as is required to convict on an indictment for perjury. "In other words the defendant must prove all the particulars which constituted the crime of perjury, viz., the deliberate deposition, the lawfully administered oath, the judicial proceedings, the absoluteness of the matter testified to, its materiality to the point in question, direct or collateral, and its falsity." Hopkins *v.* Smith, 3 Barb. (N. Y.) 599, *citing* Woodbeck *v.* Keller, 6 Cow. (N. Y.) 118; Clark *v.* Dibble, 16 Wend. (N. Y.) 601. See also Spruil *v.* Cooper, 16 Ala. 691.

Where the Alleged Defamatory Statement Was a Charge of False Swearing, and the defendant pleaded as a justification that the plaintiff was guilty of perjury, it was held that he would be required to prove the fact of perjury, although he was not obliged to impute this crime in order to justify the words spoken. Hicks *v.* Rising, 24 Ill. 566.

76. McClaugherty *v.* Cooper, 39 W. Va. 313, 19 S. E. 415.

77. Coons *v.* Robinson, 3 Barb. (N. Y.) 625; Spooner *v.* Keeler, 51 N. Y. 527; Jacobs *v.* Fyler, 3 Hill (N. Y.) 572, *explaining* and *distinguishing* Bullock *v.* Koon, 9 Cow. (N. Y.) 30.

78. Where the alleged slander charges the plaintiff with false swearing on a particular trial the plaintiff must show that his testimony was material to the point in issue. "If the charge is general, and proof be adduced that plaintiff was a witness and gave evidence on the trial of a cause, the law may perhaps presume that some part of his testimony was material; but if the charge is confined to a particular fact sworn to such presumption ought not to be indulged; it should appear affirmatively that the fact was material to the issue. Although the law may reasonably enough intend that some part of the testimony given by a witness on the trial is material, the presumption would be too violent that the whole was so, and without such presumption it cannot be said that a specified part is material." Power *v.* Price, 12 Wend. (N. Y.) 500. But see *s. c.* on appeal to the court of errors, 16 Wend. (N. Y.) 449, in which the chancellor differs with the supreme court upon this point, holding that where the words are such as naturally to make the impression upon the minds of the hearers that the plaintiff has been guilty of the crime of perjury it is not incumbent upon him to prove affirmatively that the testimony given by him was material, but the burden of proving its immateriality and that there was no intention to impute the crime of perjury rests upon the defendant; and that also if the charge be false swearing in some particular part of the testimony it is incumbent upon the defendant to show that it is irrelevant or immaterial, since the hearers must necessarily have understood that the testimony charged to have been false was immaterial or irrelevant.

79. Where the alleged slander charges the plaintiff with taking a false oath, such statement does not necessarily imply perjury, and the defendant, who has pleaded the general issue and also the truth of the words, may show under the general issue, and notwithstanding the plea of truth, that the words spoken had

perjury, the presumption is that the testimony referred to was material,[80] although the contrary has been held.[81]

XXIII. DEFAMATION OF TITLE OR BUSINESS.

In an action for defamation of title or business there are no presumptions of falsity and damage, and consequently the burden is on the plaintiff to prove the falsity of the statement, malice and special damage.[82]

XXIV. RELATION OF PLEADINGS TO EVIDENCE AND EFFECT ON ADMISSIBILITY THEREOF.

1. Evidence of Truth Under General Issue. — A. GENERALLY. Under a plea of the general issue, evidence of the truth of the charge is not admissible.[83] When, however, the plaintiff relies on the

relation to the plaintiff's testimony on immaterial points, and so did not import a charge of perjury. Sibley *v.* Marsh, 7 Pick. (Mass.) 38.

80. Wood *v.* Southwick, 97 Mass. 354; Spooner *v.* Keeler, 51 N. Y. 527; Jacobs *v.* Fyler, 3 Hill (N. Y.) 572, *explaining* and *distinguishing* Bullock *v.* Koon, 9 Cow. (N. Y.) 30.

81. Ross *v.* Rouse, 1 Wend. (N. Y.) 475.

Where the alleged slander charges the plaintiff with false swearing and perjury, and the words spoken do not necessarily import perjury, the burden is upon the plaintiff to show that the oath referred to by the defendant must have been taken under such circumstances that the plaintiff might have been guilty of perjury; hence he must show that the fact sworn to was material to the issue. Roberts *v.* Champlin, 14 Wend. (N. Y.) 120.

82. Trade Libel. — In an action for slander or libel of plaintiff's trade or business, the burden is upon him to show the falsity of the charge, that it was made maliciously and that it caused special damage. "In cases where character is at stake the presumption is in favor of the party defamed, but there is no similar presumption in favor of a man's title or the quality of his merchandise." Young *v.* Geiske, 209 Pa. St. 515, 58 Atl. 887.

Slander of Title. — In an action for slander of title the plaintiff must prove that the words used were false and malicious, and that special damage was sustained. The necessary malice may, however, be inferred from the language used and the circumstances and conduct. Hopkins *v.* Drowne, 21 R. I. 20, 41 Atl. 567. See Butts *v.* Long, 106 Mo. App. 313, 80 S. W. 312.

In an action of slander of title where the occasion is privileged, malice will not be implied. Hargraves *v.* Le Breton, 4 Burr. (Eng.) 2422.

83. *United States.* — Mayo *v.* Blair, 1 Hayw. & H. 96, 16 Fed. Cas. No. 9354; Barrows *v.* Carpenter, 1 Cliff. 204, 2 Fed. Cas. No. 1058.

Alabama. — Douge *v.* Pearce, 13 Ala. 127; Scott *v.* McKinnish, 15 Ala 662.

Connecticut. — Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865; Bailey *v.* Hyde, 3 Conn. 463; Swift *v.* Dickerman, 31 Conn. 285; Treat *v.* Browning, 4 Conn. 408.

Delaware. — Parke *v.* Blackiston, 3 Har. 373; Kinney *v.* Hosea, 3 Har. 397.

Indiana. — Abshire *v.* Cline, 3 Ind. 115; Henson *v.* Veatch, 1 Blackf. 369; Burke *v.* Miller, 6 Blackf. 155.

Maine. — Taylor *v.* Robinson, 29 Me. 323.

Maryland. — Padgett *v.* Sweeting, 65 Md. 404, 4 Atl. 887.

Massachusetts. — Alderman *v.* French, 1 Pick. 1, 11 Am. Dec. 114.

Mississippi. — Jarnigan *v.* Fleming, 43 Miss. 710, 5 Am. Rep. 514.

falsity of the charge as evidence of express malice, and offers evidence to prove it, the defendant in rebuttal may show its truth, although he has pleaded no justification.[84]

B. Evidence Tending To Prove the Truth. — a. *Generally.* On the question of whether or not evidence which tends to prove the truth of the charge is competent under the general issue to disprove malice and thus mitigate the damages, the cases are in great conflict and confusion. The common-law rule was that facts which might tend to establish the truth could not be proved under the general issue in mitigation of damages,[85] but owing to the fact that this rule

New Hampshire. — Knight *v.* Foster, 39 N. H. 576; Smart *v.* Blanchard, 42 N. H. 137.

New York. — Van Ankin *v.* Westfall, 14 Johns. 233.

North Carolina. — Smith *v.* Smith, 30 N. C. 29.

North Dakota. — Lauder *v.* Jones, 101 N. W. 907.

Pennsylvania. — Barger *v.* Barger, 18 Pa. St. 489.

South Carolina. — Eagan *v.* Gantt, 1 McMull. 468.

Tennessee. — Haws *v.* Stanford, 4 Sneed 520; Shirley *v.* Keathy, 4 Cold. 29.

A justification cannot be proved under the general issue, and where the offered testimony can have no other effect than to make apparent the guilt of the plaintiff and prove the truth of the words spoken, thereby necessarily tending to justify the speaking of the words, and not merely to mitigate damages, the facts relied on, and proposed to be offered in evidence, must be specially pleaded, and are not admissible under the general issue. Duval *v.* Davey, 32 Ohio St. 604, holding incompetent particular acts of misconduct by the plaintiff where the charge was unchastity.

84. Cameron *v.* Corkran, 2 Marv. (Del.) 166, 42 Atl. 454; Taylor *v.* Robinson, 29 Me. 323.

"Where a communication is privileged, the plaintiff cannot recover without proving affirmatively not only the falsehood of its contents, but also that it was published with express malice. Unless he can prove both of these points he must fail. The falsehood being a necessary part of the case to be made out by the plaintiff, the truth is but a contradiction of that case, and may be made out under the general issue, therefore, without resort to a special plea or notice. Upon this question there seems to be no conflict of authority, and it is in accordance with the general doctrine of pleading that the defendant may deny, under the general issue, whatever the plaintiff is obliged to prove as an essential part of his own case. Where the libel charged is not privileged, then the plaintiff is not bound to prove its falsity; and the justification of it as true, not being a denial of anything which rests on the plaintiff, is strictly in avoidance, and must, therefore, be pleaded or noticed specially." Edwards *v.* Chandler, 14 Mich. 471.

If the plaintiff, in proof of malice, relies upon the falsity of the charge the defendant may rebut the inference by evidence of the truth of the charge, even under the general issue. So also if the plaintiff undertakes to show that matters asserted by the defendant as grounds for his belief of the truth of the charge were false, and thus to establish malice, the defendant should be permitted to rebut such testimony by showing the truth of the facts proved by him as the basis of his belief. Brown *v.* Wright, 6 La. Ann. 253.

85. *Delaware.* — Parke *v.* Blackiston, 3 Har. 373; Kinney *v.* Hosea, 3 Har. 397.

Indiana. — Teagle *v.* Deboy, 8 Blackf. 134.

Massachusetts. — Bodwell *v.* Swan, 3 Pick. 376.

Michigan. — Thompson *v.* Bowers, 1 Doug. 321.

Mississippi. — Jarnigan *v.* Fleming, 43 Miss. 710, 5 Am. Rep. 514.

deprived the defendant of the right to prove mitigating circumstances which tend to establish the truth without subjecting himself to the penalty which might follow a failure to establish this plea, many courts have refused to follow this rule and permit proof of any facts or circumstances tending to negative malice and to show good faith,[86] although they may also tend to establish the truth of the

New York. — Root *v.* King, 7 Cow. 613; Bisbey *v.* Shaw, 12 N. Y. 67; Purple *v.* Horton, 13 Wend. 9; Fero *v.* Ruscoe, 4 N. Y. 162; Cooper *v.* Barber, 24 Wend. 105.

Pennsylvania. — Minesinger *v.* Kerr, 9 Pa. St. 312; Updegrove *v.* Zimmerman, 13 Pa. St. 619; Smith *v.* Smith, 39 Pa. St. 441.

South Carolina. — Eagan *v.* Gantt, 1 McMull. 468.

Tennessee. — Hackett *v.* Brown, 2 Heisk. 264.

Virginia. — Bourland *v.* Eidson, 8 Gratt. 27.

Extent of Rule. — Under a plea of the general issue the defendant may prove any circumstances which tend to rebut malice, but if such circumstances tend to prove the truth of the charge they are not competent. "This qualification excludes not only such circumstances as the law recognizes as *competent* evidence tending to prove the truth of the charge, but all circumstances which, in the popular mind, tend to cast suspicion of guilt upon the plaintiff." Storey *v.* Early, 86 Ill. 461. In this case it was held error to exclude evidence by the defendant that he had been induced to publish the libelous statement by two forged letters purporting to have been written by two reputable citizens of another place. The court distinguished this evidence from an attempt to prove rumors or general suspicion of the truth of the charge, on the ground that the latter would tend to cast additional reproach upon the plaintiff. "In many cases the application of this rule of exclusion may be difficult. It may not be easy at all times to distinguish between that which is free from the suggestion of guilt in plaintiff and that which is not. The propriety of this exclusion of some matters, though they may seem to rebut malice, seems to rest upon the idea that while the law will allow a guilty defendant to mitigate, if he can, the degree of his guilt, this is a privilege which must not be exercised if to do so involves the necessity of casting reproach upon an innocent plaintiff who has done no wrong. The proof on this point offered in this case, taken as a whole, tended in no degree to cast additional reproach upon the plaintiff, and ought to have been admitted."

It is not competent for a defendant, in mitigation of damages, to give evidence of facts and circumstances which induced him to suppose that the charges were true at the time they were made, if such facts and circumstances tend to prove the charges or form a link in the chain of evidence to establish a justification and he is not allowed to give such evidence, although he expressly disavows a justification and fully admits the falsity of the charge. Purple *v.* Horton, 13 Wend. (N. Y.) 9; Petrie *v.* Rose, 5 Watts & S. (Pa.) 364; Minesinger *v.* Kerr, 9 Pa. St. 312. But see Hart *v.* Reed, 1 B. Mon. (Ky.) 166, 35 Am. Dec. 179.

86. Heaton *v.* Wright, 10 How. Pr. (N. Y.) 79; Swift *v.* Dickerman, 31 Conn. 285 (*following* Williams *v.* Miner, 18 Conn. 464); Mitchell *v.* Spradley, 23 Tex. Civ. App. 43, 56 S. W. 134; Patten *v.* Belo, 79 Tex. 41, 14 S. W. 1037; Donahoe *v.* Star Pub. Co., 4 Pen. (Del.) 166, 55 Atl. 337.

In Bush *v.* Prosser, 11 N. Y. 347, Selden, J., says that the rule excluding proof of evidence tending to show the truth of the charge under a plea of the general issue originated with the case of Underwood *v.* Parks, 2 Strange (Eng.) 1200, which was a departure from the principles of the common law and a pure piece of judicial legislation, and contrary to the rule previously followed as shown by the case of Smithies *v.*

Harrison, 1 Ld. Raym. (Eng.) 727, and in an extended discussion shows the injustice of the rule.

Under the general issue evidence which would amount to a justification is admissible, though no justification is pleaded; but such evidence goes only in reduction of damages. Spooner *v.* Daniels, 22 Fed. Cas. No. 13,244*a*.

Under the general issue, for the purpose of mitigating damages by rebutting the presumption of malice, the defendant may show facts tending to prove the truth of the charge. "It has been long and well settled that in an action for slander or libel, under the plea of the general issue, evidence of particular facts or circumstances calculated to have induced mistake, or to have misled the party in the publication of the slander, is competent in mitigation of damages by way of rebutting the presumption of malice or proof of express malice. But this rule has been subject to the two following material qualifications, which do not appear to be well founded in reason, or to tend to the purposes of justice: 1. That such evidence is incompetent, if it *tend* to prove the truth of the slanderous charge; and, 2. That it is incompetent if *it establish the truth of the charge,* or in other words, *unless it fall short of proving the truth of the charge.*" Van Derveer *v.* Sutphin, 5 Ohio St. 293, *citing* and *quoting* extensively from Bush *v.* Prosser, 1 Kern. (N. Y.) 362; and Williams *v.* Miner, 18 Conn. 464.

Rule in Underwood v. Parks Explained. — The case of Huson *v.* Dale, 19 Mich. 17, contains a very clear and valuable discussion by Christiancy, J., on the question whether evidence tending to prove the truth of the defamatory statement is admissible under the general issue to negative express malice. The conflict in the decisions upon this question is explained as due to a misapprehension and misapplication of the rule laid down in the leading case of Underwood *v.* Parks, 2 Strange (Eng.) 1200. In that case the defendant's offer was to prove under the plea of not guilty, in mitigation of damages, *the truth of the words* charged as slanderous. Judge Christiancy, while recognizing that this case lays down a new rule requiring the truth to be pleaded to render admissible evidence of it in mitigation, contends that there is nothing in the case "which would require the rejection of any evidence tending to show that defendant believed the truth of the charge when uttered, for the purpose of disproving malice and mitigating the damages; especially if offered in a manner and under circumstances amounting to a clear disclaimer of the right to insist upon the truth of the charge, or an admission that it was false in fact, though when made believed to be true. The legal effect, as it seems to me, of the rule actually laid down by the court was substantially this: that under the general issue, without a plea of justification, the defendant should not be at liberty to insist upon the truth of the slanderous words; but the words being proved, the defendant, by omitting to plead the truth in justification, was to be considered as, in legal effect, admitting their falsehood. And in this view of the case the very offer of such evidence as last supposed, though its tendency might otherwise be to prove the truth of the charge, would (under the operation of this rule), when considered in connection with the neglect to plead in justification, constitute a clear and conclusive admission that the charge was false in fact, though at the time he made it he may have believed it to be true. But more especially, as it seems to me, would this be the case when the offer, in its very terms, shows that it is to be introduced only for the purpose of rebutting malice and mitigating the damages. Had this, which seems to me to have been the substantial legal effect of the rule in that case, been generally accepted as its true exposition, volumes of conflicting decisions and judicial controversy might have been avoided. But complete justice could not always be done to the defendant under the rule so long as courts should adhere to the arbitrary rule that a plea or notice of justification not sustained by the proof was conclusive evidence of

charge. And the rule has been changed by statute in some states,[87] but even under the more liberal rule where the only tendency of the evidence offered in mitigation is to prove the truth of the charge it is not admissible except under a proper plea.[88]

b. *Grounds of Suspicion or Belief.* — Under the general issue the defendant may prove facts and circumstances known to him and affording a ground of suspicion of the truth of the charge if they do not amount to proof thereof.[89] Evidence tending to show prob-

malice in aggravation of damages. But where this last rule has been abandoned, or, as in this state and many others, abolished by statute, I can see no hardship to the defendant, nor any difficulty in the way of a fair trial likely to result from the rule in Underwood *v.* Parks, as I have endeavored to explain it. And the rule in that case, so far as it requires the defendant, if he intend to rely upon the truth of the charge in any way, to plead it, has been so long and so generally adopted, and the corresponding practice so thoroughly settled, that I see no satisfactory reason for disturbing the rule thus limited."

While a justification cannot be proved under the general issue, any matters short of actual proof of justification are admissible in mitigation. Hart *v.* Reed, 1 B. Mon. (Ky.) 166, 35 Am. Dec. 179 (disapproving the rule laid down by Starkie and other authorities that no fact which might be admissible as even one link in a chain of facts necessary to sustain a justification ought to be admitted under the general issue in mitigation of damages). To the same effect Craig *v.* Catlet, 5 Dana (Ky.) 323.

The tendency of recent decisions is to give a much wider latitude in the introduction of evidence in mitigation of damages, under the general issue, than formerly. West *v.* Walker, 2 Swan (Tenn.) 32.

Any Facts Tending to Show an Honest Belief in the substance of the publication when made are admissible under the general issue, though they tend to prove the truth of the charge. Simons *v.* Burnham, 102 Mich. 189, 60 N. W. 476; Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865.

Circumstances Insufficient to Prove Truth. — Under the general issue circumstances which are of themselves insufficient to establish the truth of the charge may be proved in rebuttal of malice and in mitigation of damages. Jones *v.* Townsend, 21 Fla. 431, 441, 443, 58 Am. Dec. 676; Ransom *v.* McCurley, 140 Ill. 626, 31 N. E. 119.

87. Bush *v.* Prosser, 11 N. Y. 347; Bisbey *v.* Shaw, 12 N. Y. 67.

88. Swift *v.* Dickerman, 31 Conn. 285; Reynolds *v.* Tucker, 6 Ohio St. 516, 67 Am. Dec. 353; Duval *v.* Davey, 32 Ohio St. 604.

89. *England.* — Knobell *v.* Fuller, 2 Camp. 253.

Connecticut. — Bailey *v.* Hyde, 3 Conn. 463; Treat *v.* Browning, 4 Conn. 408.

Florida. — Coogler *v.* Rhodes, 38 Fla. 240, 21 So. 109.

Maryland. — Wagner *v.* Holbrunner, 7 Gill 296; Rigden *v.* Wolcott, 6 Gill & J. 413.

Ohio. — Dewit *v.* Greenfield, 5 Ohio 225.

South Carolina. — Anonymous, 1 Hill 251; Freeman *v.* Price, 2 Bail. L. 115; Buford *v.* M'Luny, 1 Nott & McC. 268.

Texas. — Mitchell *v.* Spradley, 23 Tex. Civ. App. 43, 56 S. W. 134; Patten *v.* Belo, 79 Tex. 41, 14 S. W. 1037.

Virginia. — McAlexander *v.* Harris, 6 Munf. 465.

In Hutchinson *v.* Wheeler, 35 Vt. 330, as tending to show his belief in the truth of the charge that the plaintiff had poisoned his cow, it was held competent for the defendant to show that for some time previous to the loss of the cow there had been bitterly hostile feelings on the part of the plaintiff toward the defendant, and that the defendant having at a former time poisoned the plaintiff's dog, the latter had several times threatened to pay the defendant in his own coin; that the plaintiff had

able grounds for believing the truth of the charge is competent under the general issue.[90]

c. *Previous Statements of the Plaintiff* which may have induced a belief in the truth of the charge are competent on behalf of the defendant,[91] but they must have some connection with the defamatory charge.[92]

d. *Previous Conduct of the Plaintiff* leading the defendant to believe him guilty of the charge made against him is competent under the general issue to show the defendant's good faith.[93] It has been held to the contrary, however.[94]

attempted to get a criminal prosecution instituted against the defendant, and shortly before the defendant's cow was poisoned a new quarrel had broken out between the parties. These facts, although tending to prove the truth of the charge, would fall short of establishing such a plea, and were not offered for that purpose.

While a justification cannot be proved under the general issue, nevertheless the defendant may, in mitigation of damages, show circumstances which influenced him in speaking the words and which tended to justify his conclusions, although it subsequently transpires that the conclusion and statement were unfounded. Haywood *v.* Foster, 16 Ohio 88, holding erroneous the rejection of evidence as to the plaintiff's conduct which tended to justify the conclusion drawn by the defendant.

General Suspicions and Reports. See *infra*, "Rumors, Reports and Suspicions."

90. Wilson *v.* Apple, 3 Ohio 270; Remington *v.* Congdon, 2 Pick. (Mass.) 310.

In Reynolds *v.* Tucker, 6 Ohio St. 516, 67 Am. Dec. 353, it was held competent for the purpose of mitigating damages for the defendant, under the general issue, to prove facts which were from their nature calculated to induce a belief on his part of the truth of the charge, "provided such proof did not establish a justification." Such evidence is admitted, however, merely to show the defendant's belief in the truth of his statement, and is not admissible as a justification.

91. Previous Threats by the Plaintiff to Commit the Crime with which the defendant subsequently charged him are admissible on behalf of the defendant, if known to him at the time of the publication, to show his good faith and belief in the truth of his statement. Hitchcock *v.* Moore, 70 Mich. 112, 37 N. W. 914, 14 Am. St. Rep. 474.

92. Delaney *v.* Kaetel, 81 Wis. 353, 51 N. W. 559.

93. Mosier *v.* Stoll, 119 Ind. 244, 20 N. E. 752; Bradley *v.* Heath, 12 Pick. (Mass.) 163. See Bourland *v.* Eidson, 8 Gratt. (Va.) 27; Hutchinson *v.* Wheeler, 35 Vt. 330.

In Wilson *v.* Apple, 3 Ohio 270, the slanderous charge consisted of the words "you are a thief, you have stolen geese." The general issue was pleaded, and the defendant in mitigation of damage offered to show that the plaintiff had driven away a flock of geese belonging to a particular person. The exclusion of this evidence was held error.

While the truth of the defamatory words cannot be proved under the general issue, nevertheless it is competent for the defendant to show that the charge was occasioned by the misconduct of the plaintiff, either in attempting to commit the crime or leading the defendant to believe him to be guilty thereof. Shirley *v.* Keathy, 4 Cold. (Tenn.) 29, in which case evidence that the defendant had left the corn, with the larceny of which he had charged the plaintiff, in the latter's possession, and that a portion of it had been lost while in the plaintiff's custody, was held erroneously excluded.

94. Alderman *v.* French, 1 Pick. (Mass.) 1, 11 Am. Dec. 114 (disapproving of a contrary *dictum* in Larned *v.* Buffinton, 3 Mass. 546);

e. *When Special Damages Are Claimed.* — It has been held that the rule excluding evidence of facts tending to prove the truth of the charge has no application when special damages are claimed, on the ground that such evidence would tend to show that the damage did not flow from the defendant's act, but from the fact itself.[95]

f. *When Occasion Is Privileged.* — It has been held that this general rule excluding evidence tending to show the truth under the general issue has no application when the communication was made on a privileged occasion, the evidence being competent under such circumstances to show probable cause for the statement.[96]

2. Evidence Competent in Mitigation Under the General Issue. Under the general issue the defendant may prove in mitigation any facts or circumstances tending to show the absence of malice if they do not prove or tend to prove the truth of the defamatory charge.[97]

McGee *v.* Sodusky, 5 J. J. Marsh. (Ky.) 185, 20 Am. Dec. 251.

The defendant cannot, under the general issue, either in mitigation of damages or to rebut malice, show the truth of the words spoken, nor any improper acts and conduct on the part of the plaintiff affording the defendant grounds for believing his statement to be true, although such acts and conduct are not sufficient to prove actual guilt. Knight *v.* Foster, 39 N. H. 576.

95. In Wier *v.* Allen, 51 N. H. 177, it was held that facts tending to prove the truth of the charge cannot be shown under the general issue in mitigation of *general* damages. The court recognizes that this rule has been relaxed in some jurisdictions and changed by statute, but adheres to the old rule. When, however, *special* damages are claimed it is incumbent upon the plaintiff to show that they resulted from the defendant's act, and the defendant may in consequence show by any competent evidence that such damage did not flow from his act; hence he may show that the charge was true, because this tends to show that the damage resulted not from the defendant's statement, but from the fact itself.

96. While it is true that under the general issue evidence tending to show the truth of the charge is not admissible in mitigation in ordinary cases for libel or slander, this rule does not apply where the communication was made on a privileged occasion, for under such circumstances evidence tending to prove the truth of the charge would be admissible to show a probable cause for making the statement. "The rule we take to be this, that evidence, although true, or tending to prove the truth of the charges, in a privileged communication, may be admitted under the general issue for the purpose of showing probable cause for the complaint, rebutting any presumption of malice." Chapman *v.* Calder, 14 Pa. St. 365, holding competent evidence that rumors of the truth of the charge were in circulation previous to the publication relied on.

97. *Alabama.* — Shelton *v.* Simmons, 12 Ala. 466; Kennedy *v.* Dear, 6 Port. 90; Arrington *v.* Jones, 9 Port. 139.

Illinois. — Thomas *v.* Dunaway, 30 Ill. 373.

Indiana. — Blickenstaff *v.* Perrin, 27 Ind. 527; Mosier *v.* Stoll, 119 Ind. 244, 20 N. E. 752.

Maryland. — Rigden *v.* Wolcott, 6 Gill & J. 413.

Mississippi. — Jarnigan *v.* Fleming, 43 Miss. 710, 5 Am. Rep. 514.

New York. — Gilman *v.* Lowell, 8 Wend. 573; Snyder *v.* Andrews, 6 Barb. 43.

North Carolina. — Knott *v.* Burwell, 96 N. C. 272, 2 S. E. 588.

Pennsylvania. — Minesinger *v.* Kerr, 9 Pa. St. 312; Updegrove *v.* Zimmerman, 13 Pa. St. 619.

Statutes, however, may require such mitigating circumstances to be pleaded.[98]

Evidence of Privilege. — Under the general issue the defendant may introduce any evidence which tends to negative malice, and therefore may show that the statement was made on a privileged occasion.[99]

When Answer Contains Several Pleas. — When several distinct pleas are made in the defendant's answer he is entitled to introduce the same evidence under a particular issue that he could if that issue stood alone.[1] And where the general issue and the truth of the charge are both pleaded, evidence offered in justification, if insufficient to prove the truth, may be considered under the general issue in mitigation of damages.[2]

98. Lauder *v.* Jones (N. D.), 101 N. W. 907; Willover *v.* Hill, 72 N. Y. 36; Wilson *v.* Noonan, 35 Wis. 321.

99. Hagan *v.* Hendry, 18 Md. 177; Torrey *v.* Field, 10 Vt. 353; Abrams *v.* Smith, 8 Blackf. (Ind.) 95; Root *v.* King, 7 Cow. (N. Y.) 613; Fero *v.* Ruscoe, 4 N. Y. 162; Taylor *v.* Robinson, 29 Me. 323.

1. Hawkins *v.* New Orleans Print. & Pub. Co., 29 La. Ann. 134; Blickenstaff *v.* Perrin, 27 Ind. 527. But see Larned *v.* Buffinton, 3 Mass. 546.

2. Landis *v.* Shanklin, 1 Ind. 92; West *v.* Walker, 2 Swan (Tenn.) 32.

LICENSES.— See Intoxicating Liquors; Patents.

LIENS.— See Admiralty; Judgments; Mechanics' Liens; Pledges; Timber.

LIFE INSURANCE.— See Insurance.

LIFE TABLES.— See Judicial Notice; Mortality Tables.

LIMITATION OF ACTIONS.

I. PRESUMPTIONS AND BURDEN OF PROOF.

1. In General. — As to whether the party seeking to enforce his cause of action or the party relying upon the statute to defeat recovery has the burden of proof is a question upon which the courts do not agree. Some hold that where a party relies upon the statute to defeat recovery the burden is upon the other party to show that his cause of action was not barred when he commenced his action.[1]

1. *Arkansas.* — Brown *v.* Hanauer, 48 Ark. 277, 3 S. W. 27; Yell *v.* Lane, 41 Ark. 53; McNeil *v.* Garland, 27 Ark. 343; Taylor *v.* Spears, 6 Ark. 381, 44 Am. Dec. 519.

Michigan. — Ayres *v.* Hubbard, 71 Mich. 594, 40 N. W. 10.

North Carolina. — House *v.* Arnold, 122 N. C. 220, 29 S. E. 334; Nunnery *v.* Averitt, 111 N. C. 394, 16 S. E. 683; Parker *v.* Harden, 121 N. C. 57, 28 S. E. 20; Moore *v.* Garner, 101 N. C. 374, 7 S. E. 732; Graham *v.* O'Bryan, 120 N. C. 463, 27 S. E. 122; Gupton *v.* Hawkins, 126 N. C. 81, 35 S. E. 229; Koonce *v.* Pelletier, 115 N. C. 233, 20 S. E. 391; Hooker *v.* Worthington, 134 N. C. 283, 46 S. E. 726.

In Houston *v.* Thornton, 122 N. C. 365, 29 S. E. 827, where the defendant pleaded the statute of limitations, it was held that the burden was upon the plaintiff to show that the action was commenced within three years from the date when the statute began to run.

In Leigh *v.* Evans, 64 Ark. 26, 41 S. W. 427, an action on a claim against an administrator wherein the statute of limitations was pleaded, it was held that the burden was upon the plaintiff to show that his claim was not barred.

Libel and Slander. — In Huston *v.* McPherson, 8 Blackf. (Ind.) 562, an action for slander, wherein the defendant pleaded the statute of limi-

The majority of the courts, however, regard the statute of limitations as an affirmative plea or defense, and accordingly hold that the party asserting the statutory bar must prove every fact necessary to substantiate his plea.[2]

2. Cause of Action Apparently Barred. — A. In General. Where it appears that the cause of action is *prima facie* barred, the burden of proof is upon the party seeking to enforce the cause of action to show facts taking his case out of the operation of the statute.[3]

tations, to which the plaintiff replied that the words had been spoken within the prescribed time, it was held incumbent upon the plaintiff to prove the speaking of some of the actionable words within that time. See also Pond *v.* Gibson, 5 Allen (Mass.) 19, 81 Am. Dec. 724.

2. *California.* — Wright *v.* Ward, 65 Cal. 525, 4 Pac. 534.

Illinois. — Haines *v.* Amerine, 48 Ill. App. 570.

Indiana. — Grant *v.* Monticello, 71 Ind. 58.

Iowa. — Tredway *v.* McDonald, 51 Iowa 663, 2 N. W. 567.

Minnesota. — Davenport *v.* Short, 17 Minn. 24.

Missouri. — Whitaker *v.* Whitaker, 157 Mo. 342, 58 S. W. 5.

Oklahoma. — Bradford *v.* Brennan, 12 Okla. 333, 71 Pac. 655.

South Carolina. — Yancey *v.* Stone, 9 Rich. Eq. 429.

Tennessee. — Pickett *v.* Gore, 58 S. W. 402.

Texas. — Barnet *v.* Houston, 18 Tex. Civ. App. 134, 44 S. W. 689; Tyler *v.* Jester (Tex. Civ. App.), 74 S. W. 359.

Utah. — White *v.* Century Gold Min. & Mill. Co., 78 Pac. 868.

Virginia. — Goodell *v.* Gibbons, 91 Va. 608, 22 S. E. 504.

A Plea of the Statute of Limitations Impliedly Admits the Existence of the Demand, and the burden of proving a bar by the statute is on the party pleading it. Borland *v.* Haven, 37 Fed. 394, *holding*, accordingly, that where a portion of the demand is claimed to have been barred, the party so claiming must prove the specific amount; that mere proof that some portion is barred, not showing the amount, is not sufficient to establish that the bar applies to any. The burden of proving that a transfer, alleged to be voluntary, was made more than five years before the institution of the suit to have it set aside is on the party pleading the statute. Vashon *v.* Barrett, 99 Va. 344, 38 So. 260.

In Buck *v.* Newberry (W. Va.), 47 S. E. 889, an action of trespass for cutting trees, wherein the defendant had pleaded the statute of limitations, it was held incumbent upon him to show the date of the trespass, and that since part of the cutting was more and part less than five years before the commencement of the action it was incumbent upon him to show what part was barred.

In McDowell *v.* Potter, 8 Pa. St. 189, 49 Am. Dec. 503, an action to recover from the defendant money collected by him as attorney for the plaintiffs, wherein the defendant pleaded the statutory bar, it was held incumbent upon the defendant to show that the plaintiffs knew, or with ordinary care and diligence might have known, of the collection of the money.

3. Davis *v.* Davis, 98 Me. 135, 56 Atl. 588; Campbell *v.* Boggs, 48 Pa. St. 524; Spuryer *v.* Hardy, 4 Mo. App. 573; Burdick *v.* Hicks, 29 App. Div. 205, 51 N. Y. Supp. 789; Reilly *v.* Sabater, 26 Civ. Proc. 34, 43 N. Y. Supp. 383; Utz *v.* Utz, 34 La. Ann. 752. See also Hulbert *v.* Nichol, 20 Hun (N. Y.) 457.

When a party has pleaded the statute of limitations as a defense to a promissory note, and such note is introduced in evidence by the opposing party, and it appears upon its face to be barred by the statute — the court taking judicial notice of when the action was commenced — the burden of proving that the note is not in fact

B. PAYMENTS. — When the creditor relies upon payments by the debtor to prevent the running of the statute, the burden is upon him to show the payments.[4] And where a creditor relies upon a payment upon an account so as to take the account out of the statute it is incumbent upon him to show that the payment was made with a clear understanding upon the part of the debtor that there was a balance remaining unpaid after such payment.[5] Other courts, however, hold that where the creditor has established the fact of a partial payment it will be presumed that it was unaccompanied by any fact or circumstance which would tend to qualify its effect upon the running of the statute; and it is incumbent upon the debtor to show that it was made under such circumstances as to repel this presumption.[6]

barred devolves upon the party claiming under the note. Dielmann *v.* Citizens Nat. Bank of Madison, 8 S. D. 263, 66 N. W. 311. See also Davis *v.* Davis, 98 Me. 135, 56 Atl. 588.

4. Simpson *v.* Brown-Desnoyers Shoe Co., 70 Ark. 598, 70 S. W. 305; Gregory *v.* Filbeck (Colo. App.), 77 Pac. 369; Davis *v.* Davis, 98 Me. 135, 56 Atl. 588; Gupton *v.* Hawkins, 126 N. C. 81, 35 S. E. 229; Strong *v.* State *ex rel.* Attorney-General, 57 Ind. 428.

In an action against one of several joint makers of a promissory note, who pleads the statute of limitations, and the plaintiff seeks to avoid the bar of the statute by a payment indorsed on the note, before the bar was complete, he must prove affirmatively — the burden is upon him — that the payment was made by the defendant before the cause of action was barred. Knight *v.* Clements, 45 Ala. 89, 6 Am. Rep. 693.

In Armistead *v.* Brook, 18 Ark. 521, an action upon a bond, wherein the defendant pleaded the statute of limitations, to which the plaintiff replied a part payment, and it appeared that he held several indisputable claims against the defendant, it was held that the plaintiff must prove not only a payment by the defendant, but an appropriation of that payment to that particular debt.

Where the issue framed between the parties is the statute of limitations, and whether the debt sued upon has been taken out of the statute by a part payment, the burden of proof is upon the plaintiff to show not only that payment was made by the maker to the payee, but that it was intended as a payment upon the identical note upon which the action has been brought. Easter *v.* Easter, 44 Kan. 151, 24 Pac. 57.

5. Burdick *v.* Hicks, 29 App. Div. 205, 51 N. Y. Supp. 789; Adams *v.* Olin, 140 N. Y. 150, 35 N. E. 448; Crow *v.* Gleason, 141 N. Y. 489, 36 N. E. 497, where the court said: "In order to have that effect it must not only appear that the payment was made on account of a debt, but also on account of the debt for which action is brought, and that the payment was made as a part of a larger indebtedness, and under such circumstances as warrant a jury in finding an implied promise to pay the balance. If it be doubtful whether the payment was a part payment of an existing debt, more being admitted to be due, or whether the payment was intended by the party to satisfy the whole of the demand against him, the payment cannot operate as an admission of a debt, so as to extend the period of limitation. If there be a mere naked payment of money without anything to show on what account, or for what reason, the money was paid, the payment will be of no avail under the statute. The payment must be made under such circumstances as to show a recognition of a larger debt remaining unpaid."

6. Neilands *v.* Wright, 134 Mich. 77, 95 N. W. 997.

On an issue as to whether such

C. Acknowledgment, New Promise, Etc. — So, too, where a creditor relies upon an acknowledgment of the debt, or a new promise to pay, oral or written, as the law may recognize sufficient, or require, it is incumbent upon him to establish such acknowledgment or new promise.[7] And the acknowledgment or new promise must be shown to relate to the particular demand in controversy.[8] It is not enough that the evidence shows casual loose and general expressions with respect to the acknowledgment of the barred debt; it must show an

payments were made on notes as will prevent their being barred by limitation, it is not incumbent on the plaintiff to prove that payments were made by the debtor with the intention of continuing the notes in force, or reviving them, such intention being presumed from the fact of payment, if proven. Young *v.* Alford, 118 N. C. 215, 23 S. E. 973.

Part Payment Is Only Prima Facie Evidence of an admission of continued indebtedness, and may be rebutted by other evidence and the circumstances under which it was made. Ketcham *v.* Hill, 42 Ind. 64; Strong *v.* State, 57 Ind. 428.

7. *Connecticut.* — Buckingham *v.* Smith, 23 Conn. 453.

Illinois. — Wachter *v.* Albee, 80 Ill. 47; Wellman *v.* Miner, 73 Ill. App. 448; McClintic *v.* Layman, 12 Ill. App. 356; McGrew *v.* Forsyth, 80 Ill. 596; Parsons *v.* Northern Illinois C. & I. Co., 38 Ill. 430; Carroll *v.* Forsyth, 69 Ill. 127.

Maine. — Davis *v.* Davis, 98 Me. 135, 56 Atl. 588.

Maryland. — Leonard *v.* Hughlett, 41 Md. 380; Trustees *v.* Miller, 99 Md. 23, 57 Atl. 644; Gill *v.* Donovan, 96 Md. 518, 54 Atl. 117.

Minnesota. — Russell *v.* Davis, 51 Minn. 482, 53 N. W. 766.

New York. — Reilly *v.* Sabater, 26 Civ. Proc. 34, 43 N. Y. Supp. 383.

Pennsylvania. — Henry *v.* Zurflieh, 203 Pa. St. 440, 53 Atl. 766. See also Palmer *v.* Gillespie, 95 Pa. St. 340.

In Kent *v.* Wilkinson, 5 Gill & J. (Md.) 497, an action of assumpsit, wherein the defendant pleaded the statute of limitations, the plaintiff proved that the defendant, an administrator, in answer to the demand for payment said that he thought the debt had been paid and that he could produce the receipts, and that if he could not and the debt was correct it should be paid, and it was held incumbent upon the plaintiff to prove the debt before he could avail himself of the promise.

8. Buckingham *v.* Smith, 23 Conn. 453; Cook *v.* Martin, 29 Conn. 63, *holding* further that as the question whether it was so made is one of fact, no legal evidence which in any measure tends to prove it should be rejected. In that case two independent claims were held by the plaintiff against the defendant — one an account, the other a note — a statement of which, on a single piece of paper, was presented to the defendant soon after they fell due, and admitted by him as so presented. Five years afterward the defendant made a general acknowledgment of indebtedness to the plaintiff, and promised to pay him what he owed him. In a suit on the note and account, to which the defendant pleaded the statute of limitations, and in which the plaintiff offered evidence of the new promise, it was held that the evidence was not to be rejected on the ground that the promise was too general and indefinite, but that the question of its application was one for the jury. See also Shipley *v.* Shilling, 66 Md. 558, 8 Atl. 355.

In Hopper *v.* Beck, 83 Md. 647, 34 Atl. 474, an action on a note, wherein a new promise was relied on to remove the statutory bar, it was held that the fact that a note was, within the statutory period, presented to the defendant for payment, on which he acknowledged liability, did not impose upon the defendant the burden of showing that the note presented was not the note sued on.

McNamee *v.* Tenny, 41 Barb. (N.

express promise to pay, or an unqualified acknowledgment from which a promise to pay may be inferred.[9]

Although the new promise or acknowledgment itself must be clear and explicit, it is not essential that the evidence by which that promise or acknowledgment is established should be clear and explicit.[10] It seems that the law requires no greater degree of proof of a new promise to bar the statute after it has once become operative than in the case of a new promise before the expiration of the limited time.[11]

D. Conditional Promise. — When a conditional promise is relied upon to defeat the statute the creditor must not only show the promise, but also the performance of the condition.[12]

Y.) 495. In the absence of proof that other demands existed to which the acknowledgment of the debtor might apply, the presumption is that it applied to the demand in question.

9. Kallenbach *v.* Dickinson, 100 Ill. 427; Thomas *v.* Carey, 26 Colo. 485, 58 Pac. 1093; Cunkle *v.* Heald, 6 Mack. (D. C.) 485; Shepherd *v.* Thompson, 122 U. S. 231; Biddel *v.* Brizzolara, 64 Cal. 354, 30 Pac. 609; Watson *v.* Stem, 76 Pa. St. 121. See also Ryan *v.* McElroy, 15 App. Div. 216, 44 N. Y. Supp. 196.

10. Strickland *v.* Walker, 37 Ala. 385, where the court said: "There is a wide difference between *the promise* or *acknowledgment*, and the *evidence* by which that promise or acknowledgment is made to appear. The former, no matter how clearly it be proved — even though it be in writing — is not sufficient if its terms be equivocal or indeterminate. But there is no rule which requires that the proof of such promise shall be different in measure, or more strict than that which is required to establish any disputed fact in a civil suit. Evidence which satisfies the minds of the jury is enough." *Compare* Bell *v.* Morrison, 1 Pet. (U. S.) 351; Yaw *v.* Kerr, 47 Pa. St. 333.

Direct and positive proof of an acknowledgment or promise in any set form of words is not required. It may be inferred from facts without any words: as from the payment of part of the contract, or giving security for part or the whole, within the six years. Whitney *v.* Bigelow, 4 Pick. (Mass.) 110.

11. Henry *v.* Zurflieh, 203 Pa. St. 440, 53 Atl. 243. *Compare in re* Reed, 6 Biss. 250, 20 Fed. Cas. No. 11,635.

12. *United States.* — Tridell *v.* Munhall, 124 Fed. 802; Lonsdale *v.* Brown, 4 Wash. C. C. 86, 15 Fed. Cas. No. 8493; Bell *v.* Morrison, 1 Pet. 351; Wetzell *v.* Bussard, 11 Wheat. 309.

Illinois. — Parsons *v.* Northern Illinois C. & I. Co., 38 Ill. 430; Carroll *v.* Forsyth, 69 Ill. 127; Boone *v.* A'Hern, 98 Ill. App. 610.

Maryland. — Oliver *v.* Gray, 1 Har. & G. 204.

Minnesota. — McNab *v.* Stewart, 12 Minn. 407.

New York. — Wakeman *v.* Sherman, 9 N. Y. 85.

See also Hanson *v.* Towle, 19 Kan. 273.

In assumpsit on a claim barred by the statute of limitations, evidence that the defendant said he had no money; that he would settle when he got the money; that he would not promise any time when he would pay; that he expected his mother would die, and if she should he would settle up the matter, is not sufficient to take the case out of the statute, without proof of the defendant's ability to pay. Stowell *v.* Fowler, 59 N. H. 585.

After a debt had been barred by the statute of limitations the debtor said to the creditor, "Unless J. R. has paid it for me, it is a just debt and I will pay it;" and again, "It is a just debt and I will pay it, if I cannot prove that it has been settled by J. R." *Held*, that the case was thereby taken out of the statute. By

E. Matters Arresting Running of Statute. — a. *In General.* Where a party, in an action as to which the statutory bar would otherwise be complete, claims that by reason of the existence of facts which by the express terms of the statute will arrest the running of the statute, his cause of action is not barred, he has the burden of proving the facts necessary to bring him within the terms of the exception.[13]

b. *Infancy.* — When the plaintiff relies upon the fact of his minority to bar the running of the statute it is incumbent upon him affirmatively to show his non-age at such time as will bring him within the exception of the statute.[14]

c. *Coverture.* — A party relying on coverture to prevent the running of the statute has the burden of proof.[15]

d. *Non-Discovery of Fraud.* — So, too, in an action grounded upon fraud upon the part of the defendant, as to which the statutory bar would be complete unless the facts constituting the fraud did

such declarations, the *onus* of proof that the debt had been paid rested on the defendant. Richmond *v.* Fugua, 33 N. C. 445.

13. Hunt *v.* Gray, 76 Iowa 268, 41 N. W. 14; Vail *v.* Halton, 14 Ind. 344; Young *v.* Whittenhall, 15 Kan. 579; Zane *v.* Zane, 5 Kan. 134.

In Davis *v.* Sullivan, 7 Ark. 449, a statute in force at that time provided that if any person entitled to bring any action was at the time the cause of action accrued under disability, such as non-age or insanity or coverture, or was beyond the limits of the state, he was at liberty to bring the action within the time specified in the statute after the removal of the disability; and in that case, the plaintiff having established the fact of his non-residence at the time of the accrual of the cause of action, the legal presumption was that he so continued until within five years of the institution of a suit, that being the statutory period, the defendant having wholly failed to show the contrary.

When it is incumbent upon the plaintiff to prove that he was under a disability which exempts him from the operation of the statute of limitations, he must show that it was a continuing disability from the time the cause of action first accrued. Edwards *v.* University, 21 N. C. 325, 30 Am. Dec. 170.

If the plaintiff would avoid the bar of the statute of limitations by having seasonably sued out process which failed of service through inevitable accident in the transportation by mail, it is incumbent on him to show that he previously ascertained the course of the mail, and that a letter inclosing the precept, and properly directed, was put into the postoffice sufficiently early to have reached the officer, by the ordinary route, in season for legal service. Jewett *v.* Greene, 8 Me. 447.

In Stewart *v.* McMillan, 34 Iowa 455, it appeared that by a statute then in force the limitation did not apply, although the debt was apparently barred on its face, if from the testimony of defendant as a witness it appeared affirmatively that the cause of action still justly subsisted, and it was held that unless the defendant in such case testified affirmatively that the debt was not paid, or to what was equivalent thereto, no judgment could properly be rendered against him. See also McNitt *v.* Helm, 29 Iowa 302; Howells *v.* Patton, 26 Iowa 531; Webster *v.* Rees, 23 Iowa 269; Porter *v.* McKinzie, 20 Iowa 462.

14. French *v.* Watson, 52 Ark. 168, 12 S. W. 328; Vail *v.* Halton, 14 Ind. 344. See also Hillebrant *v.* Brewer, 6 Tex. 45, 55 Am. Dec. 757.

15. McConnico *v.* Thompson, 19 Tex. Civ. App. 539, 47 S. W. 537.

Where a *feme sole* plaintiff in

not come to the knowledge of the plaintiff until within the time fixed by the statute within which the action must be commenced, the burden is upon the plaintiff to establish the discovery of the fraud within the time so limited;[16] although there are cases to the

ejectment relies upon a former coverture to save her right from the bar by time, she must show that the action was commenced within the three years allowed her for that purpose after her disability was removed. Downing *v.* Ford, 9 Dana (Ky.) 391.

Where coverture is relied upon to save an action from the bar of the statute of limitations, the burden of proving the marriage is satisfied by proof of cohabitation and reputation as husband and wife. Lawrence R. Co. *v.* Cobb, 35 Ohio St. 94.

16. Mason *v.* Henry, 152 N. Y. 529, 46 N. E. 837; Prewett *v.* Dyer, 107 Cal. 154, 40 Pac. 105; Lemster *v.* Warner, 137 Ind. 79, 36 N. E. 900 (where the court said: "The statute of limitations is a statute of repose, and in order to bring a case within the exception made by concealment, and to avoid the statute, something more than silence or mere general declarations on the part of the person liable must be shown. There must be some trick or artifice to prevent inquiry or elude investigation, or some fact misstated to, or concealed from, the party by some positive act or declaration when inquiry was being made or information sought"); Hellman *v.* Davis, 24 Neb. 793, 40 N. W. 309; Farnam *v.* Brooks, 9 Pick. (Mass.) 212; Baldwin *v.* Martin, 3 Jones & S. (N. Y.) 85. See also Springer *v.* Hardy, 4 Mo. App. 573.

To entitle a creditor to bring an action to set aside a conveyance as fraudulent after the lapse of five years from its execution, he must allege and prove that he discovered the fraud within five years next before bringing the suit, and that he could not, with the use of reasonable diligence, have discovered it sooner. Brown *v.* Brown, 91 Ky. 639, 11 S. W. 4.

In Hooker *v.* Worthington, 134 N. C. 283, 46 S. E. 726, an action by the plaintiff as judgment creditor to have certain deeds made by mortgagees of the defendant husband to his wife set aside for fraud and the property subjected to the payment of the plaintiff's debt, wherein the defendant had pleaded the statute of limitations against the debt, it was held necessary for the plaintiff to show that a discovery of the fraud alleged in the complaint had not been made by the plaintiff more than three years before the commencement of the action.

In Tillison *v.* Ewing, 91 Ala. 467, 8 So. 404, it was held that under a statute permitting a party to bring an action within one year after the discovery of the facts constituting the fraud on which he relies to avoid the bar created by the statute of limitations, he must show not only the non-discovery of the fraud, but also due diligence on his part to discover the facts; proof of mere ignorance of them is not enough. See also Prewett *v.* Dyer, 107 Cal. 154, 40 Pac. 105.

In Barlow *v.* Arnold, 6 Fed. 351, it was held that under a statute providing that in actions based on fraud the cause of action shall not be deemed to have accrued until the discovery of the fraud, and limiting the time in which the action must be commenced after the accrual of the cause of action, it will be presumed that the cause of action, which was one for deceit, arose when the fraud was committed, and that in order to avoid this presumption it was incumbent upon the plaintiff to prove when the fraud was discovered. The court said: "The time of the plaintiff's discovery is always within his knowledge, and rarely within that of the defendant. If, therefore, a defendant is required to prove the time of the plaintiff's discovery of the fraud, he might be often deprived of the statute of limitations, which is a statute of repose, and should be liberally construed."

In Blethen *v.* Lovering, 58 Me. 437, a provision of the statute extended the limitation in cases of fraudulent concealment of the cause

effect that averment by plaintiff of ignorance of fraud puts the burden on the defendant to prove the contrary.[17]

e. *Absence or Non-Residence of Defendant.* — Where the creditor relies upon the absence or non-residence of the debtor to prevent the running of the statute, and the statute requires the action to be commenced within a certain time after the return to the state by the debtor or obligor, the burden of proof rests upon the creditor to

of action, and it was held that a creditor who seeks to avoid the effect of the statutory bar on the ground of such fraudulent concealment has the burden of proof.

A fraudulent concealment of a cause of action to suspend the statute of limitations need not be proved beyond reasonable doubt. Ossipee *v.* Grant, 59 N. H. 70.

17. Godbold *v.* Lambert, 8 Rich. Eq. (S. C.) 155, 70 Am. Dec. 192.

See also Shannon *v.* White, 6 Rich. Eq. (S. C.) 96, 60 Am. Dec. 115, where the court said: "It was incumbent upon the defendants to prove that the plaintiffs had notice of the fraud more than four years prior to the filing. And it is here to be remarked that it would not be sufficient to prove that the plaintiff had a suspicion of the fraud. But it is necessary to bring home to the plaintiff a knowledge of the facts constituting the fraud. Suppose some one were to tell him that a fraud had been committed; it would not be sufficient unless he were informed of the facts constituting the fraud, or put in the possession of a clue by which, with a proper diligence, he might come to a knowledge of the facts. He would not be required to enter into a costly contest, which would end in disappointment and defeat, or to encounter a shadowy and intangible phantom, which was sure to elude his attack. But when a knowledge of the facts constituting the fraud are brought home, or the means by which a knowledge of those facts might by proper diligence have been obtained, then the statute begins to run, and not before."

In Bartelott *v.* International Bank, 119 Ill. 259, 9 N. E. 898, *affirming* 18 Ill. App. 359, where the defendant had pleaded the statute of limitations, the plaintiff in his reply set out specific facts constituting a cause of action, and that knowledge thereof had been concealed from him, which replication the defendant traversed, and it was held that the burden was upon the defendant. That "if a thing alleged as a fact never existed it would seem clear that knowledge of it could not have been concealed; and so in order to sustain his plea it was incumbent upon him to prove first the existence and then the concealment of the alleged facts."

In Faust *v.* Hosford, 119 Iowa 97, 93 N. W. 58, an action by the plaintiff to recover money alleged to have been obtained by the defendant as her agent through fraud and deceit, wherein the defendant claimed that the plaintiff's action was barred by the statute of limitations, it was held that the burden was on the defendant to show the plaintiff's knowledge of the fraud.

When a judgment is sought to be enforced against land which, it is alleged, the debtor fraudulently conveyed to his wife before the rendition of the judgment, the burden is upon defendant, pleading the statute of limitation, of proving facts necessary to constitute the bar, and to do this it is essential, under § 2741, revision of 1860, to prove not only that five years have elapsed since the fraud, but since it was discovered by or became known to plaintiff. Baldwin *v.* Tuttle, 23 Iowa 66.

In Sheldon *v.* Keokuk Northern Line Packet Co., 8 Fed. 769, it was held that the court would not, in support of a demurrer setting up the statute of limitations, infer from the fact that the alleged fraud occurred more than six years prior to the commencement of the suit; that the complainants discovered the facts constituting the fraud before the period of six years.

establish the absence or non-residence.[18] There are cases, however, holding that the absence of the debtor is, in such case, a matter within his knowledge, which he has the burden of proving.[19]

18. Investment Securities Co. *v.* Bergthold, 60 Kan. 813, 58 Pac. 469; Van Patten *v.* Bedow, 75 Iowa 589, 39 N. W. 907. See also Tremaine *v.* Weatherby, 58 Iowa 615, 12 N. W. 609. In Miller *v.* Baier, 67 Kan. 292, 72 Pac. 772, where the plaintiff pleaded the absence of the defendant from the state, which the defendant denied, it was held to be incumbent upon the plaintiff to show not merely that the defendant resided out of the state, but his continuous personal absence from the state. The court said: "It is the personal presence in the state, not the matter of residence, that affects the running of a statute, and evidence merely of residence out of the state cannot be considered as the equivalent of continuous personal absence from it."

In Crissey *v.* Morrill, 125 Fed. 878, where the statute of limitations was involved, it was contended by the plaintiff that the defendants failed to prove that they were residents of the state during the statutory period of limitation, so as to be entitled to the benefit of that statute. But the court, in ruling against the contention, said: "It is sufficient to say that when the defendants invoked the statutory bar of three years as a defense it was the duty of the plaintiff below, if the bar was not applicable because they had concealed themselves or been absent from the state, to establish that fact by competent evidence. When it appears on the trial of a case, where the statute of limitations is pleaded, that the indebtedness became due beyond the statutory period, the courts do not presume, in favor of the plaintiff who seems to have been negligent, that the defendant has concealed himself to avoid the service of process or has been absent from the state, but require the plaintiff to make such proof."

Proof by the plaintiff that the defendant was a non-resident at the time the contract was made, or the cause of action accrued, raises the presumption of continued absence from the state, and throws upon the defendant the burden of showing when it ceased, and that he has actually been within the state a sufficient length of time to create a bar under the statute. State Bank *v.* Seawell, 18 Ala. 616.

In an action upon a promissory note, where it appears from the face of the note that it matured more than six years before the commencement of the suit, it is *prima facie* within the bar of the statute of limitations; and when defendant, by special plea, sets up the statute, to which plea the plaintiff replies that his claim or demand is within the exception to the statute (Code 1886, § 2622), because the defendant has not resided in the state for six years since the execution of the note, the burden of proof rests upon plaintiff to show defendant's absence from the state, so as to bring the case within the exception to the statute. Condon *v.* Enger, 113 Ala. 233, 21 So. 227.

In Pierce *v.* McClellan, 93 Ill. 245, where the statutory period of limitation had elapsed before the commencement of the suit, but it appeared that defendant had been absent from the state portions of that time, it was held that the burden of proof was upon the complainant to overcome the presumption of a bar created by the lapse of more than the statutory period by showing that, taking out the time of the defendant's absence, the number of years constituting the statutory period were not left.

19. Kennedy *v.* Shea, 110 Mass. 147. In Little *v.* Blunt, 16 Pick. (Mass.) 359, the statute provided that where the debtor, at the time the cause of action accrued, was out of the state, and did not leave attachable property therein, the statute did not begin to run until his return, and it was held that in order to avoid this exception in the statute the debtor was bound to show that the creditor knew of his return to the state, and that he had attachable property there, so as to have an opportunity

f. *Cause of Action Accruing in Another State.* — But in the case of a cause of action accruing in another state, the statute requiring an action thereon to be commenced within a specified time after the debtor has come into the state, if the debtor relies upon the statute of limitations it is incumbent upon him to show a residence for the requisite period before the action was commenced.[20]

Foreign Law. — In a case where a foreign law as to the limitation of an action is applicable, and there is no evidence as to that law, it will be presumed that such law is the same as that of the jurisdiction where the suit is pending.[21]

g. *Failure of Former Action.* — In some jurisdictions there are statutes providing that in the case of the failure of the plaintiff for reasons specifically named therein, in an action commenced by him within the time limited by statute, he may within a certain time begin a new action, which shall be held a continuation of the first. In such second action it is incumbent upon him to establish the facts necessary to bring him within the terms of the statute.[22]

of resorting to the proper remedy for the collection of his debt, or that his coming or having property was so public as to amount to constructive notice, and to raise the presumption that the creditor might, with the use of ordinary diligence, have collected the debt.

20. Mayer *v.* Friedman, 7 Hun (N. Y.) 218; Helmer *v.* Minot, 75 Hun 309, 27 N. Y. Supp. 79; Conlon *v.* Lanphear, 37 Kan. 431, 15 Pac. 600. *Compare* Dederich *v.* McAllister, 49 How. Pr. (N. Y.) 351.

Return of Defendant to State. In Palmer *v.* Bennett, 83 Hun 220, 31 N. Y. Supp. 567, the defendant being absent from the state when the cause of action accrued, and the statute accordingly beginning to run only from the defendant's return to the state, it was held that the burden of proof was upon the defendant to show that his return to the state, which was necessary to set the statute running, was so public or notorious that the plaintiff either knew of it, or with due diligence could have ascertained it.

Where a defendant, as a defense to an action arising in another state, pleads the statute of limitations and avers that he came into the state where the action was brought more than three years prior to the commencement of the action, the burden is upon him to maintain the issue arising upon the averment. Smith-Frazer Boot & Shoe Co. *v.* White, 7 Kan. App. 11, 51 Pac. 790.

The defendant's intestate residing out of the state when the contract in suit was executed, such residence, in the absence of any proof to the contrary, is presumed to continue, and will prevent the operation of the statute of limitations. Alden *v.* Goddard, 73 Me. 345.

21. Hadley *v.* Gregory, 57 Iowa 157, 10 N. W. 319. See also First Nat. Bank *v.* Thomas (Ky.), 3 S. W. 12.

22. Unsuccessful Former Action. Where a statute provides that if, after the commencement of an action, plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within a specified time thereafter, the second is deemed a continuation of the first action so as to avoid the effect of the statute of limitations; and in such case, if the failure in the former action is due to voluntary action on the plaintiff's part, such as dismissal, etc., it is incumbent upon him to establish facts showing that the failure was not due to his negligence. Cepnley *v.* Paton, 120 Iowa 559, 95 N. W. 179.

In Arkansas a statute (Sand. & H., § 4841) provides that if the plaintiff suffers a non-suit in any action commenced within the limit of time

II. MODE OF PROOF.

1. Acknowledgment or Promise Not Required To Be in Writing. A. In General. — In the absence of any statute requiring the acknowledgment or promise to be in writing and signed by the party to be charged, or by his duly authorized agent, it would seem that any legal evidence conducing to prove the recognition of the debt as still subsisting, and as one of the debts referred to and spoken of by the debtor in his acknowledgment or promise, should be received.[23]

Original Instrument as Evidence of Consideration for New Promise. Although the remedy on the original instrument is barred by the statute, yet in an action of assumpsit on an express promise made by the debtor the original may be received as the inducement to, or as explanatory of, and as furnishing the legal basis of, the express promise.[24]

he may commence a new action within a year from such non-suit. And in Watkins *v.* Martin, 69 Ark. 311, 65 S. W. 103, 425, where the plaintiff relied upon the fact that two actions had been brought by him on the same cause of action, of which one was brought within time and non-suit taken, and the other within one year thereafter, the burden is upon him to show that fact.

In Railway *v.* Shoecraft, 53 Ark. 96, 13 S. W. 422, where the plaintiff, in anticipation of a plea of the statute of limitations by the defendant, alleged the bringing, within the statutory period, of a former action and its dismissal, which the defendant denied and pleaded the statute in bar, it was held that the burden was upon the plaintiff to prove the facts alleged.

23. Cook *v.* Martin, 29 Conn. 63; Buckingham *v.* Smith, 23 Conn. 453.

In a suit to recover for timber cut from plaintiff's land by defendant's contractor, where the defendant denies the trespass and gives notice of the statute of limitations, testimony of a third party showing a settlement by defendant with him for a trespass committed on his land within the time limited by statute and at the same time as the one charged by plaintiffs, and by the same contractor, which cutting extended onto plaintiff's land, is admissible as tending to establish plaintiff's claim, and as showing that it was not barred by the statute of limitations. Ayres *v.* Hubbard, 71 Mich. 594, 40 N. W. 10.

The promise to pay the balance of the account is competent evidence to show that the payment was made in part satisfaction only of an admitted claim. Romaine *v.* Corlies, 47 N. J. L. 108.

24. Trustees *v.* Miller, 99 Md. 23, 57 Atl. 644, so holding under the Maryland statute, which provides that "no 'specialty whatsoever, except such as shall be taken for the use of the state, shall be good and pleadable, or admitted in evidence against any person in this state after the principal debtor and creditor have both been dead twelve years, or the debt or thing in action is above twelve years' standing,' with a saving to persons under disabilities." See also Leonard *v.* Hughlett, 41 Md. 380; Wright *v.* Gilbert, 51 Md. 146; Lamar *v.* Manro, 10 Gill & J. (Md.) 50; Young *v.* Mackall, 4 Md. 362; Atkinson *v.* Atkinson, 2 Colo. 381.

In Hancock *v.* Melloy, 189 Pa. St. 569, 42 Atl. 292, an action upon promissory notes maturing more than six years before the commencement of the action, but alleged by the plaintiff to have been taken out of the bar of the statute by an express promise of payment, it was held proper to admit in evidence the original notes for the purpose of identifying them as the notes referred to in the new promise.

The written instrument relied upon and operating as an acknowledgment

Authority of Creditor To Apply Funds in His Hands in Part Payment. Where the question whether the debt was barred by the statute of limitations turns on whether the creditor was authorized by his debtor to apply funds in his hands belonging to the debtor in part payment of the debt, it is proper to show not only that the funds were rightfully in his possession, but that he possessed the requisite authority to apply them as he did.[25]

B. Indorsement as Evidence of Payment. — a. *In General.* The rule is uniformly recognized that an indorsement on a note is admissible as evidence of payment on the note so as to take it out of the operation of the statute, where it clearly appears that the indorsement was made before the statutory bar was complete, the theory being that such an indorsement is against the interest of the one who made it;[26] but that where it appears that the indorsement was made after the statutory bar was complete it cannot be received in evidence to prove payment.[27]

b. *Proof of Indorsement.* — It has been held that in the absence of any proof to the contrary it will be presumed that the indorsement was made at the time it bears date.[28] But the decided weight of

of the original obligation as a subsisting debt may be received in evidence to prove the acknowledgment in an action on the debt, although as a separate enforceable contract it is absolutely void. Thompson *v.* Shepherd, 1 Mack. (D. C.) 385. See also Utica Ins. Co. *v.* Kip, 3 Wend. (N. Y.) 369.

25. Brown *v.* Warner, 116 Wis. 358, 93 N. W. 17, *holding* that it was proper for this purpose to receive in evidence letters written by the debtor and receipts given by the creditor tending to show that the creditor had collected rents belonging to the debtor by his authority, and had paid out certain moneys therefrom, taking receipts in his own name. To the same effect see Bond *v.* Wilson, 131 N. C. 505, 42 S. E. 956.

26. Young *v.* Alford, 118 N. C. 215, 23 S. E. 973; Shaffer *v.* Shaffer, 41 Pa. St. 51. See also Purdy *v.* Purdy, 47 App. Div. 94, 62 N. Y. Supp. 153.

27. Roseboom *v.* Billington, 17 Johns. (N. Y.) 182; Mills *v.* Davis, 113 N. Y. 243, 21 N. E. 68, 3 L. R. A. 394.

28. Gibson *v.* Peebles, 2 McCord (S. C.) 418, where it was held that receipts upon a note, if apparently fair, and not attended with circumstances calculated to excite suspicion that they were indorsed for the purpose of taking it out of the statute, are *prima facie* evidence of the fact they indicate. The court said: "The receipt accompanies the evidence of the debt, and so long as the one is preserved the other is secured. It is not said that such receipt is to be conclusive on the rights of the parties. It is a circumstance on which the presumption of payment may be raised, and it is to be submitted to the jury. If there be nothing to induce a belief that the receipt is not a fair one, the jury ought, and no doubt will, always presume that the payment was made. If there be any such circumstances they can be urged by the defendant, and if the payment was not made there will be always some circumstances on which to raise a presumption of fraud."

In Smith *v.* Ferry, 69 Mo. 142, the court said: "In general, indorsements made upon promissory notes are presumed to have been made at the time such indorsements bear date. If, however, there be anything in the indorsement indicative of alteration the usual presumption ceases, and it then devolves upon the holder of the paper to explain that which is apparently suspicious."

Although the statute may provide

authority is that there must be other proof as to when it was made,[29] or that the debtor had assented to it.[30] Still other courts hold that

that an indorsement on a note is not sufficient proof of payment to avoid the effect of the statute unless in the handwriting of the payor, nevertheless an indorsement not written by the payor is competent evidence, whether made before or after the statute has run. McDowell *v.* McDowell (Vt.), 56 Atl. 98.

29. *Alabama.* — Curtis *v.* Daughdrill, 71 Ala. 590; Knight *v.* Clements, 45 Ala. 89, 6 Am. Rep. 693; McGehee *v.* Greer, 7 Port. 537; Walker *v.* Wykoff, 14 Ala. 560.

Georgia. — Smith *v.* Simms, 9 Ga. 418.

Massachusetts. — Whitney *v.* Bigelow, 4 Pick. 110.

Missouri. — Haver *v.* Schwyhart, 39 Mo. App. 303.

New York. — Hulbert *v.* Nichol, 20 Hun. 454; Purdy *v.* Purdy, 47 App. Div. 94, 62 N. Y. Supp. 153, (where the court said that if the rule contended for by counsel — that is, that the presumption supplies the place of proof for the purpose of rendering the indorsement admissible — was to prevail it would to a very great extent interfere with the operation of the statute as applied to promissory notes, and furnish a great temptation to the entry of false indorsements made for the purpose of taking them out of the bar of the statute); Roseboom *v.* Billington, 17 Johns. 182; United States Trust Co. *v.* Stanton, 76 Hun 32, 27 N. Y. Supp. 614; Mills *v.* Davis, 113 N. Y. 243, 21 N. E. 68, 3 L. R. A. 394.

North Carolina. — Cupton *v.* Hawkins, 126 N. C. 81, 35 S. E. 229; White *v.* Beaman, 85 N. C. 3; Grant *v.* Burgwyn, 84 N. C. 56.

Washington. — Schlotfeldt *v.* Bull, 18 Wash. 64, 50 Pac. 590.

The obvious policy and the provision of the statute of limitations are that the payee of a note shall not make evidence, to take the promise out of the statute, by an indorsement of payment on the note by himself, or any one in his behalf. Waterman *v.* Burbank, 8 Metc. (Mass.) 352.

In Snyder *v.* Winsor, 44 Mich. 140, 6 N. W. 197, a note purporting on its face to be eight years overdue had upon it two indorsements dated within six years of the time of bringing the action upon it. The only proof offered by the plaintiff was that no other payments than those indorsed had been made, and it was held that this did not prove or tend to prove the indorsed payments.

Compare Oughterton *v.* Clark, 65 Hun 624, 20 N. Y. Supp. 381, where it was held that although the rule stated in the text is undoubtedly the true rule, the indorsement in that case was proper evidence of the payment, because there was testimony by the plaintiff that previous to the action the note so indorsed had been presented to the defendant, who admitted the correctness of the indorsement, which testimony was corroborated in part by another witness; and the further fact that the defendant, although in court, and a competent witness, was not called either to deny or explain away this positive testimony.

30. Schlotfeldt *v.* Bull, 18 Wash. 64, 50 Pac. 590; Haver *v.* Schwyhart, 39 Mo. App. 303; Bender *v.* Blessing, 91 Hun 73, 36 N. Y. Supp. 162; Smith *v.* Simms, 9 Ga. 418.

"Indorsements made by the creditor after the statute has run upon the claim, and without the authority or knowledge of the debtor, furnish no evidence whatever that the payment was made, for the reason that it is an *ex parte* declaration by a party in his own favor, and no one is allowed to make evidence for himself." Easter *v.* Easter, 44 Kan. 151, 24 Pac. 57.

In Colorado it is provided by statute that no indorsement or memorandum of payment written on a promissory note is sufficient proof of payment to avoid the bar (Mills' Ann. Stat., § 2921). And in Coulter *v.* Bank of Clear Creek Co., 18 Colo. App. 444, 72 Pac. 602, it was held that the indorsements made on the note in controversy did not prove themselves, but that it was incumbent upon the plaintiff to show that

the payment indorsed must be established by other evidence than the indorsement when the fact of the payment is controverted by the debtor,[31] but that where it is not controverted by him the presumption is that the indorsement was made with his privity.[32]

Where the Debtor Is Dead, and indorsements upon the instrument evidencing the debt are relied upon to repel the statutory bar, the creditor is not a competent witness to testify that the payments were made by the debtor at the date of the credits indorsed, under the statute prohibiting a party from testifying to a transaction with the deceased person.[33]

C. Credits Upon Open Account. — So, too, in the case of an open account, credits of cash appearing on the credit side of the account have no probative force unless they are accompanied by proof that they were actually paid.[34]

D. Entries in Creditor's Book of Accounts. — An entry in the creditor's cash book of a payment by the debtor, although supported by the proper suppletory oath, is not admissible on behalf of the creditor to prove the payment,[35] especially where it appears that the entry was made after the bar of the statute had become complete.[36]

E. Admissions by Debtor. — a. *To Creditor.* — Evidence of an admission to the creditor himself, or to his duly authorized agent, orally[37] acknowledging the debt as a subsisting obligation, when

they were memoranda of payments actually made by some one of the defendants, or by his authority.

31. Frazer *v.* Frazer, 13 Bush. (Ky.) 397, where the court said: "The party in possession of the note must be presumed to know when and by whom the payment was made and the credit entered, and the mere indorsement of a credit, although apparently against the interest of the obligee at the time it purports to have been made, cannot be regarded as sufficient evidence of payment by the obligor when that fact is controverted by answer." See also Kendall *v.* Clarke, 90 Ky. 178, 13 S. W. 583.

32. Hopkins *v.* Stout, 6 Bush. (Ky.) 375. See also English *v.* Wathen, 9 Bush (Ky.) 387.

33. Gupton *v.* Hawkins, 126 N. C. 81, 35 S. E. 229, where the court said: "To prove when the obligor made them necessarily is to prove that he made them."

34. *In re* Gladke, 45 App. Div. 625, 60 N. Y. Supp. 869.

35. Schlotfeldt *v.* Bull, 18 Wash. 64, 50 Pac. 590; Libby *v.* Brown, 78 Me. 492, 7 Atl. 114; Oberg *v.* Breen, 50 N. J. L. 145, 12 Atl. 203; Coyle *v.* Creevy, 34 La. Ann. 539; Penniman *v.* Rotch, 3 Metc. (Mass.) 216.

36. Small *v.* Rose, 97 Me. 286, 54 Atl. 726. The court said: "Had the entry in the cash book been made a reasonable time before the note became outlawed, its effect being an admission of the reduction of the debt, it might have been admissible if offered in evidence by the plaintiff (who was the executor of the creditor) as an entry made by a person since deceased apparently against his interest. But after the statutory bar had become complete it was clearly not against his interest, but on the contrary to his great advantage, to show a part payment on the note. This destroys entirely the probative force of the written memorandum and makes it inadmissible in evidence to prove the fact of payment."

37. Soper *v.* Baum, 6 Mack. (D. C.) 29; Kirby *v.* Mills, 78 N. C. 124 (where the admission was made to the creditor's attorney); Lang *v.* Gage, 66 N. H. 624, 32 Atl. 155; Fowles *v.* Joslyn (Mich.), 97 N. W.

such acknowledgment is not required to be in writing, or written,[38] is competent to meet the defense of the statute, notwithstanding a subsequent statute is passed and is in force when the action is pending making on oral acknowledgment or promise insufficient

790. See also Davis *v.* Davis, 98 Me. 135, 56 Atl. 588.

An admission that a payment previously made was intended as a part payment of a note claimed to be barred by the statute of limitations may be proved for the purpose of removing the bar of the statute, although such admission was made between the hours of sunrise and sunset on Sunday. Beardsley *v.* Hall, 36 Conn. 270. See also Thomas *v.* Hunter, 29 Md. 270.

In Haines *v.* Watts, 53 N. J. L. 455, 21 Atl. 1032, an action of assumpsit, in which the statute of limitations had been pleaded, the plaintiff under his replication produced testimony competent to prove that payments within six years had been made on account of the debt in controversy, as part of a system of partial payments begun twenty years before, by which the defendant had undertaken to pay off the entire debt, and for this purpose introduced written and oral declarations of the debtor that had accompanied the said payments at the inception of the undertaking and during its continuance. It was held that such testimony was competent, and that the plaintiff was not confined to the proof of such matters only as had happened within six years.

38. Letters Written by Debtor. When the statute of limitations is pleaded, and the existence of any indebtedness at a particular time is also a material question, letters written at that time by the defendant to the plaintiff, containing general admissions of indebtedness, and excuses for delay in making payment, are competent evidence on the question of indebtedness *vel non*, although the admissions may not be sufficient as an acknowledgment or promise to avoid the statute of limitations. Minniece *v.* Jeter, 65 Ala. 222.

In Cole *v.* Putnam, 62 N. H. 616, where the question was whether the defendant had promised to pay the debt, as to which the statutory bar was complete, it was held that a letter by him in response to a demand for payment, stating that the matter would have his earliest and best attention, was competent evidence to be considered in connection with other evidence. See also Lang *v.* Gage, 66 N. H. 624, 32 Atl. 155.

In a suit upon an open account against which the statute of limitations had run, unless a payment has been made, as testified by the plaintiff, a letter written by the defendant to the plaintiff about two years after the time the payment is claimed to have been made, asking for a statement of defendant's account, and stating that plaintiff knew that defendant had paid some on it, is admissible as bearing upon the question of such payment. Floersheim *v.* Vosburgh, 99 Mich. 11, 57 N. W. 1039.

In Martin *v.* Somervell Co., 21 Tex. Civ. App. 308, 52 S. W. 556, where the acknowledgment and promise to pay consisted of a written acknowledgment on the original instrument purporting to have been executed shortly before the bar of the statute was complete, and to have been signed by the debtor, the execution of which he denied, as well as the fact of extension for the time of payment, it was held that a note given by the debtor subsequent to the date of the indorsement, in an amount equal to the interest on the principal debt up to the time of the execution of the note, was relevant as tending to show that the debtor then recognized the existence and validity of the indorsement in question. The court said that had there in fact been no such acknowledgment of extension then the principal debt was barred before the execution of the interest note, and that the question might well be asked why the debtor should execute a promissory note for interest maturing after the time the note was barred, unless

evidence.[39] Evidence of a promise by the debtor to pay a balance on the aggregate of several claims, some of which are barred by the statute, does not establish a promise upon his part to pay those so barred.[40]

b. *To Third Persons.* — At one time the courts held that an admission by the debtor to any third person that he owed the money was competent evidence to revive the debt or to answer the defense of the statute,[41] and this rule is still adhered to in some states.[42] But nearly all of the courts now hold that evidence of admissions by the

he at the time recognized the original obligation as just and binding.

39. Shelley *v.* Westcott, 23 App. D. C. 135, where the court said: "While it has been the usual custom at all times in this jurisdiction, when the statute of limitations and a new promise are or may be in question, to sue upon the original contract, and when the statute of limitations is pleaded to meet it with the replication of a new promise, yet it has been held by the Supreme Court of the United States in the case of Bell *v.* Morrison, 1 Pet. 351, 7 L. Ed. 174, that the new promise, with the pre-existing indebtedness for its consideration, constitutes a new cause of action upon which suit may be maintained. It is, therefore, the real cause of action, and, if it may be created by parol, it must necessarily follow that it must be provable by parol, whatever changes may thereafter be made in the rules of evidence. In such case, to change the rule of evidence would be to destroy the right. This the legislature undoubtedly did not intend to do by the enactment of the code, and we do not think that it has done so."

40. Thomas *v.* Carey, 26 Colo. 485, 58 Pac. 1093. See also Boxley *v.* Gayle, 19 Ala. 151; Buckingham *v.* Smith, 23 Conn. 453; Walker *v.* Griggs, 32 Ga. 119; Suter *v.* Sheeler, 22 Pa. St. 308; Palmer *v.* Gillespie, 95 Pa. St. 340.

41. *England.* — Mountstephen *v.* Brook, 3 B. & A. 141, 5 E. C. L. 245; Clark *v.* Hougham, 3 B. & C. 149.

Alabama. — McRae *v.* Kennon, 1 Ala. 295; St. John *v.* Garrow, 4 Port. 223.

Delaware. — Smith *v.* Campbell, 5 Har. 380.

Georgia. — Bird *v.* Adams, 7 Ga. 505.

Maryland. — Felty *v.* Young, 18 Md. 163; Oliver *v.* Gray, 1 Har. & G. 204.

Massachusetts. — Whitney *v.* Bigelow, 4 Pick. 110; Williams *v.* Gridley, 9 Metc. 482.

New Hampshire. — Titus *v.* Ash, 24 N. H. 319.

New York. — Soulden *v.* Van Rensselaer, 9 Wend. 293; Watkins *v.* Stevens, 4 Barb. 168; McCrea *v.* Purmort, 16 Wend. 460; Phillips *v.* Peters, 21 Barb. 351; Carshore *v.* Huyck, 6 Barb. 583.

42. Cirwithin *v.* Mills, 2 Marv. (Del.) 232, 43 Atl. 151; Utz *v.* Utz, 34 La. Ann. 752; Stewart *v.* Garrett, 65 Md. 392, 5 Atl. 324. See also Emerson *v.* C. Altman & Co., 69 Md. 125, 14 Atl. 671.

In Babylon *v.* Duttera, 89 Md. 444, 43 Atl. 938, an action against the maker by the assignee of certain promissory notes, wherein the defendant had pleaded the statute of limitations, it was held proper to permit proof of an acknowledgment made by the defendant when giving his testimony in a former suit in equity, that he had executed the notes and that they had not been paid; that the "declarations and admissions, if believed by the jury, constitute a recognition and acknowledgment of the existence of a present subsisting debt, and should have been submitted to the jury."

Admissions by the debtor acknowledging the debt may be received in an action brought after his death against his administrator in order to raise the bar of the statute of limitations. Cirwithin *v.* Mills, 2 Marv. (Del.) 232, 42 Atl. 151.

debtor to third persons is incompetent.[43] But evidence of such an admission has been held proper where it appears that it was the debtor's intention that the statement should be communicated to and influence the creditor.[44]

c. *Joint Debtors.* — In the case of joint debtors, an admission of one made without the knowledge or assent of, or subsequent ratification by, his co-debtor, after the statutory bar is complete, is not admissible against the other for the purpose of proving a new promise.[45]

d. *Offer to Compromise.* — Evidence of an offer by the debtor to compromise, or that he was desirous of settling the claim, against

43. *England.* — Badger *v.* Arch, 10 Exch. 333.

United States. — Shepherd *v.* Thompson, 122 U. S. 231.

California. — Biddel *v.* Brizzolara, 64 Cal. 354, 30 Pac. 609.

Colorado. — Thomas *v.* Carey, 26 Colo. 485, 58 Pac. 1093.

District of Columbia. — Cunkle *v.* Heald, 6 Mack. 485.

Illinois. — Wachter *v.* Albee, 80 Ill. 47; Collar *v.* Patterson, 137 Ill. 403, 27 N. E. 604; McGrew *v.* Forsyth, 80 Ill. 596.

Kansas. — Investment Securities Co. *v.* Bergthold, 60 Kan. 813, 58 Pac. 469; Sibert *v.* Wilder, 16 Kan. 176.

Kentucky. — Trousdale *v.* Anderson, 9 Bush 276; Hargis *v.* Sewell, 87 Ky. 63, 7 S. W. 557.

Missouri. — Cape Girardeau Co. *v.* Harbison, 58 Mo. 90.

Nevada. — Taylor *v.* Hendrie, 8 Nev. 243.

New York. — Bloodgood *v.* Bruen, 4 Sandf. 427, 8 N. Y. 362; Wakeman *v.* Sherman, 9 N. Y. 85; Matter of Kendrick, 107 N. Y. 104, 13 N. E. 762.

North Carolina. — Hussey *v.* Kirkman, 95 N. C. 63.

Pennsylvania. — Spangler *v.* Spangler, 122 Pa. St. 358, 15 Atl. 436; Gillingham *v.* Gillingham, 17 Pa. St. 302; Hostetter *v.* Hollinger, 117 Pa. St. 606, 12 Atl. 741.

In Pearson *v.* Darrington, 32 Ala. 227, where the debtor, on being reminded by a third person of a promise made many years before to pay the debt when he became able, replied "that whenever the notes were presented he would make a satisfactory arrangement; that the payment of the principal ought to be received as satisfactory, and that he wished him to so advise the creditor," it was held that this was not sufficient to remove the bar.

In Henry *v.* Smith, 29 N. C. 348, an action on a bond for $60, payable to two attorneys for attending to a suit, which bond had been due more than twenty years, the defendants relied upon the presumption of payment, or satisfaction under the statute, from the lapse of time. To rebut the presumption the plaintiff proved that one of the defendants had recently said that he had paid one-half of the bond, and the other half was relinquished, because the attorney to whom it was payable had neglected to attend to the suit. It was held that these declarations were not sufficient to rebut the presumption.

44. Evans *v.* Carey, 29 Ala. 99; Jordan *v.* Hubbard, 26 Ala. 433; Wakeman *v.* Sherman, 9 N. Y. 85; Collett *v.* Frazier, 56 N. C. 80; O'Hara *v.* Murphy, 196 Ill. 599, 63 N. E. 1081.

45. Kallenbach *v.* Dickinson, 100 Ill. 427.

Compare Beardsley *v.* Hall, 36 Conn. 270, *holding* that the admission by one partner of a partnership debt, after the dissolution of the partnership, but before the statute of limitations has taken effect, is sufficient to remove the bar of the statute as to all the partners. See on this question more fully the article "ADMISSIONS," Vol. I, p. 580.

which the statute has run, is not competent to establish a new promise.[46]

F. Parol Evidence. — a. *Fact of Payment.* — A partial payment upon the principal debt relied upon by the creditor need not necessarily be indorsed or evidenced by a written receipt; it may be proved by parol.[47]

b. *As to Time of Payment of Principal Debt.* — Parol evidence to change the effect of a writing with reference to time of payment is not admissible on behalf of the creditor so as to avoid the effect of the statute.[48]

46. Thomas *v.* Carey, 26 Colo. 485, 58 Pac. 1093.

47. Ketcham *v.* Hill, 42 Ind. 64; Egery *v.* Decrew, 53 Me. 392. See also Ramsay *v.* Barnes, 35 N. Y. St. 43, 12 N. Y. Supp. 726.

In a suit by the payee against the maker of a promissory note, if the defendant relies on the statute of limitations, and the plaintiff relies on a payment by the defendant within six years, the plaintiff may introduce parol evidence of a receipt given by him to the defendant for money paid on the note, although it appears that the defendant returned the receipt to him upon his indorsing the amount thereof upon the note. Williams *v.* Gridley, 9 Metc. (Mass.) 482.

48. Borden *v.* Peay, 20 Ark. 293. The court said in this case that in an action upon a written obligation the debtor would not be permitted to introduce parol evidence changing the date of the instrument, the effect whereof would be to lessen the time of payment so as to render the bar of the statute operative, and that it is but reasonable that the rule should work both ways, and that the creditor should not be permitted to prove such a parol agreement to avoid the consequences of his delay in suing upon the instrument. "The policy of the law is that the written contract entered into between the parties is to be looked to for the purpose of determining the time of payment agreed upon by them." See also Joseph *v.* Bigelow, 4 Cush. (Mass.) 82; Huston *v.* Young, 33 Me. 85.

See also Hursh *v.* North, 40 Pa. St. 241, where suit was brought for a bill of goods more than six years before, and the statute of limitations was pleaded; evidence of the practice and custom of the trade to sell goods upon a system of credits was held inadmissible for the purpose of proving that the price was not to be paid when the goods were sold, but on a certain date thereafter, so as to avoid the bar of the statute by showing that the bill was not due until within the six years; and that it was error in the court below to receive the evidence and refer it to the jury as testimony from which they might infer a contract different in terms from that exhibited in the account.

In Nicholas *v.* Krebs, 11 Ala. 230, the defendant made a writing of the following tenor, viz: "Good for three hundred dollars. Jan'y 15th, 1829." It was held competent for the plaintiff to show by parol evidence that it was delivered to and intended to acknowledge a liability to him; but such evidence of an agreement, made simultaneously with the writing, is not admissible to show it was understood between the parties that there was no present indebtedness, or that it should be payable at a future day, so as to postpone the time when the statute of limitations began to operate. The court said: "If the paper imposed a legal duty it is difficult to perceive upon what ground the parol evidence could affect the operation of the statute of limitations. Its effect, if operative as an undertaking to pay, was to give to the party in whose favor it is made a present right of action, without reference to the consideration on which it is founded. The evidence then was allowed to change the legal effect of the paper, and instead of treating it as a debt *in praesenti*, so interpolating it as to make it, in the opinion of the cir-

c. *To Show Commencement of Judicial Proceedings.* — The time of commencement of judicial proceedings to avoid a statutory bar may be shown by parol evidence.[49]

d. *Reason for Failure of Service in Former Action.* — In some states by statute if in an action commenced within the time limited by the statute the writ fails of sufficient service or return by unavoidable accident, the plaintiff may within one year after the determination of the original suit commence a new action for the same cause; and it has been held that in the second action parol evidence may be received for the purpose of showing why the writ in the original action failed of service.[50]

2. Acknowledgment or Promise Required To Be in Writing. — A. In General. — Where the acknowledgment or new promise is required to be in writing and signed by the party to be charged, or by his specially authorized agent, oral evidence is not admissible.[51]

cuit judge, a debt payable whenever the plaintiff chose to demand it."

49. Witters *v.* Sowles, 32 Fed. 765, *citing* Day *v.* Lamb, 7 Vt. 426; Gardner *v.* Webber, 17 Pick. (Mass.) 407. See also Johnson *v.* Farwell, 7 Me. 370, 22 Am. Dec. 203.

The Date of the Summons Is Not Conclusive Evidence of the time of the commencement of the action. Alabama Gt. S. R. Co. *v.* Hawk, 72 Ala. 112; Huss *v.* Central R. & Bkg. Co., 66 Ala. 472.

Where a complaint is demurred to on the ground that the action is barred by the statute of limitations, it is proper for the court to consider in connection with the complaint the return of the officer upon the summons, for the purpose of ascertaining whether the statute had run. Smith *v.* Day, 39 Or. 531, 64 Pac. 812, 65 Pac. 1055.

In Lewis *v.* Seattle, 28 Wash. 639, 69 Pac. 393, where the statutes provided that an action shall be commenced by filing a complaint, and that the clerk shall indorse thereon a certificate showing the date of filing, and requiring the clerk to keep an appearance docket, in which he shall note all appearances in an action and the time of filing all the pleadings therein, it was held that the court would presume, as against the statute of limitations, where these dates disagree and no showing is made of the true date, that the certificate on the complaint shows the true date.

A Wisconsin Statute provides that an action is commenced when the summons is delivered to the sheriff for service. It does not require the docket of the justice to show when the summons was so delivered, although another section provides that the sheriff's certificate of such time indorsed on the summons is presumptive evidence that he did receive the summons on the date thus certified. It was held that since there was no record evidence of the time when the summons was delivered to the sheriff for service, and the statute required none, the fact may properly be proved by parol evidence. Woodville *v.* Harrison, 73 Wis. 360, 41 N. W. 526.

50. Tracy *v.* Grand Trunk R. Co., 76 Vt. 313, 57 Atl. 104.

51. Coyle *v.* Creevy, 34 La. Ann. 539; Offutt *v.* Chapman, 21 La. Ann. 293; Faison *v.* Bowden, 74 N. C. 43; Ketcham *v.* Hill, 42 Ind. 64. See also People's Bank *v.* Girod, 31 La. Ann. 592.

In Weil *v.* Jacobs, 111 La. 357, 35 So. 599, the court, in speaking of the Louisiana statute requiring an acknowledgment of or promise to pay a debt barred by the statute of limitations to be in writing and signed by the party to be charged, said: "The terms of the statute are absolute. They prohibit parol proof, and the jurisprudence prohibits the application or use of parol even if put in the record without objection. The statute is one of public policy, known as the 'Statute of Frauds.'

The agency must be established as a fact by plain and clear proof.[52] But this does not require that proof of the special authority shall be in writing; that may be shown by oral evidence.[53] It has been held, however, that a statute providing that "no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract," unless in writing and signed by the party to be charged, does not make evidence of an oral acknowledgment or promise wholly inadmissible.[54]

Checks Signed and Issued by a Debtor, and received by the creditor, as payments on account are competent evidence to prove the interruption of the running of the statute requiring the acknowledgment or promise to pay to be in writing and signed by the debtor.[55]

B. IDENTIFICATION OF DEBT REFERRED TO. — Where the writing constituting the new promise fails to identify the debt referred to, parol evidence is admissible to identify the debt and apply the writing.[56]

C. DATE OF EXECUTION OF INSTRUMENT. — Where the writing constituting the alleged new promise bears no date, parol evidence may be given to fix the date of its execution.[57]

Its object is to protect the estates of dead men. Its teaching is to induce living men, in dealing with each other, to put in writing the evidence of their intention to keep in force obligations which are stale, or on their face barred by prescription, and to warn them that parol will not be efficacious to revive or take such actions out of prescription if the obligor should die."

52. Miller *v.* Magee, 49 Hun 610, 2 N. Y. Supp. 156.

53. Succession of Edwards, 34 La. Ann. 216.

54. Shelley *v.* Westcott, 23 App. D. C. 135.

55. Nor does the fact that such checks have been surrendered on payment and returned to the possession of the debtor affect their evidentiary value and competency. McGinty *v.* Henderson, 41 La. Ann. 382, 6 So. 658.

56. Heflin *v.* Kinard, 67 Miss. 522, 7 So. 493, *distinguishing* Trustees *v.* Gilman, 55 Miss. 148, and Eckford *v.* Evans, 56 Miss. 18. See also DeCamp *v.* McIntire, 115 N. Y. 258, 22 N. E. 215; McNamee *v.* Tenny, 41 Barb. (N. Y.) 495.

A promise in writing, signed by the party to be charged thereby, to pay the interest due upon the whole of a pre-existing debt, given by the debtor to the creditor, is an unequivocal acknowledgment of the whole debt, from which a promise to pay the same may and ought to be implied. The identity of the sum included in the promissory note, with the interest due on the pre-existing debt, and that it was given for such interest, may be proven by parol testimony. Kelly *v.* Leachman, 3 Idaho 629, 33 Pac. 44.

57. Kincaid *v.* Archibald, 10 Hun (N. Y.) 9.

LIVERY STABLE KEEPERS.—See Bailments.

LOANS.—See Bailments; Money Counts; Mortgages; Pledges.

LODE.—See Mines and Minerals.

LOGS AND LOGGING.—See Timber.

LOST INSTRUMENTS.

By Glenda Burke Slaymaker, LL.B.

CROSS-REFERENCES:

Best and Secondary Evidence;

Deeds;

Pleadings;

Records;

Wills.

I. SCOPE.

This article will treat generally of the rules of evidence applicable where the contents of a lost writing are sought to be proved. Deeds, wills and records, where these have been lost or destroyed, are treated elsewhere in this work under appropriate titles. So also the rules governing the reception of secondary evidence of writings are more particularly set forth elsewhere.[1]

II. PRELIMINARY.

1. Competency of Secondary Evidence. — Where an instrument becomes material in the proof required of a party, either collaterally or as the foundation of the cause of action or defense, and the instrument, by reason of its loss or destruction, cannot be produced, secondary evidence of its contents may be received where the party to whose action or defense it is material has not procured its destruction for the purpose of suppressing evidence or for other fraudulent purpose.[2]

2. Admissibility of Parol. — It follows that the contents of a writing may be proved by parol evidence where no better evidence is attainable.[3]

1. See articles "DEEDS," "RECORDS," "WILLS" and "BEST AND SECONDARY EVIDENCE."

2. *England.* — Kensington *v.* Inglis, 8 East 273; Lewis *v.* Hartley, 7 Car. & P. 405.

United States. — Riggs *v.* Tayloe, 9 Wheat. 483; Renner *v.* Bank of Columbia, 9 Wheat. 581.

Alabama. — Rodgers *v.* Crook, 97 Ala. 722, 12 So. 108; Miller *v.* State, 110 Ala. 69, 20 So. 392; Bracken *v.* State, 111 Ala. 68, 20 So. 636.

California. — Bagley *v.* Eaton, 10 Cal. 126.

Connecticut. — Bank *v.* Sill, 5 Conn. 106.

Illinois. — Blake *v.* Fash, 44 Ill. 302.

Indiana. — Anderson Bridge Co. *v.* Applegate, 13 Ind. 339; Rudolph *v.* Lane, 57 Ind. 115.

Maine. — Tobin *v.* Shaw, 45 Me. 331.

Maryland. — Wright *v.* State, 88 Md. 705, 41 Atl. 1060.

Massachusetts. — Stone *v.* Sanborn, 104 Mass. 319; Gage *v.* Campbell, 131 Mass. 566.

Michigan. — Gugins *v.* Van Gorder, 10 Mich. 523; People *v.* Lange, 90 Mich. 454, 51 N. W. 534; Shrimpton *v.* Netzorg, 104 Mich. 225, 62 N. W. 343.

Minnesota. — Winona *v.* Huff, 11 Minn. 119.

Missouri. — Skinner *v.* Henderson, 10 Mo. 205.

New Jersey. — Broadwell *v.* Stiles, 8 N. J. L. 58; Wyckoff *v.* Wyckoff, 16 N. J. Eq. 401; Clark *v.* Hornbeck, 17 N. J. Eq. 430.

New York. — Jackson *v.* Lamb, 7 Cow. 431; Blade *v.* Noland, 12 Wend. 173, 27 Am. Dec. 126; Livingston *v.* Rogers, 2 Johns. Cas. 488; Clute *v.* Small, 17 Wend. 238; Steele *v.* Lord, 70 N. Y. 280; Mason *v.* Libbey, 90 N. Y. 683.

North Carolina. — McAulay *v.* Earnhart, 46 N. C. 502; Pollock *v.* Wilcox, 68 N. C. 46.

Pennsylvania. — Shortz *v.* Unangst, 3 Watts & S. 45.

South Carolina. — State *v.* Head, 38 S. C. 258, 16 S. E. 892.

Tennessee. — Anderson *v.* Maberry, 2 Heisk. 653.

Vermont. — State *v.* Marsh, 70 Vt. 288, 40 Atl. 836.

See also article "BEST AND SECONDARY EVIDENCE."

3. Kelley *v.* Riggs, 2 Root (Conn.) 126; Menendez *v.* Lari-

3. Order of Proof. — Three elements of proof are required in establishing or proving a lost writing by secondary evidence, namely, existence or execution, loss and contents. Of course before proof of contents may be made, execution and lost must necessarily be made to appear.[4] In logical order the first step in the proof of a lost writing is proof of its due execution — that is, that it once had existence as a valid and subsisting instrument[5] — and next its loss,[6] though in some cases the reverse of this has been indicated or followed.[7] Last should come proof of contents.[8] In still other cases no general rule in this regard is attempted to be enforced, and it is held, in such jurisdictions, that the matter is one within the discretion of the trial court, to be determined according to the circumstances of the particular case.[9]

onda's Syndics, 3 Mart. (La.) 256; Scott *v.* Crouch, 24 Utah 377, 67 Pac. 1068; Gorgas *v.* Hertz, 150 Pa. St. 538, 24 Atl. 756; Patrick *v.* Badger (Tex. Civ. App.), 41 S. W. 538.

The rule permitting parol proof of a lost instrument applies to contracts made with another which the party offering to make such proof has assumed. Louis Cook Mfg. Co. *v.* Randall, 62 Iowa 244, 17 N. W. 507.

As to Lost Deed. — When Parol Inadmissible. — The best evidence of which the case will admit is always required, and, consonant to this rule, parol evidence is not admissible where the plaintiff in ejectment could have obtained from the grantor in an alleged lost deed a deed of confirmation, or where proceedings might have been instituted to supply the defect in the title which was occasioned by the loss. Hamilton *v.* Van Swearingen, 1 Add. (Pa.) 48.

4. See articles "BEST AND SECONDARY EVIDENCE," and "ORDER OF PROOF."

5. Existence as First Element of Proof. — *England.* — Goodier *v.* Lake, 1 Atk. 446; Rex *v.* Culpepper, Skinner 673; Whitfield *v.* Fausset, 1 Ves. Sr. 387.

Alabama. — Laster *v.* Blackwell, 128 Ala. 143, 30 So. 663.

Delaware. — Bartholomew *v.* Edwards, 1 Houst. 17; Hutchinson *v.* Gordon, 2 Har. 179.

Georgia. — Garbutt Lumb. Co. *v.* Gress Lumb. Co., 111 Ga. 821, 35 S. E. 686; Baker *v.* Adams, 99 Ga. 135, 25 S. E. 28; Hayden *v.* Mitchell, 103 Ga. 431, 30 S. E. 287; Smith *v.* Smith, 106 Ga. 303, 31 S. E. 762.

Illinois. — Fisk *v.* Kissane, 42 Ill. 87; Deininger *v.* McConnel, 41 Ill. 227; Dickinson *v.* Breeden, 25 Ill. 167.

Indiana. — Murray *v.* Buchanan, 7 Blackf. 549.

Maine. — Kimball *v.* Morrill, 4 Me. 368.

Pennsylvania. — McKenna *v.* McMichael, 189 Pa. St. 440, 42 Atl. 14.

South Carolina. — Stockdale *v.* Young, 3 Strob. 501; Sims *v.* Sims, 2 Rep. Const. Ct. 225.

6. Proof of Loss Follows Existence. — *Colorado.* — Terpening *v.* Holton, 9 Colo. 306, 12 Pac. 189.

Delaware. — Bartholomew *v.* Edwards, 1 Houst. 17.

Florida. — Porter *v.* Ferguson, 4 Fla. 102.

Ohio. — Allen *v.* Parish, 3 Ohio 107.

South Carolina. — Stockdale *v.* Young, 3 Strob. 501.

Vermont. — Mattocks *v.* Stearns, 9 Vt. 326.

7. Lost Before Existence. Shrowders *v.* Harper, 1 Har. (Del.) 444; State *v.* McCoy, 2 Spear (S. C.) 711; Hobbs *v.* Beard, 43 S. C. 370, 21 S. E. 305. See also Bateman *v.* Bateman, 21 Tex. 432.

8. See cases cited in last three preceding notes.

9. Fitch *v.* Bogue, 19 Conn. 285; Groff *v.* Ramsey, 19 Minn. 44; Cross *v.* Williams, 72 Mo. 577; Den *v.* Pond, 1 N. J. L. 379; Allen *v.* Paris, 3 Ohio 107. See article "ORDER OF PROOF."

III. PRESUMPTIONS AND BURDEN OF PROOF.

1. In General. — It may in general be stated that the party claiming and asserting a right under a lost instrument has the burden to establish its execution and contents in a satisfactory manner.[10]

2. As to Consideration. — Where the existence of an instrument is admitted as to which, if the original were available, a consideration would be presumed, in an action on the lost writing a consideration will be presumed, and proof of the fact may be dispensed with.[11]

3. As to Negotiability and Negotiable Paper. — A negotiable instrument will not be presumed to have been assigned or indorsed.[12] Nor is there any presumption as to the negotiability of a lost note so as to require indemnity, within the rule requiring such in actions on lost negotiable paper.[13]

4. As to Conveyance Under Agreement to Convey. — Where a deed of conveyance is made pursuant to a written agreement to sell and convey, it will be presumed, where the deed has been executed but since lost, that the final instrument conformed to the terms of the agreement to convey.[14]

5. As to Official Papers. — There is a legal presumption in favor of the due execution of papers emanating from a public office, and when a lost instrument is shown to be such its sufficiency as to form and seal will be presumed in the absence of any impeaching evidence.[15]

10. United States *v.* Knight, 1 Black (U. S.) 227; Kelley *v.* Divver, 6 Mack. (D. C.) 440; Cooper *v.* White, 16 La. Ann. 317; Maryott *v.* Swaine, 28 N. J. Eq. 589; Erskine *v.* Wilson, 20 Tex. 77.

11. Consideration in Lost Note or Bond Presumed. — McIlvoy *v.* Cochran, 3 Litt. (Ky.) 454.

12. Clark *v.* Hornbeck, 17 N. J. Eq. 430.

Contra. — If the plaintiff in an action on a negotiable instrument would avoid giving indemnity to the defendant he has the burden to show that the instrument was not indorsed before it was lost. Bigler *v.* Keller, 8 Wkly. Notes Cas. (Pa.) 323.

13. Negotiability Not Presumed. Where indemnity to the defendant is required in an action relating to lost negotiable paper there must be proof of the negotiability; such will not be presumed. Yingling *v.* Kohlhass, 18 Md. 148; Allen *v.* Reilly, 15 Nev. 452; Clark *v.* Hornbeck, 17 N. J. Eq. 430; Blade *v.* Noland, 12 Wend. (N. Y.) 173, 27 Am. Dec. 126.

14. Patterson *v.* Florry, 2 Pa. St. 456.

15. Writ of Attachment. — Where goods are shown to have been levied upon under a writ of attachment emanating from the proper authority, and the date of the writ, the action in which it is issued, and the amount of property which it authorized to be attached are shown, the due and formal execution of the writ will be presumed. French *v.* Reel, 61 Iowa 143, 12 N. W. 573.

Official Bond. — Where the public records show that a bond has been given by a public officer, and that such bond has become lost, the court is authorized to presume that the bond was conditioned as by law required. Van Winkle *v.* Blackford, 54 W. Va. 621, 46 S. E. 589.

After thirty years it will be presumed that a lost execution was in due form, and that an officer acting under it complied with all the statutory requirements of a sale under the writ. Leland *v.* Cameron, 31 N. Y. 115.

6. As to Attaching Revenue Stamp. — Where an instrument is lost upon which a revenue stamp is required, it will be presumed, in the absence of evidence to the contrary, that a stamp had been duly affixed thereto.[16] If, however, satisfactory evidence be given that at any time after the execution of the instrument it was unstamped, this presumption is at an end, and the party relying upon the stamped instrument must prove that it was stamped as required by the statute.[17]

IV. EXISTENCE AND EXECUTION.

1. Mode of Proof. — A. By Circumstantial Evidence. — While a high degree of evidence is required on the question of the execution of an instrument, this fact, like any other, may be established by evidence of circumstances which renders execution probable, and from which the ultimate fact may be inferred.[18]

B. By Attesting Witness. — Generally where a lost instrument required by law to be witnessed appears to have been attested by a subscribing witness, the execution of it may not be proved without calling such witness, if living, competent and within the reach of the process of the court.[19]

2. Character. — The proof must go, not to the bare existence only of such a writing as is alleged, but it must be made to appear that it was a genuine instrument, executed conformably to the require-

16. Pooley *v.* Godwin, 4 Ad. & El. (Eng.) 94; Hart *v.* Hart, 1 Hare (Eng.) 1; Rex *v.* Inhabitants of Long Buckby, 7 East (Eng.) 45.

17. Marine Inv. Co. *v.* Heavinside, L. R. 5 App. Cas. 624.

18. *Connecticut.* — Witler *v.* Latham, 12 Conn. 392.

Massachusetts. — Taunton Bank *v.* Richardson, 5 Pick. 436; Central Tpke. Co. *v.* Valentine, 10 Pick. 142.

New Hampshire. — Wells *v.* Jackson Mfg. Co., 48 N. H. 491.

New Jersey. — Clark *v.* Hornbeck, 17 N. J. Eq. 430.

New York. — Blair *v.* Flack, 141 N. Y. 53, 35 N. E. 941.

Texas. — Baylor *v.* Tillebach, 20 Tex. Civ. App. 490, 49 S. W. 720.

Thus it may be shown that the grantor in an alleged lost deed joined with the plaintiff's agent in dedicating a street, the instrument of dedication reciting that the plaintiff was the owner of the property. Grayson *v.* Lofland, 21 Tex. Civ. App. 503, 52 S. W. 121.

A Record Which Is Void because an instrument for some reason is not entitled to be recorded is admissible to establish the existence of the lost original where under other circumstances the law provides for its being recorded. Stebbins *v.* Duncan, 108 U. S. 32; Simmons *v.* Hewitt (Tex. Civ. App.), 87 S. W. 188; Schultz *v.* Tonty Lumb. Co. (Tex. Civ. App.), 82 S. W. 353; McCarty *v.* Johnson, 20 Tex. Civ. App. 184, 49 S. W. 1098; Baylor *v.* Tillebach, 20 Tex. Civ. App. 490, 49 S. W. 720.

19. If the subscribing witnesses live out of the state, this dispenses with the necessity for their production. Where there is more than one subscribing witness, and one who is called is unable to identify the instrument, from want of recollection, the other subscribing witness must be called to testify before a sufficient foundation will be laid to admit secondary evidence of the execution. Kelsey *v.* Hanmer, 18 Conn. 311.

ments of the law relating to the class of instruments to which it belongs.[20]

3. Admissions. — The admissions of a party may be received to establish the execution of a controverted instrument alleged to be lost.[21] So, for the purpose of receiving secondary evidence of contents, execution may be impliedly admitted from an answer setting forth a defense inconsistent with non-execution.[22]

V. LOSS.

1. When Presumed. — It will be presumed that an instrument which has served its purpose and which has been returned to the

20. Existence as Valid and Binding Instrument Required. — *England.* — Goodier *v.* Lake, 1 Atk. 446; Rex *v.* Culpepper, Skinner 673.

Alabama. — Comer *v.* Hart, 79 Ala. 389; Hughes *v.* Southern Warehouse Co., 94 Ala. 613, 10 So. 133.

California. — Reynolds *v.* Jourdan, 6 Cal. 108.

Connecticut. — Kelsey *v.* Hanmer, 18 Conn. 311.

Delaware. — Shrowders *v.* Harper, 1 Har. 444.

Florida. — Porter *v.* Ferguson, 4 Fla. 102.

Georgia. — Hayden *v.* Mitchell, 103 Ga. 431, 30 S. E. 287; Eaton *v.* Freeman, 63 Ga. 535; Dasher *v.* Ellis, 102 Ga. 830, 30 S. E. 544; Calhoun *v.* Calhoun, 81 Ga. 91, 6 S. E. 913; Bigelow *v.* Young, 30 Ga. 121; Durham *v.* Holeman, 30 Ga. 619.

Kansas. — Stevens *v.* State, 50 Kan. 712, 32 Pac. 350.

Kentucky. — Combs *v.* Com., 15 Ky. L. Rep. 660, 25 S. W. 590; Elmondorff *v.* Carmichael, 3 Litt. 472, 14 Am. Dec. 86; Fox *v.* Pedigo, 19 Ky. L. Rep. 271, 40 S. W. 249.

Maine. — Kimball *v.* Morrill, 4 Me. 368.

Maryland. — Gunther *v.* Bennett, 72 Md. 384, 19 Atl. 1048.

Minnesota. — Stocking *v.* St. Paul Trust Co., 39 Minn. 410, 40 N. W. 365.

Mississippi. — Weiler *v.* Monroe Co., 74 Miss. 682, 21 So. 969, 22 So. 188.

Missouri. — Attwell *v.* Lynch, 39 Mo. 519.

New Hampshire. — Bachelder *v.* Nutting, 16 N. H. 261.

New York. — Jackson *v.* Frier, 16 Johns. 193; McPherson *v.* Rathbone, 7 Wend. 216; Edwards *v.* Noyes, 65 N. Y. 125.

Oregon. — Wiseman *v.* Northern Pac. R. Co., 20 Or. 425, 26 Pac. 272, 23 Am. St. Rep. 135.

Pennsylvania. — Jack *v.* Woods, 29 Pa. St. 375; Slone *v.* Thomas, 12 Pa. St. 209.

Virginia. — Barley *v.* Byrd, 95 Va. 316, 28 S. E. 329.

As an essential to the validity of an enforceable obligation, delivery must be shown. Lewis *v.* Burns, 122 Cal. 358, 55 Pac. 132.

Where an agreement to convey land is alleged to have been embodied in letters which have been lost, to sustain a conveyance as against creditors, made by the husband to the wife subsequent to the marriage, conformably to an ante-nuptial agreement, it must appear that a distinct proposal was made and accepted, and the contents of the letters should be given, and not the witness' opinion of the meaning of the language used in the letters. Elwell *v.* Walker, 52 Iowa 256, 3 N. W. 64.

21. Jackson *v.* Vail, 7 Wend. (N. Y.) 125; Scott *v.* Crouch, 24 Utah 377, 67 Pac. 1068.

22. Where in an action on a lost note the defendant answers that the instrument sued on was founded upon an illegal consideration, the former existence of the note is impliedly admitted to the extent that parol evidence of its contents may be received. Nagel *v.* Mignot, 8 Mart. (La.) 488.

party executing it has been destroyed so as to admit secondary evidence of contents.[23]

2. Circumstantial Evidence. — While the destruction of a writing is sometimes susceptible of direct proof, loss, as distinguished from destruction, is often susceptible only of indirect proof by circumstances, so that it is not only proper, but generally necessary, to receive circumstantial evidence.[24]

3. Admissions and Declarations. — The admissions of a party may be received against him to establish the fact of loss of an instrument.[25]

4. Proof by Affidavit. — In some cases under common-law rules the fact of loss as a preliminary matter was permitted to be shown by the party's own affidavit,[26] but this mode of proof is no longer

23. Eddy *v.* Wilson, 43 Vt. 362.

Promissory Note. — Where notes were paid several years prior to the trial and were given to the maker, it was said that such notes would be presumed to have been destroyed or otherwise canceled. Pond *v.* Lockwood, 8 Ala. 669.

Title Bond. — After the execution of a deed by a vendor, his title bond is presumed to have been given up and destroyed so as to admit secondary evidence of contents. Williams *v.* Mitchell, 30 Ala. 299.

24. Swift *v.* Stevens, 8 Conn. 431; Elwell *v.* Mersick, 50 Conn. 272; Taunton Bank *v.* Richardson, 5 Pick. (Mass.) 436; Peay *v.* Picket, 3 McCord (S. C.) 318.

Under the Louisiana statute the fact of loss must be shown by direct evidence or rendered probable by circumstantial evidence supported by the party's oath (Lewis *v.* Splane, 2 La. Ann. 754); but where the evidence of the loss is direct the party's oath is not required (Weaver *v.* Cox, 15 La. Ann. 463).

25. *United States.* — Stebbins *v.* Duncan, 108 U. S. 32.

Alabama. — Pentecost *v.* State, 107 Ala. 81, 18 So. 146; Cooper *v.* Maddan, 6 Ala. 431.

Indiana. — Indianapolis R. Co. *v.* Jewett, 16 Ind. 273.

New York. — Mandeville *v.* Reynolds, 68 N. Y. 528.

Pennsylvania. — Diehl *v.* Emig, 65 Pa. St. 320; Shortz *v.* Unangst, 3 Watts & S. 45.

The admission of a defendant in a criminal prosecution, while testifying as a witness in another action, to the effect that he had received and destroyed a particular deed, is admissible and sufficient to show the destruction of the instrument and to admit secondary evidence of the missing document. Rex *v.* Hayworth, 4 Car. & P. 254, 19 E. C. L. 502.

Declarations of Testator. — The declarations of a testator in his last sickness are admissible to strengthen or repel the presumption that a will executed by him, but not found at his death, had been destroyed by him. Betts *v.* Jackson, 6 Wend. (N. Y.) 173.

But in an action on a bond alleged to be lost, evidence that the plaintiff's testator, from whom the plaintiff received the bond, caused an advertisement of the loss to be published, was held to be inadmissible as being hearsay. Mobile Co. *v.* Sands, 127 Ala. 493, 29 So. 26.

26. *United States.* — Tayloe *v.* Riggs, 1 Pet. 591; Patterson *v.* Winn, 5 Pet. 233.

Alabama. — Ward *v.* Ross, 1 Stew. 136.

Arkansas. — Kellogg *v.* Norris, 10 Ark. 18; Worthington *v.* Curd, 15 Ark. 491.

California. — Bagley *v.* Eaton, 10 Cal. 126; Skinker *v.* Flohr, 13 Cal. 638.

Florida. — Porter *v.* Ferguson, 4 Fla. 102.

Georgia. — Smith *v.* Atwood, 14 Ga. 402.

Illinois. — Taylor *v.* McIrvin, 94 Ill. 488.

Indiana. — Cleveland *v.* Worrell,

necessary, and, indeed, is open to positive objection under modern rules as not competent. In some jurisdictions this common-law anomaly has been retained by statute in actions relating to records of deeds.[27] It would seem that the affidavit of a stranger to the action is incompetent for this purpose,[28] though in some jurisdictions, under the wide range allowed in making proof of collateral matters, such affidavits have been received.[29]

5. Advertisement of Fact of Loss. — Where it is required that the loss of a negotiable instrument be advertised parol evidence is competent to prove the fact of such advertisement; the printed notice need not be introduced.[30]

6. Where Instrument Executed in Duplicate, Etc. — The rule requiring a party to produce the best evidence obtainable puts upon the party offering secondary evidence of a lost writing, shown to have been executed in duplicate, or in more numerous parts, the necessity of proving the loss of all the parts.[31]

7. Hearsay. — The statements of a third party, though the last-known custodian, that an instrument is lost, or that he has made diligent search for the instrument alleged to be lost without finding it, is incompetent to prove the loss, being a violation of the

13 Ind. 545; Bean *v.* Keen, 7 Blackf. 152.

Louisiana. — Flower *v.* O'Conner, 7 La. 198.

Massachusetts. — Page *v.* Page, 15 Pick. 368; Mitchell *v.* Shanley, 12 Gray 206; Taunton Bank *v.* Richardson, 5 Pick. 436.

Mississippi. — Davis *v.* Black, 5 Smed. & M. 226.

Missouri. — Beachboard *v.* Luce, 22 Mo. 168.

New Hampshire. — Stevens *v.* Reed, 37 N. H. 49.

Ohio. — Wells *v.* Martin, 1 Ohio St. 386.

Rhode Island. — Aborn *v.* Bosworth, 1 R. I. 401.

Texas. — Wallace *v.* Wilcox, 27 Tex. 60.

But see Hooe *v.* Harrison, 11 Ala. 499.

Sufficiency of Affidavit. — The affidavit receivable in such a case must show the diligence of the party in making search in equal degree with oral evidence of like facts. Palmer *v.* Logan, 4 Ill. 56; Mason *v.* Tallman, 34 Me. 472; Carter *v.* Vaulx, 2 Swan (Tenn.) 639.

Proof by Affidavit Not Exclusive. The rule permitting the use of the party's affidavit to establish the loss did not require the fact to be established by this means alone, but permitted it to be shown by other witnesses and other evidence. Foster *v.* Mackay, 7 Metc. (Mass.) 531; Hale *v.* Darter, 10 Humph. (Tenn.) 92.

Statutory Rule. — Nor is the statutory rule in this regard exclusive in the mode of proof of loss, but cumulative. Branch Bank *v.* Tillman, 12 Ala. 214.

27. See statutes of the various states.

28. Stranger's Affidavit Inadmissible. — Becker *v.* Quigg, 54 Ill. 390; McFarland *v.* Dey, 69 Ill. 419; Poignand *v.* Smith, 8 Pick. (Mass.) 272; Viles *v.* Moulton, 13 Vt. 510.

29. In McCann *v.* Beach, 2 Cal. 25, and Bagley *v.* Eaton, 10 Cal. 126, the court admitted the affidavits of strangers, saying that the proper ground of such evidence was that the matter was an incidental one, and not a resort of necessity. And see Taylor *v.* McIrvin, 94 Ill. 488.

30. Miller *v.* Webb, 8 La. 516.

31. Reg. *v.* Castleton, 6 T. R. (Eng.) 236; Doe *v.* Pulman, 3 Q. B. 622; Alivon *v.* Furnival, 1 Cr. M. & R. (Eng.) 277; Cincinnati N. O. & T. P. R. Co. *v.* Disbrow, 76 Ga. 253; Dyer *v.* Fredericks, 63 Me. 173.

hearsay rule.[32] But such statements may be received, it has been held in some English cases, not to establish the ultimate fact of loss, but to show thoroughness and diligence in making the search.[33] The statement of a person, since deceased, reciting the destruction of an instrument has been held admissible, however, to lay the foundation for secondary evidence of contents.[34]

8. Search. — A. In General. — The rule as to the proof of loss preliminary to the admissibility of secondary evidence may be stated as requiring the party offering such evidence to show that he has to a reasonable degree exhausted all the means of locating the instrument, and in good faith prosecuted a search for it in all places accessible to him where the circumstances indicate it as likely to be.[35]

32. *England.* — Rex *v.* Denio, 7 Barn. & C. 620, 14 E. C. L. 279; Walker *v.* Beauchamp, 6 Car. & P. 552, 25 E. C. L. 571.

Canada. — Bratt *v.* Lee, 7 U. C. C. P. 280.

Kansas. — Brock *v.* Cottingham, 23 Kan. 383.

North Carolina. — Justice *v.* Luther, 94 N. C. 793; Governor *v.* Barkley, 11 N. C. 20.

South Carolina. — Cathcart *v.* Gibson, 2 Spear 661.

Texas. — Masterton *v.* Jordan (Tex. Civ. App.), 24 S. W. 549; Dunn *v.* Choate, 4 Tex. 14.

See, however, the case of Higgins *v.* Watson, 1 Mich. 428, where, in an action on an alleged lost promissory note, the court, on the question of the loss, observed that, the matter being a preliminary inquiry addressed to the court and not to the jury, no objection appeared to the reception of the statement of a witness "that a certain individual was prosecuted criminally for stealing the note, and that he confessed his guilt and stated what he had done with it."

33. Smith *v.* Smith, 10 Ir. Eq. 273; Reg. *v.* Inhabitants of Kenilworth, 7 Ad. & El. (N. S.) 642, 53 E. C. L. 641; Reg. *v.* Inhabitants of Braintree, 1 Ellis & Ellis Q. B. 51, 102 E. C. L. 49.

34. Harper *v.* Scott, 12 Ga. 125. So in Corbett *v.* Nutt, 18 Gratt. (Va.) 624, the statement of a clerk of probate, since deceased, in response to an inquiry for a will left with him for probate, that it had been destroyed in a fire, was held admissible to lay a foundation for secondary evidence where the circumstances were free from suspicion.

35. *England.* — Reg. *v.* Inhabitants of Kenilworth, 7 Ad. & El. (N. S.) 642, 53 E. C. L. 641; Rex *v.* Morton, 4 M. & S. 48; Rex *v.* Castleton, 6 T. R. 236; Smith *v.* Mason, 1 C. & K. 48.

Alabama. — McGuire *v.* Bank of Mobile, 42 Ala. 589; Glassell *v.* Mason, 32 Ala. 719.

Connecticut. — Kelsey *v.* Hanmer, 18 Conn. 311.

Georgia. — Doe *v.* Biggers, 6 Ga. 188.

Illinois. — Cook *v.* Hunt, 24 Ill. 536.

Indiana. — Bascom *v.* Toner, 5 Ind. App. 229, 31 N. E. 856.

Kansas. — Stratton *v.* Hawks, 43 Kan. 538, 23 Pac. 591.

Maine. — Bain *v.* Walsh, 85 Me. 108, 26 Atl. 1001; Simpson *v.* Norton, 45 Me. 281.

Maryland. — Glenn *v.* Rogers, 3 Md. 312.

Massachusetts. — Page *v.* Page, 15 Pick. 368; Walker *v.* Curtis, 116 Mass. 98; Smith *v.* Brown, 151 Mass. 338, 24 N. E. 31.

Michigan. — Darrow *v.* Pierce, 91 Mich. 63, 51 N. W. 813.

Missouri. — Lindauer *v.* Meyberg, 27 Mo. App. 181.

Nebraska. — Baldwin *v.* Burt, 43 Neb. 245, 61 N. W. 601.

New Hampshire. — Pickard *v.* Bailey, 26 N. H. 152; Bachelder *v.* Nutting, 16 N. H. 261.

New Jersey. — Johnson *v.* Arnwine, 42 N. J. L. 451.

New York. — Jackson *v.* Frier, 16

B. Sufficiency of Search. — Question for Presiding Judge. No hard and fast general rule governing the sufficiency of a search has been formulated and enforced by the courts, but each case is left to be determined by the presiding judge[36] from a consideration

Johns. 193; Woodworth *v.* Barker, 1 Hill 172.

North Carolina. — Smith *v.* Allen, 112 N. C. 223, 16 S. E. 932.

Pennsylvania. — Flynn *v.* McGonigle, 9 Watts & S. 75.

South Carolina. — Congdon *v.* Morgan, 14 S. C. 587.

Tennessee. — Tyree *v.* Magness, 1 Sneed 276.

Vermont. — Fletcher *v.* Jackson, 23 Vt. 581.

Rule Stated. — "As a general rule we, however, may say that when from the ownership, nature or objects of a paper it has properly a particular place of deposit, or where from the evidence it is shown to have been in a particular place or in particular hands, then that place must be searched by the witness proving the loss or the person produced into whose hands it has been traced. The extent of the search to be made in such place or by such person must depend in a great degree upon circumstances. Ordinarily it is not sufficient that the paper is not found in its usual place of deposit, but all the papers in the office or place should be examined. But this need not always be done when from the extent of the archives or office it would be impracticable and the order in which it is kept a more limited examination is equally satisfactory. In all cases the search must be made in the utmost good faith, and should be as thorough and vigilant, as, if the paper were not found, its benefit would be lost. On the whole the court must be satisfied that the paper is destroyed or cannot be found. It is true the party need not search every possible place where it might be, for then the search might be interminable; but he must search every place where there is a reasonable probability that it may be found. Nor must he produce every man upon the stand into whose hands rumor alone may have traced it, for if the inquiry is only suggested by hearsay, it may be answered by hearsay. If on the other hand legal testimony shows it to have been in a particular place, or if the natural and legitimate presumption is that it is in certain hands, then it must be proved by legal evidence that it is not there." Caton, J., in Mariner *v.* Saunders, 10 Ill. 113.

Conclusions Not Competent. — In testifying as to the loss of an instrument, the statement of a witness that he has made diligent search for it, being the statement of a mere conclusion, is not the proper method of proving search, but the acts of the witness in the premises should be detailed. Booth *v.* Cook, 20 Ill. 130; Shepard *v.* Pratt, 16 Kan. 209.

Suspicious Circumstances Attending Loss. — Where suspicion is cast upon the fact of loss by any circumstances disclosed by the evidence, a greater degree of diligence in making the search for the lost instrument must be shown than where no suspicious circumstances are disclosed. Juzan *v.* Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Phoenix Ins. Co. *v.* Taylor, 5 Minn. 492; Pickard *v.* Bailey, 26 N. H. 152; Kelsey *v.* Hanmer, 18 Conn. 311; Leland *v.* Cameron, 31 N. Y. 115.

Paper Belonging to Adverse Party. — A less degree of diligence in searching for a paper is required where it belongs to one's adversary than where it belongs to, or would be expected to be in the custody of, the party desiring to prove contents. Desnoyer *v.* McDonald, 4 Minn. 515.

Search Not Necessary Where Evidence of Destruction Is Direct. — Of course proof of search for an instrument is not necessary where the destruction of the instrument is shown by direct evidence. Postel *v.* Palmer, 71 Iowa 157, 32 N. W. 257.

36. *England.* — Smith *v.* Mason, 1 C. & K. 48; Reg. *v.* Kenilworth, 7 Ad. & El. 642, 53 E. C. L. 641.

Alabama. — Jernigan *v.* State, 81 Ala. 58, 1 So. 72; Glassell *v.* Mason, 32 Ala. 719.

of all the facts and circumstances appearing.[37] Nevertheless certain essentials to a sufficient search, usually common to the cases variously arising, have been stated.

C. Place of Search. — a. *Private Papers.* — Search must be shown to have been made in the place where the instrument asserted to be lost was last known to be.[38]

b. *Public Papers.* — The presumption obtains that an officer has performed his lawful duties and that the papers appertaining to his office will be found in the possessic of the last incumbent, and at the place where they, in obedience to official duty, should be

Arkansas. — Wilburn *v.* State, 60 Ark. 141, 29 S. W. 149.

California. — Kenniff *v.* Caulfield, 140 Cal. 34. 73 Pac. 803.

Connecticut. — Elwell *v.* Mersick, 50 Conn. 272.

Georgia. — Phillips *v.* Lindsey, 65 Ga. 139; Graham *v.* Campbell, 56 Ga. 258.

Indiana. — Howe *v.* Fleming, 123 Ind. 262, 24 N. E. 238.

Kansas. — Stratton *v.* Hawks, 43 Kan. 538, 23 Pac. 591.

Maine. — Milford *v.* Veazie, 14 Atl. 730.

Massachusetts. — Page *v.* Page, 15 Pick. 368; Smith *v.* Brown, 151 Mass. 338, 24 N. E. 31; Walker *v.* Curtis, 116 Mass. 98.

Missouri. — Hume *v.* Hopkins, 140 Mo. 65, 41 S. W. 784; Kleimann *v.* Geiselmann, 114 Mo. 437, 21 S. W. 796; Christy *v.* Kavanagh, 45 Mo. 375; Lindauer *v.* Meyberg, 27 Mo. App. 181.

New Hampshire. — Bachelder *v.* Nutting, 16 N. H. 261.

New Jersey. — Longstreth *v.* Korb, 64 N. J. L. 112, 44 Atl. 934; Johnson *v.* Arnwine, 42 N. J. L. 451.

New York. — Woodworth *v.* Barker, 1 Hill 172.

North Carolina. — Bonds *v.* Smith, 106 N. C. 553, 11 S. E. 322.

Pennsylvania. — Flynn *v.* McGonigle, 9 Watts & S. 75; Leazure *v.* Hillegas, 7 Serg. & R. 313; Gorgas *v.* Hertz, 150 Pa. St. 538, 24 Atl. 756.

South Carolina. — Norris *v.* Clinkscales, 47 S. C. 488, 25 S. E. 797; Elrod *v.* Cochran, 59 S. C. 467, 38 S. E. 122.

Tennessee. — Tyree *v.* Magness, 1 Sneed 276.

Vermont. — Durgin *v.* Danville, 47 Vt. 95; Moore *v.* Beattie, 33 Vt. 219.

37. *England.* — Gathercole *v.* Miall, 15 Mees. & W. 319; Brewster *v.* Sewell, 3 Barn. & Ald. 296; Gully *v.* Exeter, 4 Bing. 290.

Canada. — Tiffany *v.* McCumber, 13 U. C. Q. B. 159.

United States. — Minor *v.* Tillotson, 7 Pet. 99; Doe d. Winchester *v.* Aiken, 31 Fed. 393.

Alabama. — Jernigan *v.* State, 81 Ala. 58, 1 So. 72; Juzan *v.* Toulmin, 9 Ala. 662, 44 Am. Dec. 448.

Connecticut. — Witter *v.* Latham, 12 Conn. 392; Kelsey *v.* Hanmer, 18 Conn. 311; Waller *v.* Eleventh School District, 22 Conn. 326.

Georgia. — Doe d. Vaughn *v.* Biggers, 6 Ga. 188.

Illinois. — Mariner *v.* Saunders, 10 Ill. 113.

Louisiana. — Winston *v.* Prevost, 6 La. Ann. 164.

Maine. — Simpson *v.* Norton, 45 Me. 281; Milford *v.* Veazie, 14 Atl. 730.

Maryland. — Glenn *v.* Rogers, 3 Md. 312.

New Hampshire — Pickard *v.* Bailey, 26 N. H. 152.

New Jersey. — Johnson *v.* Arnwine, 42 N. J. L. 451.

New York. — Jackson *v.* Frier, 16 Johns. 193.

North Carolina. — Bonds *v.* Smith, 106 N. C. 553, 11 S. E. 322.

Ohio. — Wells *v.* Martin, 1 Ohio St. 386.

South Carolina. — Congdon *v.* Morgan, 14 S. C. 587.

38. **Search of Last-Known Place Required.** — Davis *v.* Spooner, 3 Pick. (Mass.) 284; Dennis *v.* Brewster, 7 Gray (Mass.) 351; Rash *v.* Whitney, 4 Mich. 495; Meek *v.* Spencer, 8 Ind. 118. See cases cited *supra.*

kept, so that a search must be made at such place to establish the loss of an instrument of an official nature.[39]

D. By Whom Made and Proved. — The fact of loss may be proved by any witness cognizant of the facts, and the plaintiff or defendant need not himself be sworn as to the loss to admit secondary evidence of contents.[40] It is laid down as a rule generally applicable to the proof relating to the search necessary to be made for a lost writing that the person last known to have had the instrument in custody should make search therefor,[41] and should be produced to testify to the effort he has made to discover the instrument, or his absence should be satisfactorily accounted for.[42] The declarations of the last custodian as to the fact of search or loss

39. Adams *v.* Fitzgerald, 14 Ga. 36; Carr *v.* Miner, 42 Ill. 179; Little *v.* City of Indianapolis, 13 Ind. 364; Simpson *v.* Norton, 45 Me. 281; Howe *v.* Fleming, 123 Ind. 262, 24 N. E. 238; Stow *v.* People, 25 Ill. 69; Wylie *v.* Smitherman, 30 N. C. 236.

Consonant to the rule of the text, it is to be presumed that an officer has performed his duty in the matter of making a return to a writ, and where the return must be filed or kept in a particular place or office, search for the same must be made in the appropriate place before parol evidence of its contents is admissible. The rule was so applied in the case of a sheriff's return to a tax execution. Doe d. Davenport *v.* Harris, 27 Ga. 68.

40. Smith *v.* Young, 2 Barb. (N. Y.) 545. In an early Massachusetts case (Foster *v.* Mackay, 1 Metc. [Mass.] 531), it was said that while in general the affidavit of the plaintiff was necessary to establish the loss in an action on a lost instrument, the rule in that regard was not inflexible, and especially would the rule be dispensed with where the plaintiff in the record was only a nominal party, and not the party actually seeking relief, and where the nominal party to the record had absconded and his whereabouts were unknown.

41. *Illinois.* — Sturges *v.* Hart, 45 Ill. 103; Rhode *v.* McLean, 101 Ill. 467; Cook *v.* Hunt, 24 Ill. 536; Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640.

Pennsylvania. — Ralph *v.* Brown, 3 Watts & S. 395.

Tennessee. — Pharis *v.* Lambert, 1 Sneed 228; Tyree *v.* Magness, 1 Sneed 276.

Vermont. — Fletcher *v.* Jackson, 23 Vt. 581; Moore *v.* Beattie, 33 Vt. 219.

For Public Paper. — To admit parol evidence of the contents of a lost execution it is not necessary that the search be made in the clerk's office by the clerk himself, but a search at such place by any one having access thereto is sufficient. Hill *v.* Fitzpatrick, 6 Ala. 314.

42. *Illinois.* — Lundberg *v.* Mackenheuser, 4 Ill. App. 603; Sturges *v.* Hart, 45 Ill. 103; Cook *v.* Hunt, 24 Ill. 536; Rhode *v.* McLean, 101 Ill. 467.

Kansas. — Brock *v.* Cottingham, 23 Kan. 383.

Michigan. — Darrow *v.* Pierce, 91 Mich. 63, 51 N. W. 813.

Pennsylvania. — Ralph *v.* Brown, 3 Watts & S. 395.

South Carolina. — Floyd *v.* Mintsey, 5 Rich. L. 361.

Tennessee. — Tyree *v.* Magness, 1 Sneed 276; Pharis *v.* Lambert, 1 Sneed 228.

Texas. — Trimble *v.* Edwards, 84 Tex. 497, 19 S. W. 772.

"When the evidence follows a paper from hand to hand as far as it can be traced, and concludes with proof of a careful search among the papers of the last person known to have had it, nothing more can fairly be required. Other persons, however, connected with or related to the party need not answer upon their oaths every suggestion of a mere possibility that they may have it." Black, J., in Hemphill *v.* McClimans, 24 Pa. St. 367.

are not sufficient, nor, indeed, admissible to prove such fact.[43] Where the last-known custodian is deceased, search should be made among the papers of the deceased and his representatives,[44] and the latter should be produced to testify to the search they have made.[45] The person making the search must possess sufficient education to discover and recognize the instrument should he come upon it.[46] Where a writing may last have been in the possession of two or more persons, a search for it by a less number than all is insufficient.[47] Where there is no apparent motive for the withholding of a paper for which two or more persons acting together have made search, the testimony of one only of the number may be sufficient.[48]

E. When To Be Made. — The time of the making of the search for an instrument must be such as to show that a reasonable effort to find the instrument has been made and to create a probability of its loss. A search made three years before the trial has in England been held sufficient,[49] while a search made a like period before the trial,[50] and even one year previous thereto,[51] has been held insufficient by the Pennsylvania court.

F. Instruments Entitled to Record. — There is no presumption that a lost instrument, entitled to record, has been recorded, and no search of the appropriate record is required before secondary evidence of contents will be received.[52]

When the place where the last custodian kept the instrument in controversy was searched by another under the last possessor's direction, it is sufficient to call only the person making the search. Buchanan *v.* Wise, 34 Neb. 695, 52 N. W. 163; Waggoner *v.* Alvord, 81 Tex. 365, 16 S. W. 1083.

43. Vandergriff *v.* Piercy, 59 Tex. 371. Nor are such declarations admissible, but the testimony of such person is required to be received under oath like that of any other witness. Land Mtge. Bank *v.* Quanah Hotel Co. (Tex. Civ. App.), 32 S. W. 573.

44. Vaulx *v.* Merriwether, 2 Sneed (Tenn.) 683; Girdner *v.* Walker, 1 Heisk. (Tenn.) 186; Floyd *v.* Mintsey, 5 Rich. L. (S. C.) 361.

45. Floyd *v.* Mintsey, 5 Rich L. (S. C.) 361; Trimble *v.* Edwards, 84 Tex. 497, 19 S. W. 772; Vandergriff *v.* Piercy, 59 Tex. 371; Hill *v.* Taylor, 77 Tex. 295, 14 S. W. 366; Blalock *v.* Miland, 87 Ga. 573, 13 S. E. 551.

46. A search by a person who can neither read nor write is not sufficient to satisfy the rule. Mitchell *v.* Mitchell, 3 Stew. & P. (Ala.) 81.

47. Cruise *v.* Clancy, 6 Ir. Eq. 552; Richards *v.* Lewis, 11 C. B. 1035; Rex *v.* Hinckley, 32 L. J. (M. C.) 158; Hall *v.* Ball, 3 Man. & G. (Eng.) 242; Patterson *v.* Keystone Min. Co., 30 Cal. 360; Taunton Bank *v.* Richardson, 5 Pick. (Mass.) 436.

48. In Jernigan *v.* State, 81 Ala. 58, 1 So. 72, the witness and his two attorneys together made diligent search for papers left in the hands of the attorneys. After the search, and before the trial, the attorneys had moved to another county in the same state. The witness was alone produced to testify as to the search for the papers and the lack of success. There being no motive for withholding the instruments in question, the court held that the proof of search was sufficient.

49. Fitz *v.* Rabbits, 2 Moody & R. (Eng.) 60.

50. Burr *v.* Kase, 168 Pa. St. 81, 31 Atl. 954.

51. Porter *v.* Wilson, 13 Pa. St. 641.

52. Mattocks *v.* Stearns, 9 Vt. 326. See article "Records."

G. Importance of Instrument. — When the document was relatively inconsequential, and such as was not likely to have been preserved, slight evidence of search or of the fact of loss will suffice.[53] Upon the other hand, if the document was one to which considerable importance attached, no mean degree of proof would suffice, for the greater the importance the stronger the probability of its continued existence, and the greater the temptation to withhold it from an improper motive.[54]

VI. CONTENTS.

1. Admissions and Declarations. — The declarations of a party to an instrument alleged to be lost, involving a statement of its contents, are not admissible to prove contents.[55] The declarations of a party, since deceased, against the interest of the declarant have, however, been received for this purpose,[56] as have the admissions of a party to the action.[57]

2. Opinion Evidence. — The testimony must relate to the witness' recollection of the terms and the substance of the writing, and not to an opinion as to its purport or effect,[58] though where the preparation of an instrument is shown, the scrivener preparing it may testify as to the character of the instrument by stating whether it

53. *England.* — Gathercole *v.* Miall, 15 Mees. & W. 319, 15 L. J. Ex. 179, 10 Jur. 337; Kensington *v.* Myles, 8 East 273; Brewster *v.* Sewell, 3 Barn. & Ald. 296; Freeman *v.* Arkell, 2 Barn. & C. 494, 2 L. J. (O. S.) K. B. 64, 2 D. & R. 669, 1 Car. & P. 135; East *v.* Farley, 6 D. & R. 147.

Connecticut. — Rhode *v.* Eleventh School Dist., 22 Conn. 326.

Illinois. — Rhode *v.* McLean, 101 Ill. 467.

Oregon. — Wiseman *v.* Northern Pac. R. Co., 20 Or. 425, 26 Pac. 272, 23 Am. St. Rep. 135.

Pennsylvania. — Spalding *v.* Bank, 9 Pa. St. 28.

Virginia. — Beirne *v.* Rosser, 26 Gratt. 537.

54. Juzan *v.* Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Waller *v.* Eleventh School Dist., 22 Conn. 326; Winston *v.* Prevost, 6 La. Ann. 164; Sexton *v.* McGill, 2 La. Ann. 190; Wiseman *v.* Northern Pac. R. Co., 20 Or. 425, 26 Pac. 272, 23 Am. St. Rep. 135; Beirne *v.* Rosser, 26 Gratt. (Va.) 537.

55. The declarations of a party to a deed alleged to be lost, whenever made, are inadmissible to establish the contents of the instrument; nor is reception of such evidence justified under the *res gestae* rule. Kimball *v.* Morrill, 4 Me. 368.

56. The admissions of a person, since deceased, that he had conveyed certain property to another are admissible against those claiming under him and in favor of one asserting to have received a deed from the declarant which has become lost. Scott *v.* Crouch, 24 Utah 377, 67 Pac. 1068.

57. Where evidence is conflicting as to the contents of a lost bill of sale, upon which a party relies, the admission of such party as to the nature of his claim to the property involved is admissible against him. Leggett *v.* McLendon, 66 Ga. 725.

Letters of Party as Admission. Letters written by a party to the action, addressed to a third party, stating the terms and contents of a lost writing, are admissible against the writer to establish the contents of the instrument. Peart *v.* Taylor, 2 Bibb (Ky.) 556.

58. A witness may testify only to his recollection of the substance of the contents of an instrument. He

was one thing or another.[59] The opinion of counsel, after an examination of title papers, as to the state of one's title is inadmissible and irrelevant in proof of the contents of an instrument of title.[60]

3. Admissibility of Original. — Where an instrument upon which a party proceeds as upon a lost writing is found after the bringing of the action, the instrument may be received and read in evidence.[61] Where the adverse party offers what is asserted to be the original, and different from that which the other party has by parol proof shown the lost writing to be, the former has the burden to establish the identity of the offered instrument to warrant the court's striking out the evidence of contents as only secondary.[62]

4. Affidavit of Loss. — The party's affidavit of the loss of an instrument is not admissible to prove contents.[63]

5. Intention of Parties to Instrument. — The intention of the parties in executing an instrument is an immaterial circumstance,

may not state his opinion of the effect of the writing. Edwards *v.* Rives, 35 Fla. 89, 17 So. 416.

59. Morrison *v.* Jackson, 35 S. C. 311, 14 S. E. 682.

60. Evidence that the plaintiff's title was submitted to counsel for examination, and that opinion was given that the title was good, is irrelevant and inadmissible on an issue as to the existence and contents of an alleged lost deed to the premises. Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561.

61. Carlisle *v.* Davis, 7 Ala. 42. See also Drake *v.* Ramsey, 3 Rich. L. (S. C.) 37.

62. In Helzer *v.* Helzer, 187 Pa. St. 243, 41 Atl. 40, the court say: "The plaintiff declared upon a lost note, and at the trial gave evidence as to the making of the note, its amount, the search and failure to find it. All this was in very general terms, but it was sufficient to carry the case declared upon to the jury. Plaintiff was then proceeding to make more specific proof of the contents when defendant produced a note purporting to be the one sued on, but which the plaintiff, after inspection, declined to accept or recognize as such. The judge, however, then refused to admit any further evidence of the contents, and, without striking out the evidence already in, peremptorily instructed the jury to find for the defendant. This he did apparently in the view that the note itself being produced, and being the best evidence of the contents, the previous testimony became merely secondary, and inadmissible. In general that is a correct view. If secondary evidence has been received on the supposition that it is the best attainable, and it subsequently appears during the trial that a higher grade of evidence is within present reach of the party, no doubt the judge may require its production. But the necessary preliminary to that is to strike out the secondary evidence already in, and that cannot be done unless the presence of the better evidence is admitted, or otherwise indisputable. The judge was apparently of opinion that the plaintiff was bound to accept the note produced by the defendant, or to submit it to the witness, to disprove its identity with the one declared on. But the burden of such proof was not on the plaintiff. She had declared on a lost note, and had made out a case for the jury on that basis. Her case was liable to be overthrown by the production of the note itself, with a resulting contradiction or material variance of its terms, but plaintiff was not bound to accept any or every paper produced as the genuine basis of a suit. The burden of proving it to be so was on the defendant, and, if contested, would be a question for the jury."

63. Davis *v.* Black, 5 Smed. & M. (Miss.) 226.

and evidence of intention, therefore, except as arising from the terms used, is inadmissible.[64]

6. Previous or Concurrent Conversations and Negotiations. — The principle of the rule forbidding a written contract to be varied by evidence of the previous or concurrent negotiations and conversations of the parties operates to forbid the reception of evidence of such matters in proving the contents of a lost writing.[65]

7. Proof of Consideration. — When, though not necessary, a particular consideration is averred as appearing in the lost writing, the evidence relating to consideration must be restricted to the consideration alleged.[66]

8. Memoranda of Counsel Preparing Instrument. — The papers, records and memoranda of counsel who prepared an instrument that has been destroyed may be received in evidence to establish the contents of the instrument where the attorney is since deceased.[67]

9. Records. — The certified copy of an instrument not entitled to recordation is inadmissible as secondary evidence of the contents of the lost writing unless other proof be made of the execution of the original[68] and of the authenticity of the record.[69] Where an instrument is entitled to record in two or more places, but is recorded in one only, an exemplified copy is admissible in the jurisdiction where the paper is not recorded.[70]

10. Certified Copy of Judgment Roll. — Where judgments rendered by justices of the peace may be enrolled in the circuit court and become liens upon property, a certified copy of the judgment

64. Nicholson *v.* Tarpey, 89 Cal. 617, 26 Pac. 1101.

65. The contents of a lost written agreement cannot be established by evidence of the previous conversations of the parties to it as to what they proposed to agree to in the writing afterward to be executed. Richardson *v.* Robbins, 124 Mass. 105; Hooper *v.* Chism, 13 Ark. 496. Nor will evidence of the prior or concurrent negotiations of the parties be admissible. The evidence received must relate to the contents — the terms of the writing itself. Nicholson *v.* Tarpey, 89 Cal. 617, 26 Pac. 1101; Tayloe *v.* Riggs, 1 Pet. (U. S.) 591; Capell *v.* Fagan (Mont.), 77 Pac. 55.

66. Thus where the plaintiff relies on a money consideration, evidence as to whether he agreed to care for the grantor as a part of the consideration is inadmissible. Kenniff *v.* Caulfield, 140 Cal. 34, 73 Pac. 803.

67. Moffatt *v.* Moffatt, 23 N. Y. Super. Ct. 468.

68. Eaton *v.* Freeman, 63 Ga. 535; Gill *v.* Strozier, 32 Ga. 688.

The certified copy of an instrument not entitled to record under the law is not admissible to establish contents of the lost original without proof of due execution. Ben *v.* Peete, 2 Rand. (Va.) 539. And this rule is not satisfied by evidence merely that the maker of the alleged lost instrument had admitted the execution of an instrument of that nature respecting the property in controversy. Hatcher *v.* Clifton, 35 Ala. 275.

69. Hatcher *v.* Clifton, 35 Ala. 275; Barley *v.* Byrd, 95 Va. 316, 28 S. E. 329; Eaton *v.* Freeman, 63 Ga. 535.

70. Van Gunden *v.* Virginia Coal & Iron Co., 52 Fed. 838, 3 C. C. A. 294; Jackson *v.* Rice, 3 Wend. (N. Y.) 180, 20 Am. Dec. 683. See also Wheeler *v.* Winn, 53 Pa. St. 122, 91 Am. Dec. 186.

roll in such case may be received to establish the judgment of a justice of the peace whose docket is lost.[71]

11. Reading Copy to Witness. — It is not permissible to read to a witness a paper that purports to be a copy of a lost writing to enable him to testify as to whether the copy corresponds with his recollection of the original.[72]

12. Witness' Source of Knowledge. — A witness having knowledge of the contents of a lost writing, whether acquired by reading or having the same read to him, may testify concerning its contents, though the latter method may affect the credibility of the testimony.[73] Where, however, the witness has acquired his knowledge of an instrument merely by having another state to him its contents, and not by reading it to him, his testimony will not be admissible.[74]

VII. COMPETENCY OF WITNESSES.

1. General Rules as to Competency of Witnesses Obtain. — The rules of evidence generally obtaining with respect to the competency of witnesess are applicable to actions relating to lost instruments.[75]

2. Party in Interest. — A. To Prove Loss. — The common-law rule disqualifying an interested party from testifying in his own behalf has been held generally inapplicable where the loss of an instrument is sought to be shown to lay the foundation for secondary evidence of contents.[76]

B. To Prove Execution and Contents. — While a party in interest was held competent to testify to the fact of loss as a preliminary matter, he was incompetent at common law to testify

71. Wise *v.* Keer Thread Co., 84 Miss. 200, 36 So. 244.

72. Singer Mfg. Co. *v.* Riley, 80 Ala. 314; Jaques *v.* Horton, 76 Ala. 238. See also *in re* Gazett, 35 Minn. 532, 29 N. W. 347; McGinnis *v.* Sawyer, 63 Pa. St. 259.

73. Laster *v.* Blackwell, 128 Ala. 143, 30 So. 663; Apperson *v.* Dowdy, 82 Va. 776, 1 S. E. 105; Rankin *v.* Crow, 19 Ill. 626; Morris *v.* Swaney, 7 Heisk. (Tenn.) 591. See, however, to the effect that a witness may not testify who has only had the instrument in question read to him, Nichols *v.* Kingdom Iron Ore Co., 56 N. Y. 618.

74. Russell *v.* Brosseau, 65 Cal. 605, 4 Pac. 643.

75. Hill *v.* Barney, 18 N. H. 607. See article "Competency of Witnesses."

76. *United States.* — Tayloe *v.* Riggs, 1 Pet. 591; Patterson *v.* Winn, 5 Pet. 233; Riggs *v.* Tayloe, 9 Wheat. 483.

Alabama. — Juzan *v.* Toulmin, 9 Ala. 662, 44 Am. Dec. 448.

California. — Bagley *v.* Eaton, 10 Cal. 126.

Connecticut. — Witter *v.* Latham, 12 Conn. 392.

Kentucky. — Hamit *v.* Lawrence, 2 A. K. Marsh. 366.

Massachusetts. — Taunton Bank *v.* Richardson, 5 Pick. 436; Poignand *v.* Smith, 8 Pick. 272; Page *v.* Page, 15 Pick. 368.

New Jersey. — Clark *v.* Hornbeck, 17 N. J. Eq. 430.

New York. — Jackson *v.* Frier, 16 Johns. 193; Betts *v.* Jackson, 6 Wend. 173; Chamberlain *v.* Gorham, 20 Johns. 144.

North Carolina. — Blanton *v.* Miller, 1 Hayw. 4; Seekright *v.* Bogan, 1 Hayw. 176.

concerning the execution and contents of the lost writing.[77] This rule is, of course, generally abrogated by modern statutes.

3. Person Taking Maker's Acknowledgment. — The person before whom an instrument is acknowledged is not for that reason disqualified from testifying concerning its contents in an action on such instrument.[78]

4. Subscribing Witnesses. — Where the subscribing witness to a lost instrument is known and can be produced, or his evidence given, such witness must be first produced or his evidence received; but where the subscribing witness is unknown or cannot be produced, any other person cognizant of the facts is competent.[79]

5. Where Other Party to Transaction Is Deceased. — The statute forbidding a party to testify in his own favor as to a transaction had solely between himself and a deceased person may render him incompetent to testify to the existence of an instrument.[80]

VIII. SUFFICIENCY OF EVIDENCE.

1. Degree of Proof in General. — To support a recovery upon or under a lost instrument the evidence must be clear and satisfactory that the instrument once existed,[81] but has been lost, and though

Ohio. — Smiley *v.* Dewey, 17 Ohio 156.

Pennsylvania. — Snyder *v.* Wolfley, 8 Serg. & R. 328.

Virginia. — Thomas *v.* Ribble, 24 S. E. 241.

In Fitch *v.* Bogue, 19 Conn. 285, the court observed that a party is competent to testify to the fact of the loss of an instrument whether the question arises directly or indirectly.

But see as to negotiable instruments in actions at law, Cotton *v.* Beasley, 2 Murphy (N. C.) 259; McRae *v.* Morrison, 35 N. C. 46; Fisher *v.* Carroll, 41 N. C. 485; Flower *v.* O'Conner, 7 La. 198.

In Equity. — In Chancy *v.* Baldwin, 46 N. C. 78, it was observed that the loss of the instrument could be proved in equity by the oath of the plaintiff, because in such a suit indemnity could be required, whereas at law this could not be done.

77. Ben *v.* Peete, 2 Rand. (Va.) 539; Thomas *v.* Ribble (Va.), 24 S. E. 241; Bagley *v.* Eaton, 10 Cal. 126.

78. Rowland *v.* Day, 17 Ala. 681.

79. Turner *v.* Cates, 90 Ga. 731, 16 S. E. 971; Felton *v.* Pitman, 14 Ga. 530; Jackson *v.* Vail, 7 Wend. (N. Y.) 125; Giannone *v.* Fleetwood, 93 Ga. 491, 21 S. E. 76.

Not Necessary to Produce Witness. — Where attestation is not necessary to the operative effect of an instrument. Sherman *v.* Champlain Trans. Co., 31 Vt. 162.

80. Neely *v.* Carter, 96 Ga. 197, 23 S. E. 313.

81. Barley *v.* Byrd, 95 Va. 316, 28 S. E. 329; Gillis *v.* Wilmington, O. & E. C. R. Co., 108 N. C. 441, 13 S. E. 11, 1019.

For a case where the evidence was considered and held to show the drawing and acceptance of a draft, see Hill *v.* Bub, 34 Neb. 524, 52 N. W. 375. For a case in which the evidence was held not to sustain a plea of forgery in an action on a lost note, see Segond *v.* Roach, 4 La. Ann. 54.

The execution of a lost instrument must be quite as strictly proved as if the instrument itself were produced in court. Mariner *v.* Saunders, 10 Ill. 113.

The evidence should show the instrument in question to have been executed with the formalities required by law in the execution of

diligent search for it has been made cannot be found,[82] and as to its contents it must be proven in all its substantial parts.[83] Where the statute permits proof of contents to be made by the affidavit of the party, necessarily the party making the affidavit must have

such instruments. Edwards *v.* Noyes, 65 N. Y. 125.

The execution and existence of an instrument may be shown wholly by circumstantial evidence. Bounds *v.* Little, 75 Tex. 316, 12 S. W. 1109.

The execution and existence of a deed must be shown by evidence of a considerable degree of certainty and conclusiveness. Thomas *v.* Ribble (Va.), 24 S. E. 241.

Evidence examined and held to show execution and existence of deed: Colchester *v.* Culver, 29 Vt. 111; Matteson *v.* Hartmann, 91 Wis. 485, 65 N. W. 58. And where held insufficient, see Overand *v.* Menczer, 83 Tex. 122, 18 S. W. 301.

82. *Alabama.* — Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561; Potts *v.* Coleman, 86 Ala. 94, 5 So. 780; McBryde *v.* Rhodes, 69 Ala. 133; Jaques *v.* Horton, 76 Ala. 238; Skeggs *v.* Horton, 82 Ala. 352, 2 So. 110; Shorter *v.* Sheppard, 33 Ala. 648.

Illinois. — McCart *v.* Wakefield, 72 Ill. 101.

North Carolina. — Little *v.* Marsh, 37 N. C. 18; Loftin *v.* Loftin, 96 N. C. 94, 1 S. E. 837.

Virginia. — Barley *v.* Byrd, 95 Va. 316, 28 S. E. 329.

Where a note is alleged to have been destroyed the evidence should show its destruction beyond a reasonable doubt. Moses *v.* Trice, 21 Gratt. (Va.) 556, 8 Am. Rep. 609.

In an action on a lost note the plaintiff is required to make the same proof of loss to sustain a recovery under the common counts as is necessary to the introduction of secondary evidence of contents when seeking to recover under the special counts upon the note itself. Loewe *v.* Reismann, 8 Ill. App. 525.

Evidence that an instrument was left with an agent, that the agent had made diligent search for it, but was unable to find it, and that neither the plaintiff nor anyone else had, to his knowledge, received the instrument from him, was held sufficient to establish the loss. Templin *v.* Krahn, 3 Ind. 373.

In a suit for specific performance of a lost contract to convey lands, the fact and manner of loss must be specifically shown by the petitioner. McCarty *v.* Kyle, 4 Cold. (Tenn.) 348.

Loss. — The mere absence of an instrument is not sufficient on the question of its loss, but, as already shown, a diligent and unsuccessful search for it must be made. Allerkamp *v.* Gallagher (Tex. Civ. App.), 24 S. W. 372; Hough *v.* Barton, 20 Vt. 455; McDonald *v.* Jackson, 56 Iowa 643, 10 N. W. 223.

83. *United States.* — Kelley *v.* Divver, 6 Mack. 440; Tayloe *v.* Riggs, 1 Pet. 591.

Alabama. — Laster *v.* Blackwell, 128 Ala. 143, 30 So. 663.

Arkansas. — Hooper *v.* Chism, 13 Ark. 496.

California. — Nicholson *v.* Tarpey, 89 Cal. 617, 26 Pac. 1101.

Florida. — Fries *v.* Griffin, 35 Fla. 212, 17 So. 66; Edwards *v.* Rives, 35 Fla. 89, 17 So. 416.

Illinois. — Rankin *v.* Crow, 19 Ill. 626; Osborne *v.* Rich, 53 Ill. App. 661.

Maine. — Perkins *v.* Cushman, 44 Me. 484; Tobin *v.* Shaw, 45 Me. 331; Camden *v.* Belgrade, 78 Me. 204, 3 Atl. 652.

Massachusetts. — Richardson *v.* Robbins, 124 Mass. 105; Com. *v.* Roark, 8 Cush. 210.

Michigan. — Shouler *v.* Bonander, 80 Mich. 531, 45 N. W. 487.

New York. — Metcalf *v.* Van Benthuysen, 3 N. Y. 424; Everitt *v.* Everitt, 41 Barb. 385; Edwards *v.* Noyes, 65 N. Y. 125.

North Carolina. — Deans *v.* Dortch, 40 N. C. 331.

Pennsylvania. — Stone *v.* Thomas, 12 Pa. St. 209.

Tennessee. — Morris *v.* Swaney, 7 Heisk. 591; Tisdale *v.* Tisdale, 2 Sneed. 596, 64 Am. Dec. 775.

Virginia. — Thomas *v.* Ribble, 24 S. E. 241.

personal knowledge of the facts to which he deposes.[84] So, also, as already indicated, in making proof by common-law methods, the witness must testify from personal knowledge and be able to state the contents, and not the effect, of the instrument.[85] Nor will a

West Virginia. — Board *v.* Callihan, 33 W. Va. 209, 10 S. E. 382.

Strong and conclusive evidence of the contents of a lost deed is required to warrant a court of equity to establish it by a re-execution. Barley *v.* Byrd, 95 Va. 316, 28 S. E. 329.

In a suit for the specific performance of a contract to sell and convey lands where the writing is alleged to be lost, its contents must be strictly, and not merely generally, proved. McCarty *v.* Kyle, 4 Cold. (Tenn.) 348. And the land in controversy must be shown to have been identified by the contract, and the consideration and terms of payment must be clearly established. Edwards *v.* Rives, 35 Fla. 89, 17 So. 416. See also Madeira *v.* Hopkins, 12 B. Mon. (Ky.) 595.

Where the loss of a note is shown by the testimony of plaintiff, and its contents by the testimony of a disinterested witness, a recovery on the instrument is justified. Wardla *v.* Gray, Dud. (S. C.) 85.

The evidence adduced must be so clear and full as practically to amount to a reproduction in all its parts of the controverted instrument. Capell *v.* Fagan (Mont.), 77 Pac. 55.

Where a recovery is sought on notes destroyed by fire there must be proof of the identity and contents of the instruments sued on. Burridge *v.* Geauga Bank, Wright (Ohio) 688.

It has been held that to recover on a lost instrument a plaintiff must establish the execution and contents of the instrument by clear and satisfactory evidence, and that there must be more than a preponderance of evidence to make out the plaintiff's case. This rule was announced in the case of Gillis *v.* Wilmington, O. & E. C. R. Co., 108 N. C. 441, 13 S. E. 1019, where the plaintiff relied on certain letters alleged to constitute a contract of employment, which had become lost.

Of course a witness is not called upon to detail from memory all the language of a lost instrument, but he should be able to state the substance of its contents. Emig *v.* Diehl, 76 Pa. St. 359.

In an action on a lost note the evidence as to the amount, terms and identity should be reasonably clear and specific. McDonald *v.* Jackson, 56 Iowa 643, 10 N. W. 223.

Where in an action on a note there is proof of its execution, that it was given for money loaned, that interest had been paid thereon, and that the note was lost or destroyed and remained unpaid, such evidence will be sufficient without proof of the date of the note or of the time of the accrual of interest. Yingling *v.* Kohlhass, 18 Md. 148. But where the evidence wholly fails to show the date of its execution, its terms, and the day of maturity, it has been held insufficient. Owen *v.* Crum, 20 Mo. App. 121.

Where a note is averred to have been given for borrowed money, and proof of the loss, the amount thereof and of the execution and delivery of a note from the defendant to the plaintiff at the time of the alleged loan is duly made, the evidence will be sufficient to support a recovery on the instrument. Tucker *v.* Tucker, 119 Mass. 79.

Proof of Negotiability. — The negotiability of a lost note is not established by evidence merely that the name of the payee was indorsed upon it at the time of its loss. Hough *v.* Barton, 20 Vt. 455.

84. Under a statute providing that a lost instrument may be supplied by the affidavit of any person having a knowledge of the facts, the contents of an instrument may not be established by the testimony of a person who was a child of tender years at the time when the instrument was executed. Cheek *v.* James, 2 Heisk. (Tenn.) 170.

85. Where the evidence relating to the contents of a bill of sale disclosed only that one witness had no recollection of ever having heard the

copy of a writing made after the date of the loss of the instrument be sufficient.[86]

2. **Corroborative Evidence. — Statutory Rule.** — Where corroborative evidence of the loss and contents of an instrument is required by statute, the evidence of a single witness without corroboration is insufficient to sustain a recovery.[87]

3. **Instruments of Differing Value.** — Where the evidence shows that the plaintiff is entitled to recover upon one of two lost instruments of differing values, but does not establish upon which he is entitled to recover, having the burden of proof in the premises he will be required to take his recovery upon the one of smaller value.[88]

4. **Execution and Contents.** — A. Joint Makers. — Execution by All. — Where an instrument is alleged to have been executed by several joint makers there must be proof of execution by all, and proof of execution by a number fewer than all is insufficient.[89]

B. As to Signature. — Where the execution of a lost instrument is in issue there must be evidence tending to show the genuineness of the signature of the party sought to be charged, and evidence going only to the fact that the name of such party was attached to the instrument is insufficient to support a recovery.[90]

C. As to Seal. — Where a seal is essential to be proved in the due execution of an instrument, the evidence must establish that the same was so affixed.[91]

D. Number of Witnesses. — A plurality of witnesses is not required in support of the execution and contents of a lost instrument, and the evidence of a single witness, unless otherwise provided by statute, may be sufficient.[92]

E. Acts and Admissions of Maker. — The execution of a lost

instrument read, and the other merely expressed the opinion that the instrument was of a certain effect, the evidence was held insufficient. Hooper *v.* Chism, 13 Ark. 496.

86. Evidence that the contents of a bond consisted of what purported to be a copy of the instrument admittedly made after the instrument was lost was held insufficient to support a recovery. Anderson *v.* Cox, 6 La. Ann. 9.

87. Where a draft paid by a merchant is lost or mislaid, under a statute of the kind referred to in the text, in suing on the account, an item for the payment of such draft must be supported by corroborative evidence. Andrew *v.* Keenan, 14 La. Ann. 705.

88. Townsend *v.* Moss, 58 N. C. 145.

89. Neely *v.* Carter, 96 Ga. 197, 23 S. E. 313.

90. **Genuineness of Signature.** Hedricks *v.* Whitecotton, 60 Mo. App. 671.

It has been said that strict proof of the handwriting of the alleged maker will not be required in an action on a lost note, and whatever will satisfy the jury should be held sufficient. Bradley *v.* Long, 2 Strob. (S. C.) 160.

For a case in which the evidence was considered and held not sufficiently to establish the genuineness of the signature to a lost bond, see Arnold *v.* Voorhies, 4 J. J. Marsh. (Ky.) 507.

91. On the question whether a lost instrument was executed under seal, the testimony of a witness: "I don't understand it. I can't tell in English. There was a wafer," was held insufficient. Reimer *v.* Muller, 47 N. Y. Super. Ct. 226.

92. Albro *v.* Lawson, 17 B. Mon. (Ky.) 642.

instrument may be sufficiently established as against him by the subsequent acts and admissions of the party charged to have executed it.[93]

F. Court Bond. — Officer's Return. — In an action on a lost court bond, the contents of the instrument are not sufficiently proven by a return of the fact merely of the giving of the bond.[94]

G. Note. — Recitals in Mortgage. — In an action on a lost note, secured by mortgage, the recitals of the mortgage setting forth all the essential elements of the note are sufficient evidence of its contents.[95]

93. Elliott *v.* Dycke, 78 Ala. 150; Fearn *v.* Taylor, 4 Bibb. (Ky.) 363; Latapie *v.* Gravier, 8 Mart. (La.) 316.

94. Rousher *v.* Hamm, 3 Brewst. (Pa.) 233.

95. Caston *v.* Dawson, 3 Wills. Civ. Cas. Ct. App. (Tex.) 399.

LOTTERIES.— See Gaming.

LUGGAGE.— See Carriers.

LUNATICS.— See Insanity.

MALICE.

By Charles A. Robbins.

CROSS-REFERENCES:

Arson; Assault and Battery;

Bias;

Circumstantial Evidence;

Homicide;

Intent;

Libel and Slander;

Malicious Mischief; Malicious Prosecution;

Res Gestae.

I. DEFINITION OF SUBJECT.

There are two kinds of malice: malice in fact and malice in law. Malice in law is the evil purpose imputed by law to one who does a wrongful act intentionally and without just cause or excuse. In the former and common acceptation it means personal spite or ill-will.[1] For the most part this article deals with malice in the latter sense.

II. WHEN MALICE IS MATERIAL AND RELEVANT.

Evidence of malice is not ordinarily material in civil actions.[2] The motive of the plaintiff in commencing the action is immaterial.[3] Evidence of malice is material in an action for malicious prosecution,[4] or to overcome a plea of privilege in libel or slander,[5] or on a claim for exemplary damages.[6] It is material, of course, when malice is an element of crime.[7] Such evidence is often relevant to

1. Bromage *v.* Prosser, 4 B. & C. 247, 10 E. C. L. 321.
2. Moyer *v.* Gordon, 113 Ind. 282, 14 N. E. 476.
3. Lipprant *v.* Lipprant, 52 Ind. 273; Rogers *v.* Morrison, 21 La. Ann. 455; Stansell *v.* Leavitt, 51 Mich. 536, 16 N. W. 892; Brewer *v.* Hyndman, 18 N. H. 9; Bates *v.* Cilley, 47 Vt. 1.
4. See article "Malicious Prosecution," this volume.
5. See article "Libel and Slander," this volume.
6. See article "Assault and Battery," Vol. I, p. 996; "Damages," Vol. IV, p. 32.
7. See article "Homicide," Vol. VI.

prove a motive for committing or intent to commit a crime or tort.[8]

III. BURDEN OF PROOF, PRESUMPTIONS AND INFERENCES.

The burden of proving malice as an element of tort[9] or damage[10] or crime,[11] or as proof of motive or intent, rests upon the party charging it. But malice is sometimes presumed in law from the character of a libel or slander.[12] Malice may be inferred in fact from want of probable cause for a prosecution,[13] imprisonment[14] or attachment,[15] or from the character of an assault or homicide.[16]

IV. PROOF OF MALICE.

1. **Direct Testimony.** — Where express malice is in issue as an element of tort or damage, the person charged may testify as to his motive or intent in doing the act complained of, and to the absence of ill-feeling or malice on his part.[17] But one person cannot testify that another was not actuated by malice in the doing of a particular act.[18] Thus in an action for malicious prosecution, malicious attachment or false imprisonment, the defendant may testify that he believed the charges when made, upon which the

8. Shanks *v.* Robinson, 130 Ind. 479, 30 N. E. 516. See articles "Arson," Vol. I, p. 984, and "Circumstantial Evidence," Vol. III, p. 123.

9. **Malicious Prosecutions.** — Turner *v.* O'Brien, 5 Neb. 542; Christian *v.* Hanna, 58 Mo. App. 37; John *v.* Bridgman, 27 Ohio St. 22; Griswold *v.* Griswold, 143 Cal. 617, 77 Pac. 672; Judy *v.* Gifford (Ind. App.), 71 N. E. 504.

Libel and Slander. — Mertens *v.* Bee Pub. Co. (Neb.), 99 N. W. 847; Fahr *v.* Hayes, 50 N. J. L. 275, 13 Atl. 261.

Malicious Attachment. — Sledge *v.* McLaren, 29 Ga. 64; Dwyer *v.* Testard, 1 White & W. Civ. Cas. (Tex.) § 1228.

False Imprisonment. — Rich *v.* McInery, 103 Ala. 345, 15 So. 663; Lowry *v.* Hately, 30 Ill. App. 297; Casebeer *v.* Rice, 18 Neb. 203, 24 N. W. 693. And see the foregoing articles.

10. Fitzpatrick *v.* Small, 1 White & W. Civ. Cas. (Tex.) § 1140.

It is sufficient to prove malice by a preponderance of the evidence for the purpose of justifying exemplary damages. St. Ores *v.* McGlashen, 74 Cal. 148, 15 Pac. 452.

See article "Damages," Vol. IV, p. 8.

11. See article "Homicide," Vol. VI.

12. See article "Libel and Slander," this volume.

13. See article "Malicious Prosecution," this volume.

14. Murray *v.* Friensberg, 61 Hun 620, 15 N. Y. Supp. 450; King *v.* Dittrich, 28 La. Ann. 243; Block *v.* Meyers, 33 La. Ann. 776; Judson *v.* Reardon, 16 Minn. 431; Casebeer *v.* Rice, 18 Neb. 203, 24 N. W. 693; Grinnell *v.* Stewart, 32 Barb. (N. Y.) 544; Rosen *v.* Stein, 54 Hun 179, 7 N. Y. Supp. 368.

15. Schwartz *v.* Burton, 1 White & W. Civ. Cas. (Tex.), § 1216; Willis *v.* McNeill, 57 Tex. 465; Tillman *v.* Adams, 2 Wills. Civ. Cas. (Tex.), § 308.

16. See articles "Assault and Battery," Vol. I, and "Homicide," Vol. VI.

17. See article "Intent," Vol. VII, p. 601.

18. Such testimony would be to a mere conclusion. Hamer *v.* First Nat. Bank, 9 Utah 215, 33 Pac. 941; Hurlbut *v.* Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446. But see Collins *v.* Fisher, 50 Ill. 359.

former action or process was founded,[19] and entertained no ill-will or malice against the person so charged.[20] So also one sued for libel or slander may testify that he believed the defamatory statements to be true when made, and bore no ill-will against the person defamed.[21] A person charged with malice in the commission of an assault and battery or an indirect injury to another may testify to his lack of malice against the person injured.[22] Where exemplary damages are demanded for neglect of duty by a public officer, he may testify to the motive for his conduct.[23] Where a charge for a homicide or assault involves malice as an element or motive it is generally held that the defendant may testify that he entertained no ill-will or malice against the person killed or assaulted.[24]

2. Declarations and Threats. — A. Prior to the Act. — a. *In General.* — The declarations of a party prior to the act complained of, indicating hostility or ill-feeling toward the injured person, though not necessarily amounting to threats, are admissible to prove malice.[25]

19. *Alabama.* — Lunsford *v.* Dietrich, 86 Ala. 250, 5 So. 461, 11 Am. St. Rep. 37.

Indiana. — Heap *v.* Parrish, 104 Ind. 36, 3 N. E. 549.

Michigan. — Spalding *v.* Lowe, 56 Mich. 366, 23 N. W. 46.

Minnesota. — Garrett *v.* Mannheimer, 24 Minn. 193.

Missouri. — Sparling *v.* Conway, 75 Mo. 510, *affirming* 6 Mo. App. 283.

Nebraska. — Turner *v.* O'Brien, 5 Neb. 542.

New York. — McKown *v.* Hunter, 30 N. Y. 625; Rosen *v.* Stein, 54 Hun 179, 7 N. Y. Supp. 368; Schwarting *v.* Van Wie New York Grocery Co., 60 App. Div. 475, 69 N. Y. Supp. 978.

Ohio. — White *v.* Tucker, 16 Ohio St. 468.

Tennessee. — Greer *v.* Whitfield, 4 Lea 85.

Washington. — Sloan *v.* Langert, 6 Wash. 26, 32 Pac. 1015.

Wisconsin. — Sherburne *v.* Rodman, 51 Wis. 474, 8 N. W. 414.

But see Goodman *v.* Stroheim, 4 Jones & S. (N. Y.) 215.

20. Coleman *v.* Henrich, 2 Mack. (D. C.) 189; Heap *v.* Parrish, 104 Ind. 36, 3 N. E. 549; Campbell *v.* Baltimore & O. R. Co., 97 Md. 341, 55 Atl. 532; Vansickle *v.* Brown, 68 Mo. 627; Turner *v.* O'Brien, 5 Neb. 542; McCormack *v.* Perry, 47 Hun (N. Y.) 71, *overruling* Lawyer *v.* Loomis, 3 Thomp. & C. 393; Greer *v.* Whitfield, 4 Lea (Tenn.) 85; Sherburne *v.* Rodman, 51 Wis. 474, 8 N. W. 414; L. Bucki & Son Lumb. Co. *v.* Atlantic Lumb. Co., 57 C. C. A. 469, 121 Fed. 233. But see Gabel *v.* Weisensee, 49 Tex. 131; Dunn *v.* Cole, 2 Wills. Civ. Cas. (Tex.) § 821.

21. Burdette *v.* Argile, 94 Ill. App. 171; Short *v.* Acton (Ind. App.), 71 N. E. 505; Brown *v.* Massachusetts Title Ins. Co., 151 Mass. 127, 23 N. E. 733; Faxon *v.* Jones, 176 Mass. 206, 57 N. E. 359; Friedman *v.* Pulitzer Pub. Co., 102 Mo. App. 683, 77 S. W. 340; Wrege *v.* Jones (N. D.), 100 N. W. 705; Palmer *v.* Mahin, 57 C. C. A. 41, 120 Fed. 737; Scullin *v.* Harper, 24 C. C. A. 169, 78 Fed. 460.

22. Norris *v.* Morrill, 40 N. H. 395; Sherman *v.* Kortright, 52 Barb. (N. Y.) 267.

A school teacher charged with malice in the excessive punishment of a child may testify as to his motive. Kinnard *v.* State, 35 Tex. Crim. 276, 33 S. W. 234.

23. Brewer *v.* Watson, 71 Ala. 299, 46 Am. Rep. 318.

24. See article "Homicide," Vol. VI, p. 624.

25. *Alabama.* — Marks *v.* Hastings, 101 Ala. 165, 13 So. 297 (malicious prosecution).

Florida. — Williams *v.* Dickenson, 28 Fla. 90, 9 So. 847 (arson); Ortiz *v.* State, 30 Fla. 256, 11 So. 611 (homicide).

b. *Threats.* — Prior threats of litigation[26] or of criminal prosecution,[27] or general or specific threats of other harm or injury,[28] are

Iowa. — Bruington *v.* Wingate, 55 Iowa 140, 7 N. W. 478 (malicious prosecution).

Maryland. — Turner *v.* Walker, 3 Gill & J. 377, 22 Am. Dec. 329 (malicious prosecution); Garret *v.* Dickerson, 19 Md. 418 (libel); Byers *v.* Horner, 47 Md. 23 (assault and battery).

Michigan. — Patterson *v.* Garlock, 39 Mich. 447 (malicious prosecution); Josselyn *v.* McAllister, 25 Mich. 45 (false imprisonment).

Minnesota. — Chapman *v.* Dodd, 10 Minn. 350 (malicious prosecution).

North Dakota. — Merchant *v.* Pielke, 10 N. D. 48, 84 N. W. 574 (malicious prosecution).

See article "Homicide," Vol. VI, p. 636.

A statement made by one person to another may be evidence of malice in a subsequent defamation of one by the other. Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500.

26. Bruington *v.* Wingate, 55 Iowa 140, 7 N. W. 478 (malicious prosecution); Parker *v.* Parker, 102 Iowa 500, 71 N. W. 421 (malicious prosecution); Com. *v.* Quinn, 150 Mass. 401, 23 N. E. 54 (arson); Parks *v.* Young, 75 Tex. 278, 12 S. W. 986 (malicious attachment).

27. McKenna *v.* Heinlen, 128 Cal. 97, 60 Pac. 668 (malicious prosecution); Willard *v.* Petitt, 153 Ill. 663, 39 N. E. 991, *affirming* 54 Ill. App. 257 (malicious prosecution); Holden *v.* Merritt, 92 Iowa 707, 61 N. W. 390 (malicious prosecution); Hidy *v.* Murray, 101 Iowa 65, 69 N. W. 1138 (malicious prosecution); Kolzem *v.* Broadway & S. A. R. Co., 1 Misc. 148, 20 N. Y. Supp. 700 (false imprisonment); Mylott *v.* Skinner, 12 Pa. Super. Ct. 137 (malicious prosecution). See also Logan *v.* Maytag, 57 Iowa 107, 10 N. W. 311 (malicious prosecution).

28. *Alabama.* — Prater *v.* State, 107 Ala. 26, 18 So. 238 (arson); Winslow *v.* State, 76 Ala. 42 (arson); Hudson *v.* State, 61 Ala. 333 (arson); Ross *v.* State, 62 Ala. 224 (assault and battery); Lawrence *v.* State, 84 Ala. 424, 5 So. 33 (assault); Hinds *v.* State, 55 Ala. 145 (arson); Marler *v.* State, 68 Ala. 580 (homicide); Henderson *v.* State, 70 Ala. 23, 45 Am. Rep. 72 (homicide).

California. — People *v.* Lattimore, 86 Cal. 403, 24 Pac. 1091 (arson); Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845 (slander).

Connecticut. — Bartram *v.* Stone, 31 Conn. 159 (assault and battery); Mead *v.* Husted, 49 Conn. 336 (arson).

Georgia. — Hammack *v.* State, 52 Ga. 397 (arson).

Illinois. — Painter *v.* People, 147 Ill. 444, 35 N. E. 64 (homicide).

Kentucky. — Nichols *v.* Com., 11 Bush 575 (homicide).

Louisiana. — State *v.* Edwards, 34 La. Ann. 1012 (arson).

Massachusetts. — Com. *v.* Quinn, 150 Mass. 401, 23 N. E. 54 (arson); Com. *v.* Goodwin, 14 Gray 55 (arson).

Michigan. — People *v.* Eaton, 59 Mich. 559, 26 N. W. 702 (arson); Brushaber *v.* Stegemann, 22 Mich. 266 (false imprisonment); Josselyn *v.* McAllister, 25 Mich. 45 (false imprisonment).

Minnesota. — Chapman *v.* Dodd, 10 Minn. 350 (malicious prosecution).

Missouri. — State *v.* Callaway, 154 Mo. 91, 55 S. W. 444 (homicide); Culbertson *v.* Hill, 87 Mo. 553 (trespass); State *v.* Sanders, 76 Mo. 35 (homicide).

New Hampshire. — State *v.* Palmer, 65 N. H. 216, 20 Atl. 6 (homicide).

New York. — Fry *v.* Bennett, 28 N. Y. 324 (libel); Davey *v.* Davey, 22 Misc. 668, 50 N. Y. Supp. 161 (libel).

North Carolina. — State *v.* Lytle, 117 N. C. 799, 23 S. E. 476 (arson); State *v.* Rhodes, 111 N. C. 647, 15 S. E. 1038 (arson); State *v.* Thompson, 97 N. C. 496, 1 S. E. 921 (arson).

South Dakota. — State *v.* Phelps, 5 S. D. 480, 59 N. W. 471 (homicide).

Texas. — Sullivan *v.* State, 31 Tex. Crim. 486, 20 S. W. 927, 37 Am. St. Rep. 826 (homicide).

Vermont. — State *v.* Hannett, 54 Vt. 83; State *v.* Ward, 61 Vt. 153, 17 Atl. 483 (arson).

admissible as evidence of malice toward the threatened person. Vague or covert threats are generally admissible when they appear to have foreshadowed the act complained of.[29] While threats against others than the person wronged are generally inadmissible to prove malice, general or impersonal threats otherwise shown to have been directed against him, and threats against his family, class or race are admissible.[30] It is immaterial that the injured person did not know of such threats before the commission of the wrong.[31]

c. *Time of Threats.* — It appears to be generally held that the lapse of a considerable time between the making of threats and the doing of the alleged malicious act affects rather the weight of such evidence than its competency.[32] It has been held that its admission or rejection rests largely in the discretion of the court.[33] Threats made years before have been admitted where they have been repeated from time to time, or have been followed by more recent hostile conduct.[34] In some jurisdictions threats made a considerable time before the act, and not otherwise connected therewith, have been excluded as too remote.[35]

B. At the Time of the Act. — The spontaneous declarations of the parties at the time of the act complained of,[36] or otherwise

Wisconsin. — Strehlow *v.* Pettit, 96 Wis. 22, 71 N. W. 102 (malicious prosecution).

And see articles "Arson," Vol. I, p. 984; "Assault and Battery," Vol. I, pp. 996, 1009; "Homicide," Vol. VI, p. 637; "Intent," Vol. VII, p. 617.

Provocation for Threats. — Where threats by the accused have been proved he should be permitted to show the provocation for making them. Atkins *v.* State, 16 Ark. 568.

29. State *v.* Crawford, 99 Mo. 74, 12 S. W. 354 (arson); Mead *v.* Husted, 49 Conn. 336 (arson). See article "Homicide," Vol. VI, p. 638.

A declaration of a prosecuting witness that she wanted to get a lawyer "to do a dirty mean trick" was evidence of malice. Willard *v.* Petitt, 153 Ill. 663, 39 N. E. 991, *affirming* 54 Ill. App. 257.

30. Ford *v.* State, 71 Ala. 385 (homicide); Harrison *v.* State, 79 Ala. 29 (homicide); State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89 (homicide); State *v.* Lightfoot, 107 Iowa 344, 78 N. W. 41 (malicious mischief); People *v.* Coughlin, 13 Utah 58, 44 Pac. 94 (homicide). See article "Homicide," Vol. VI, p. 640.

31. Bartram *v.* Stone, 31 Conn. 159 (assault and battery). This rule, of course, does not apply to evidence of threats offered in justification of an assault or homicide. See article "Homicide," Vol. VI.

32. Hudson *v.* State, 61 Ala. 333 (arson); Bartram *v.* Stone, 31 Conn. 159 (assault and battery); Mead *v.* Husted, 49 Conn. 336 (arson); United States *v.* Neverson, 1 Mack. (D. C.) 152 (homicide); Com. *v.* Goodwin, 14 Gray (Mass.) 55 (arson — threats two years before); Com. *v.* Quinn, 150 Mass. 401, 23 N. E. 54 (arson — threats three years before); Com. *v.* Crowe, 165 Mass. 139, 42 N. E. 563 (arson). See articles "Arson," Vol. I, p. 985; "Homicide," Vol. VI, p. 631.

33. Com. *v.* Quinn, 150 Mass. 401, 23 N. E. 54 (arson).

34. People *v.* Eaton, 59 Mich. 559, 26 N. W. 702 (arson); Peterson *v.* Toner, 80 Mich. 350, 45 N. W. 346 (assault and battery — threats four years before); Pulliam *v.* State, 88 Ala. 1, 6 So. 839 (homicide — threats three years before).

35. Irwin *v.* Yeagar, 74 Iowa 174, 37 N. W. 136 (assault and battery); Byers *v.* Horner, 47 Md. 23 (assault and battery). See article "Homicide," Vol. VI, pp. 631-646.

36. *Alabama.* — Dearing *v.* Moore, 26 Ala. 586 (trespass).

so closely related thereto as to be part of the *res gestae*,[37] are admissible in evidence to prove or disprove malice. But contemporaneous self-serving declarations evidently premeditated have been rejected.[38]

C. After the Act. — The declarations of a party after the act, indicating hostility or ill-will toward the person injured,[39] or threats against him,[40] are often admitted to prove malice at the time of the commission of the act. Such declarations and threats are more clearly admissible if they relate directly to the act.[41] In some jurisdictions such hostile declarations and threats are not admissible where they

California. — Macdougall *v.* Maguire, 35 Cal. 274, 95 Am. Dec. 98 (assault and battery).

Georgia. — Mitchum *v.* State, 11 Ga. 615 (homicide).

Iowa. — Burton *v.* Knapp, 14 Iowa 196, 81 Am. Dec. 465 (attachment).

Maryland. — Handy *v.* Johnson, 5 Md. 450 (assault and battery); Shafer *v.* Smith, 7 Har. & J. 67 (assault and battery).

Mississippi. — Bell *v.* Morrison, 27 Miss. 68 (assault and battery).

Oregon. — State *v.* Brown, 28 Or. 147, 41 Pac. 1042 (homicide).

Texas. — Denson *v.* State (Tex. Crim.), 35 S. W. 150 (homicide).

West Virginia. — State *v.* Abbott, 8 W. Va. 741 (homicide).

See article "Intent," Vol. VII, p. 612.

37. Elfers *v.* Woolley, 116 N. Y. 294, 22 N. E. 548.

38. Shuck *v.* Vanderventer, 4 Greene (Iowa) 264 (attachment). But see Wood *v.* Barker, 37 Ala. 60, 76 Am. Dec. 346 (attachment).

39. *Alabama.* — Marks *v.* Hastings, 101 Ala. 165, 13 So. 297 (malicious prosecution); Henderson *v.* State, 70 Ala. 23, 45 Am. Rep. 72 (homicide).

California. — Hearne *v.* De Young, 119 Cal. 670, 52 Pac. 150.

Illinois. — Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935, *affirming* 37 Ill. App. 510 (libel); Aulger *v.* Smith, 34 Ill. 534 (assault and battery).

Iowa. — State *v.* Gainor, 84 Iowa 209, 50 N. W. 947 (homicide).

Kentucky. — Cogswell *v.* Com., 17 Ky. L. Rep. 822, 32 S. W. 935 (assault and battery).

Maine. — Wilkinson *v.* Drew, 75 Me. 360 (exemplary damages).

Michigan. — Tyler *v.* Nelson, 109 Mich. 37, 66 N. W. 671; Josselyn *v.* McAllister, 25 Mich. 45 (false imprisonment).

New York. — Vanderbilt *v.* Mathis, 5 Duer 304 (malicious prosecution).

Texas. — McAdoo *v.* State, 35 S. W. 966 (malicious disturbance); Miller *v.* State, 31 Tex. Crim. 609, 21 S. W. 925, 37 Am. St. Rep. 836 (homicide).

Wisconsin. — Spear *v.* Sweeney, 88 Wis. 545, 60 N. W. 1060 (assault and battery).

But see Christian *v.* Hanna, 58 Mo. App. 37.

A declaration to the defendant by plaintiff in attachment that he had more money to spend in the matter than the latter was held evidence of malice. Dothard *v.* Sheid, 69 Ala. 135. But see Abbott *v.* '76 Land & Water Co., 103 Cal. 607, 37 Pac. 527; Waters *v.* Greenleaf Johnson Lumb. Co., 115 N. C. 648, 20 S. E. 718.

A statement by a plaintiff after dismissing his action that he had made it cost the defendant quite a sum is evidence of malice in commencing the action. Cohn *v.* Saidel, 71 N. H. 558, 53 Atl. 800.

A statement by the plaintiff in attachment proceedings, on being told that furniture levied on belonged to defendant's wife, that "they would not stay without their furniture; they would come around and settle," was held evidence of malice. Walkup *v.* Pickering, 176 Mass. 174, 57 N. E. 364.

40. Wright *v.* Gregory, 9 App. Div. 85, 41 N. Y. Supp. 139; Shifflet *v.* Com., 14 Gratt. (Va.) 652 (arson); State *v.* Sanders, 76 Mo. 35 (homicide). See article "Homicide," Vol. VI, p. 637.

41. Byford *v.* Girton, 90 Iowa 661, 57 N. W. 588 (attachment).

do not clearly relate to the act complained of, and might have been induced by some intervening act or difficulty.[42] Express malice in slander or libel may be proved by evidence of subsequent threats against the person defamed,[43] or by repetitions of the same, or similar defamations,[44] especially after notice of their falsity.[45] Self-serving declarations made either before or after the act are generally inadmissible to rebut evidence of malice.[46]

D. By Agents. — The declarations and admissions of an agent or servant made without the performance of the act complained of[47] or after it,[48] and not expressly authorized, are not competent to prove malice on the part of the principal or master. Thus the unauthorized declarations of attorneys made during the pendency of alleged malicious prosecutions and attachments have been held inadmissible against their clients.[49] But authorized declarations of an officer as to the motive of a prosecuting witness are competent evidence against the latter.[50]

42. Josselyn *v.* McAllister, 22 Mich. 300 (false imprisonment); Breitenbach *v.* Trowbridge, 64 Mich. 393, 31 N. W. 402 (assault and battery); Com. *v.* Smith, 2 Allen (Mass.) 517 (malicious mischief). See also Yarborough *v.* Weaver, 6 Tex. Civ. App. 215, 25 S. W. 468; Newman *v.* Goddard, 5 Thomp. & C. (N. Y.) 299 (trespass). But see Spear *v.* Sweeney, 88 Wis. 545, 60 N. W. 1060 (assault and battery).

A threat by the defendant in an action for slander to make the plaintiff smart if the action were pressed was held not evidence of malice in the publication of the defamatory words. Scougale *v.* Sweet, 124 Mich. 311, 82 N. W. 1061.

43. Paxton *v.* Woodward (Mont.), 78 Pac. 215.

44. See article "Libel and Slander," this volume.

45. Crane *v.* Bennett, 77 App. Div. 102, 79 N. Y. Supp. 66.

46. *Alabama.* — Martin *v.* State, 77 Ala. 1 (homicide).

Connecticut. — State *v.* Swift, 57 Conn. 496, 18 Atl. 664.

District of Columbia. — United States *v.* Neverson, 1 Mack. 152 (homicide); Coleman *v.* Henrich, 2 Mack. 189 (malicious prosecution).

Georgia. — Boston *v.* State, 94 Ga. 590, 21 S. E. 603 (homicide).

Indiana. — Justice *v.* Kirlin, 17 Ind. 588 (slander).

Mississippi. — Newcomb *v.* State, 37 Miss. 383 (homicide); Downey *v.* Dillon, 52 Ind. 442 (libel).

Missouri. — Scovill *v.* Glasner, 79 Mo. 449 (malicious attachment); Moore *v.* Sauborin, 42 Mo. 490 (malicious prosecution).

North Carolina. — State *v.* Whitson, 111 N. C. 695, 16 S. E. 332 (homicide).

Texas. — Kinnard *v.* State, 35 Tex. Crim. 276, 33 S. W. 234 (assault and battery).

Virginia. — McAlexander *v.* Harris, 6 Munf. 465 (slander).

But see State *v.* Graham, 46 Mo. 490 (malicious mischief). See articles "Homicide," Vol. VI, pp. 635, 654, 659; "Intent," Vol. VII, p. 619.

47. Louisville Jeans Clothing Co. *v.* Lischkoff, 109 Ala. 136, 19 So. 436 (malicious attachment).

It has been held that the declarations of counsel in the argument of a case are not admissible to justify exemplary damages. Baltimore & O. R. Co. *v.* Boyd, 67 Md. 32, 10 Atl. 315, 1 Am. St. Rep. 3, 362.

48. Baldwin *v.* Walker, 91 Ala. 428, 8 So. 364 (malicious attachment); Empire Mill Co. *v.* Lovell, 77 Iowa 100, 41 N. W. 583 (malicious attachment); Deere *v.* Bagley, 80 Iowa 197, 45 N. W. 557 (malicious attachment).

49. Floyd *v.* Hamilton, 33 Ala. 235; Baldwin *v.* Walker, 91 Ala. 428, 8 So. 364; Farrar *v.* Brackett, 86 Ga. 463, 12 S. E. 686; Taylor *v.* Huff, 130 N. C. 595, 41 S. E. 873.

50. Reynolds *v.* Haywood, 77 Hun 131, 28 N. Y. Supp. 467; Bell *v.* Day, 9 Kan. App. 111, 57 Pac. 1054.

E. By Conspirators. — Where the fact of a conspiracy to do a wrongful act has been otherwise proved, the hostile declarations of one conspirator are competent evidence against the other to prove malice.[51] The rule has been held to authorize the admission of evidence of declarations made before the formation of the conspiracy.[52]

3. Circumstantial Evidence. — A. Conduct Prior to the Act. a. *In General.* — Express malice may be proved by any prior facts and circumstances indicating ill-will or hostility between the persons involved.[53] Thus evidence of prior controversies and quarrels between them is admissible.[54] Evidence of prior litigation between such persons,[55] or of assistance in litigation rendered by one against

51. Ramsey *v.* Flowers (Ark.), 80 S. W. 147; Cohn *v.* Saidel, 71 N. H. 558, 53 Atl. 800.

52. Ramsey *v.* Flowers (Ark.), 80 S. W. 147.

53. Hinds *v.* State, 55 Ala. 145 (arson); Bruington *v.* Wingate, 55 Iowa 140, 7 N. W. 478 (malicious prosecution); Sweeney *v.* Perney, 40 Kan. 102, 19 Pac. 328 (malicious prosecution); Turner *v.* Walker, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329 (malicious prosecution); Patterson *v.* Garlock, 39 Mich. 447 (malicious prosecution); Thurston *v.* Wright, 77 Mich. 96, 43 N. W. 860 (malicious prosecution); People *v.* Eaton, 59 Mich. 559, 26 N. W. 702 (arson); Brushaber *v.* Stegemann, 22 Mich. 266 (false imprisonment); Fry *v.* Bennett, 28 N. Y. 324 (libel). See also Smith *v.* Hyndman, 10 Cush. (Mass.) 554. See article "Homicide," Vol. VI, p. 627.

Blacklisting. — That one had caused a retail dealer to be blacklisted for non-payment of a disputed balance of an account was held evidence of malice. Trapp *v.* Du Bois, 76 App. Div. 314, 78 N. Y. Supp. 505.

Withdrawal of Business. — The fact that the person defamed had withdrawn advertising from the newspaper publishing a libel may tend to prove express malice in the publication. Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865.

Discarded Suitor. — That a person who had made defamatory statements concerning a woman was a discarded suitor was held evidence of malice in making the statements. Ranson *v.* McCurley, 140 Ill. 626, 31 N. E. 119, *affirming* 38 Ill. App. 323. See also State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

Refusal to Rent. — Malice cannot be inferred from the mere refusal of the owner of a farm to rent it to one accused afterward of burning a house thereon. Simpson *v.* State, 111 Ala. 6, 20 So. 572.

54. Hudson *v.* State, 61 Ala. 333 (arson); State *v.* Edwards, 34 La. Ann. 1012 (arson); Thurston *v.* Wright, 77 Mich. 96, 43 N. W. 860; State *v.* Sanders, 106 Mo. 188, 17 S. W. 223 (assault and battery); Merchant *v.* Pielke, 10 N. D. 48, 84 N. W. 574; People *v.* Otto (N. Y.), 5 N. E. 788 (homicide); State *v.* Hannett, 54 Vt. 83 (arson). See articles "Assault and Battery," Vol. I, p. 1009; "Homicide," Vol. VI, pp. 626, 629, 631.

55. Hinds *v.* State, 55 Ala. 145 (arson); Peden *v.* Mail, 118 Ind. 560, 20 N. E. 446 (malicious prosecution); Keesling *v.* Doyle, 8 Ind. App. 43, 35 N. E. 126 (malicious prosecution); Sweeney *v.* Perney, 40 Kan. 102, 19 Pac. 328 (malicious prosecution); Price *v.* Lawson, 74 Md. 499, 22 Atl. 206 (exemplary damages); Clark *v.* Folkers, 1 Neb. Unoff. 96, 95 N. W. 328; Willis *v.* McNeill, 57 Tex. 465 (malicious attachment). But see Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500 (slander).

See article "Homicide," Vol. VI, p. 629.

Verdict or Judgment. — A finding in a criminal prosecution that it was without probable cause and malicious was held incompetent in an action for malicious prosecution. Sweeney

the other,[56] or of divorce proceedings between them,[57] or of the institution of a prior criminal prosecution by one against the other, or of assistance therein,[58] is admissible. Evidence of prior abuse or ill-treatment,[59] or of prior assaults or affrays,[60] or prior trespasses and injuries to property,[61] is admissible. So also is evidence that one has induced third persons to break off social, political or business relations with another, or has sought to do so.[62] The existence of business rivalry may tend to prove malice.[63]

v. Perney, 40 Kan. 102, 19 Pac. 328; Wilmerton *v.* Sample, 39 Ill. App. 60. *Contra.* — Coble *v.* Huffines, 132 N. C. 399, 43 S. E. 909.

56. Bruington *v.* Wingate, 55 Iowa 140, 7 N. W. 478 (malicious prosecution).

57. State *v.* Callaway, 154 Mo. 91, 55 S. W. 444 (homicide).

58. *Alabama.* — Hudson *v.* State, 61 Ala. 333 (arson).

Kentucky. — Martin *v.* Com., 93 Ky. 189, 19 S. W. 580 (homicide).

Massachusetts. — Com. *v.* Vaughan, 9 Cush. 594 (arson).

Mississippi. — Mark *v.* State, 32 Miss. 405 (homicide).

Missouri. — State *v.* Sanders, 106 Mo. 188, 17 S. W. 223 (assault and battery).

New York. — People *v.* Otto, 5 N. E. 788 (homicide).

North Carolina. — State *v.* Sheets, 89 N. C. 543 (malicious mischief).

South Dakota. — State *v.* Phelps, 5 S. D. 480, 59 N. W. 471 (homicide).

Texas. — Kunde *v.* State, 22 Tex. App. 65, 3 S. W. 325 (homicide); Powell *v.* State, 13 Tex. App. 244 (homicide).

See also Hereford *v.* Combs, 126 Ala. 369, 28 So. 582 (slander); Marler *v.* State, 68 Ala. 580 (homicide). But see Carpenter *v.* Shelden, 5 Sandf. (N. Y.) 77.

Member of Jury. — That a person assaulted had been a member of a jury which had recently convicted the defendant of an offense tends to prove malice on the part of the defendant. Trimble *v.* State (Tex. Crim.), 22 S. W. 879.

59. Oliver *v.* State, 33 Tex. Crim. 541, 28 S. W. 202 (arson). See article "Homicide," Vol. VI, p. 631.

60. *Alabama.* — Ross *v.* State, 62 Ala. 224; Crawford *v.* State, 86 Ala. 16, 5 So. 651; Lawrence *v.* State, 84 Ala. 424, 5 So. 33.

Illinois. — Painter *v.* People, 147 Ill. 444, 35 N. E. 64.

Iowa. — State *v.* Montgomery, 65 Iowa 483, 22 N. W. 639.

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

Missouri. — State *v.* Callaway, 154 Mo. 91, 55 S. W. 444.

Ohio. — State *v.* Brooks, 1 Ohio Dec. 407, 9 West. L. J. 109.

Texas. — Hall *v.* State, 31 Tex. Crim. 565, 21 S. W. 368; Crass *v.* State, 31 Tex. Crim. 312, 20 S. W. 579; Sullivan *v.* State, 31 Tex. Crim. 486, 20 S. W. 927, 37 Am. St. Rep. 826.

Washington. — State *v.* Place, 5 Wash. 773, 32 Pac. 736.

See article "Homicide," Vol. VI, p. 629.

61. Mead *v.* Husted, 49 Conn. 336.

62. Simons *v.* Burnham, 102 Mich. 189, 60 N. W. 476 (libel); Brushaber *v.* Stegemann, 22 Mich. 266 (false imprisonment); Byrd *v.* Hudson, 113 N. C. 203, 18 S. E. 209 (libel); State *v.* Palmer, 65 N. H. 216, 20 Atl. 6 (homicide).

Evidence that the foster parents of a woman had induced her not to marry the accused, and that he was informed of such fact, was admitted to prove a motive on his part for burning a building belonging to the parents. State *v.* Ward, 61 Vt. 153, 17 Atl. 483. See also Brushaber *v.* Stegemann, 22 Mich. 266.

Enticing Servant. — An attempt to induce a servant to quit his employment may be evidence of malice against the employer. Parker *v.* Parker, 102 Iowa 500, 71 N. W. 421.

63. Long *v.* State, 86 Ala. 36, 5 So. 443 (arson); Merrill *v.* Tariff Mfg. Co., 10 Conn. 384, 27 Am. Dec. 682 (exemplary damages); Simons *v.* Burnham, 102 Mich. 189, 60 N. W. 476 (libel); Hubbard *v.* Rutledge, 57 Miss. 7 (libel).

b. *Details.* — Since malice may exist as the result of past differences without regard to their merits, and on the part of either or both parties thereto, evidence of the details or merits of prior controversies,[64] or litigation,[65] or criminal prosecutions,[66] is generally excluded.

c. *Time of Difficulty.* — That a considerable time has elapsed between the controversies and matters relied on to show malice and the alleged malicious act is generally held to affect the weight of the evidence, and not its competency; but some courts have excluded evidence of former controversies not closely connected in time or subject-matter with the act in issue.[67]

B. Character of Act Itself. — Malice may often be proved or disproved by the character and immediate circumstances of the particular act complained of.[68] Thus express malice in instituting a prosecution may be evidenced by the groundlessness of the charge,[69] by the falsity of the affidavit or complaint,[70] by the hostile conduct of the prosecutor at the time,[71] by his gross overvaluation of property alleged to have been stolen,[72] or by his forwardness, zeal and activity in pressing the prosecution.[73] Circumstances of aggrava-

64. State *v.* Hannett, 54 Vt. 83 (arson); Lawrence *v.* State, 84 Ala. 424, 5 So. 33 (assault). See also State *v.* Ward, 61 Vt. 153, 17 Atl. 483 (arson). See articles "Assault and Battery," Vol. I, p. 1009; "Homicide," Vol. VI, pp. 626, 631.

But the details of prior difficulties are sometimes admissible in rebuttal. See article "Homicide," Vol. VI, p. 631.

65. State *v.* Hannett, 54 Vt. 83 (arson).

66. Com. *v.* Vaughan, 9 Cush. (Mass.) 594 (arson); Martin *v.* Com., 93 Ky. 189, 19 S. W. 580 (homicide).

67. See "Declarations," *infra* this article.

Evidence of a prior controversy and action which had been settled by the parties over a year before was held too remote to prove malice. Stamper *v.* Raymond, 38 Or. 16, 62 Pac. 20.

68. See article "Intent," Vol. VII, p. 607.

69. The rule obtains as to unfounded attachments. Lemay *v.* Williams, 32 Ark. 166; Ives *v.* Bartholomew, 9 Conn. 309; Biering *v.* First Nat. Bank, 69 Tex. 599, 7 S. W. 90.

A judgment against the plaintiff in attachment is not of itself evidence that the attachment was malicious. Gaddis *v.* Lord, 10 Iowa 141; Raver *v.* Webster, 3 Iowa 502, 66 Am. Dec. 96; Sloan *v.* Langert, 6 Wash. 26, 32 Pac. 1015.

An offer by the plaintiff to compromise a civil action was held not evidence of malice on his part in causing the arrest of a defendant therein. Emerson *v.* Cochran, 111 Pa. St. 619, 4 Atl. 498.

Evidence that the defendant in an action for malicious prosecution sought to evade service of summons therein and disposed of her property just before the action was brought was admitted to prove malice. Palmer *v.* Broder, 78 Wis. 483, 47 N. W. 744. See article "Malicious Prosecution," this volume.

70. Navarino *v.* Dudrap, 66 N. J. L. 620, 50 Atl. 353.

71. Thurston *v.* Wright, 77 Mich. 96, 43 N. W. 860.

72. Parker *v.* Parker, 102 Iowa 700, 71 N. W. 421; Olmstead *v.* Partridge, 16 Gray (Mass.) 381.

73. Marks *v.* Hastings, 101 Ala. 165, 13 So. 297; Motes *v.* Bates, 74 Ala. 374; Dreux *v.* Domec, 18 Cal. 83; Turner *v.* Walker, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329; Straus *v.* Young, 36 Md. 246; Thurston *v.* Wright, 77 Mich. 96, 43 N. W. 860; Vanderbilt *v.* Mathis, 5 Duer (N. Y.) 304.

The testimony of a prosecuting

tion and publicity in the making of an arrest are sometimes admissible as evidence of malice in malicious prosecution and false imprisonment,[74] but not as against a prosecutor who was not present and did not authorize the malicious conduct.[75] The maliciousness of a prosecution or attachment is indicated when the prosecutor or plaintiff fails to dismiss the same upon learning of his mistake,[76] or upon the advice of counsel.[77] Evidence that a seizure of property under process or otherwise was wanton or excessive tends to prove malice.[78] Express malice in the publication of a libel or slander may be evidenced by the character and circumstances of the

witness may tend to prove malice on his part. Dreux *v.* Domec, 18 Cal. 83.

Causing Commitment. — Causing one to be placed in jail while waiting for a friend to procure bail is evidence of malice. Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650; Motes *v.* Bates, 74 Ala. 374.

Contra, San Antonio & A. P. R. Co. *v.* Griffin, 20 Tex. Civ. App. 91, 48 S. W. 542.

Requesting an officer to arrest a person for burglary and then refusing to make complaint against him, and requesting the officer to prefer a charge of vagrancy, is evidence of malice. Plummer *v.* Johnsen, 70 Wis. 131, 35 N. W. 334. But see Chicago, R. I. & P. R. Co. *v.* Pierce, 98 Ill. App. 368.

Depriving Defendant of Evidence. To prosecute a person for a crime after having deprived him of his means of exculpation is evidence of malice. Fagnan *v.* Knox, 8 Jones & S. (N. Y.) 41.

Refusing Settlement. — The refusal of a plaintiff in attachment to accept security for his claim offered before the levy of the writ tends to prove malice. McLaren *v.* Birdsong, 24 Ga. 265.

A rejection of an offer to settle a disputed claim is evidence of malice in suing out an attachment therefor. Lewis *v.* Taylor (Tex. Civ App.), 24 S. W. 92. See also Christian *v.* Hanna, 58 Mo. App. 37.

The failure of a creditor to demand payment of a debt for which an action is brought and the debtor arrested is evidence of malice. Tucker *v.* Wilkins, 105 N. C. 272, 11 S. E. 575.

The commencement of an action by one partner against another by attachment upon the debit side of their accounts without regard to credits may be evidence of malice. Pierce *v.* Thompson, 6 Pick. (Mass.) 193.

Acts Not Malicious. — The attendance of a complaining witness upon the execution of a search warrant is not evidence of malice. Garvey *v.* Wayson, 42 Md. 178. Reluctance to prosecute tends to rebut malice. Goodrich *v.* Warner, 21 Conn. 432.

That the owner of a negotiable promissory note acquired it by purchase has no tendency of itself to prove malice in procuring an arrest in an action on the note. Underwood *v.* Brown, 106 Mass. 298.

74. Jeremy *v.* St. Paul Boom Co., 84 Minn. 516, 88 N. W. 13; Brushaber *v.* Stegemann, 22 Mich. 266.

Arrest of Candidate. — The fact that a person was arrested on an election day when he was a candidate for office did not of itself indicate that the arrest was malicious. Montgomery *v.* Sutton, 58 Iowa 697, 12 N. W. 719.

75. Marks *v.* Hastings, 101 Ala. 165, 13 So. 297; Vansickle *v.* Brown, 68 Mo. 627; Garvey *v.* Wayson, 42 Md. 178; Jones *v.* Wilmington & W. R. Co., 125 N. C. 227, 34 S. E. 398.

76. Flournoy *v.* Lyon, 70 Ala. 308; Scott *v.* Dennett Surpassing Coffee Co., 51 App. Div. 321, 64 N. Y. Supp. 1016; Hall *v.* Kehoe, 54 Hun 638, 8 N. Y. Supp. 176. See also Laird *v.* Taylor, 66 Barb. (N. Y.) 139; Perkins *v.* Attaway, 14 Ga. 27.

77. Wuest *v.* American Tobacco Co., 10 S. D. 394, 73 N. W. 903.

78. Tiblier *v.* Alford, 12 Fed. 262; Stamper *v.* Raymond, 38 Or. 16, 62 Pac. 20; Watts *v.* Rice, 75 Ala. 289. But see Deere *v.* Bagley, 80 Iowa 197, 45 N. W. 557.

defamation,[79] by its publication with knowledge of its falsity, or without investigation;[80] or by the use of strong, violent and abusive language in a communication otherwise privileged.[81] Circumstances of provocation are admissible in evidence to mitigate damages.[82] In a prosecution for malicious mischief[83] or arson[84] malice may be proved by circumstances indicating willful destructiveness. The presence or absence of malice in an assault or homicide may be indicated by the appearance and conduct of the parties at the time,[85] by the character of the weapon used,[86] by the state of preparation of the parties,[87] or by the character of the injuries inflicted.[88] The circumstances directly leading to the assault or homicide are admissible in evidence to prove or rebut malice,[89] though such evidence may tend to prove the commission of a distinct offense.[90] So also evidence of an assault, made immediately after an assault or homicide, upon

79. Shanks *v.* Stumpf, 23 Misc. 264, 51 N. Y. Supp. 154; Hotchkiss *v.* Porter, 30 Conn. 414; Locke *v.* Bradstreet Co., 22 Fed. 771.

The falsity of the defamation is an element in proof of malice. Laing *v.* Nelson, 40 Neb. 252, 58 N. W. 846.

80. McFadden *v.* Morning Journal Ass'n, 28 App. Div. 508, 51 N. Y. Supp. 275; Throckmorton *v.* Evening Post Pub. Co., 27 App. Div. 125, 50 N. Y. Supp. 153.

81. Nailor *v.* Ponder, 1 Marv. (Del.) 408, 41 Atl. 88; Parke *v.* Blackiston, 3 Har. (Del.) 373; Tyree *v.* Harrison, 100 Va. 540, 42 S. E. 295; Farley *v.* Thalhimer, 103 Va. 504, 49 S. E. 644.

82. Simons *v.* Lewis, 51 La. Ann. 327, 25 So. 406; Provost *v.* Brueck, 110 Mich. 136, 67 N. W. 1114.

83. State *v.* Williamson, 68 Iowa 315, 27 N. W. 259.

84. People *v.* Murphy, 63 Hun 624, 17 N. Y. Supp. 427, *affirmed* 135 N. Y. 450, 32 N. E. 138.

85. *Alabama.* — Watkins *v.* Gaston, 17 Ala. 664; Dean *v.* State, 89 Ala. 46, 8 So. 38.

Iowa. — Reddin *v.* Gates, 52 Iowa 210, 2 N. W. 1079.

Kentucky. — Rapp *v.* Com., 14 B. Mon. 614.

Maryland. — Shafer *v.* Smith, 7 Har. & J. 67; Kernan *v.* State, 65 Md. 253, 4 Atl. 124.

Mississippi. — Bell *v.* Morrison, 27 Miss. 68.

Missouri. — Joice *v.* Branson, 73 Mo. 28.

Texas. — Gomez *v.* State, 15 Tex. App. 327.

See articles "Assault and Battery," Vol. I, pp. 996, 1002, 1004; "Homicide," Vol. VI, pp. 625, 627-8, 655.

Whipping Pupil. — For evidence as to malice in whipping a pupil, see State *v.* Pendergrass, 19 N. C. 365, 31 Am. Dec. 416; Vanvactor *v.* State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645; Boyd *v.* State, 88 Ala. 169, 7 So. 268, 16 Am. St. Rep. 31.

The character of the instrument used in whipping a child should be considered in determining whether a school teacher or master was actuated by malice. Dean *v.* State, 89 Ala. 46, 8 So. 38; State *v.* Dickerson, 98 N. C. 708, 3 S. E. 687.

86. Dean *v.* State, 89 Ala. 46, 8 So. 38; State *v.* Dickerson, 98 N. C. 708, 3 S. E. 687; Gomez *v.* State, 15 Tex. App. 327. See article "Homicide," Vol. VI, p. 633.

87. See article "Homicide," Vol. VI, p. 632.

88. See article "Homicide," Vol. VI, p. 625.

89. Pokriefka *v.* Mackurat, 91 Mich. 399, 51 N. W. 1059; State *v.* Forsythe, 89 Mo. 667, 1 S. W. 834; Hall *v.* State, 31 Tex. Crim. 565, 21 S. W. 368; Rhinehart *v.* Whitehead, 64 Wis. 42, 24 N. W. 401. See article "Homicide," Vol. VI, p. 627.

90. State *v.* Deschamps, 42 La. Ann. 567, 7 So. 703, 21 Am. St. Rep. 392.

another member of the family[91] or party[92] of the person assaulted, or upon one offering him assistance,[93] is admissible to prove the maliciousness of the original act.

C. Conduct After the Act. — a. *In General.* — The hostile conduct of a person toward another after the doing of an act by him against such other is generally admissible in evidence to prove malice in the doing of the act.[94] Thus conduct indicating ill-feeling by a prosecutor against the defendant after the commencement of the prosecution,[95] or the publication by him of news of the prosecution,[96] or any other act of oppression or hostility by him after the arrest of the defendant,[97] is evidence of a malicious purpose in the prosecution. So is a distinct[98] or later[99] prosecution of the defendant by him for the same offense, or an attempt to secure the indictment of the defendant for the same offense,[1] or a later civil suit by the prosecutor against the defendant for the same unfounded claim.[2] A groundless attachment is evidence of malice in a former attachment upon the same claim.[3]

b. *Evidence of Express Malice.* — It is evidence of express malice in the publication of a slander or libel that the guilty person has refused to retract the statement or to publish notice of a denial thereof,[4] or has filed an unsupported plea alleging the truth of the

91. People *v.* Walters, 98 Cal. 138, 32 Pac. 864; Killins *v.* State, 28 Fla. 313, 9 So. 711; Denson *v.* State (Tex. Crim.), 35 S. W. 150.

92. Smith *v.* State, 88 Ala. 73, 7 So. 52; State *v.* Gainor, 84 Iowa 209, 50 N. W. 947.

93. Seams *v.* State, 84 Ala. 410, 4 So. 521; State *v.* Ramsey, 82 Mo. 133.

94. That a woman and her adult daughters, who lived in the same house with another woman whom she had injured, did not go in to see her or show any sympathy for her was held evidence that the injury was inflicted maliciously and not accidentally. State *v.* Alford, 31 Conn. 40.

95. Thurston *v.* Wright, 77 Mich. 96, 43 N. W. 860. But see Yarborough *v.* Weaver, 6 Tex. Civ. App. 215, 25 S. W. 468.

96. Cooney *v.* Chase, 81 Mich. 203, 45 N. W. 833; Smith *v.* Maben, 42 Minn. 516, 44 N. W. 792; Waters *v.* West Chicago St. R. Co., 101 Ill. App. 265; Vanderbilt *v.* Mathis, 5 Duer (N. Y.) 304.

Malice cannot be shown from a publication of notice of an attachment to the defendant's creditors unless the plaintiff be connected with such publication. Jamison *v.* Weaver, 81 Iowa 212, 46 N. W. 996.

97. Murphy *v.* Hobbs, 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366.

98. Epstein *v.* Berkowsky, 64 Ill. App. 498.

99. Coble *v.* Huffines, 132 N. C. 399, 43 S. E. 909; Hinson *v.* Powell, 109 N. C. 534, 14 S. E. 301.

A second arrest under the same void warrant is evidence of malice. Thorpe *v.* Wray, 68 Ga. 359.

1. Reynolds *v.* Haywood, 77 Hun 131, 28 N. Y. Supp. 467.

That the later prosecution was after the commencement of the action for damages is immaterial. Cooney *v.* Chase, 81 Mich. 203, 45 N. W. 833.

2. Magmer *v.* Renk, 65 Wis. 364, 27 N. W. 26; Severns *v.* Brainard, 61 Minn. 265, 63 N. W. 477.

Successive Attachments. — Successive attachments of the property of one under arrest for the burning of the prosecutor's barn were held evidence of malice in instigating the prosecution. Gifford *v.* Hassam, 50 Vt. 704.

3. Ryall *v.* Marx, 50 Ala. 31. But *compare* Williams *v.* Newberry, 32 Miss. 256.

4. Stokes *v.* Morning Journal Ass'n, 72 App. Div. 184, 76 N. Y.

same,[5] or has, since the publication, assaulted the person defamed,[6] or has attempted to procure his indictment,[7] or has otherwise sought to injure him.[8]

c. *Later Assault.* — A later assault tends to prove that a former assault was malicious.[9] Conduct toward the body of deceased may indicate malice in a homicide.[10]

D. MALICE TOWARD THIRD PERSONS. — Malice against a particular person cannot be proved ordinarily by malicious acts or conduct against another,[11] even though the other be a member of the same

Supp. 429; Wallace *v.* Jameson, 179 Pa. St. 98, 36 Atl. 142; Post Pub. Co. *v.* Hallam, 16 U. S. App. 613, 8 C. C. A. 201, 59 Fed. 530, *affirming* 55 Fed. 456. See also Bodwell *v.* Osgood, 3 Pick. (Mass.) 379, 15 Am. Dec. 228. See article "LIBEL AND SLANDER," this volume.

5. Westerfield *v.* Scripps, 119 Cal. 607, 51 Pac. 958; Parke *v.* Blackiston, 3 Har. (Del.) 373; Coffin *v.* Brown, 94 Md. 190, 50 Atl. 567, 55 L. R. A. 732; Kansas City Star Co. *v.* Carlisle, 47 C. C. A. 384, 108 Fed. 344; Sun Printing & Pub. Ass'n *v.* Schenck, 40 C. C. A. 163, 98 Fed. 925.

6. Zurawski *v.* Reichmann, 116 Iowa 388, 90 N. W. 69.

7. Tolleson *v.* Posey, 32 Ga. 372; Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935, *affirming* 37 Ill. App. 510.

8. An attempt to have the certificate of a school teacher revoked is evidence of malice in the prior publication of a libel by the same person against the teacher. Paxton *v.* Woodward (Mont.), 78 Pac. 215.

Attempts by the defendant in an action for slander to induce witnesses for the plaintiff not to testify were held not proper evidence of malice in publishing the slander. Kirkaldie *v.* Paige, 17 Vt. 256.

9. See article "HOMICIDE," Vol. VI, p. 628. See also Mills *v.* Carpenter, 32 N. C. 298.

10. See article "HOMICIDE," Vol. VI, p. 635.

11. Shanks *v.* Robinson, 130 Ind. 479, 30 N. E. 516 (malicious prosecution); Barton *v.* Kavanaugh, 12 La. Ann. 332; Moore *v.* Thompson, 92 Mich. 498, 52 N. W. 1000 (slander); Peck *v.* Chouteau, 91 Mo. 138, 3 S. W. 577, 60 Am. Rep. 236 (malicious prosecution); State *v.* Moberly, 121 Mo. 604, 26 S. W. 364 (assault and battery); State *v.* Battle, 126 N. C. 1036, 35 S. E. 624 (arson); Abernethy *v.* Com., 101 Pa. St. 322 (homicide). See also State *v.* Smalley, 50 Vt. 736 (arson). See article "HOMICIDE," Vol. VI, pp. 645, 651.

Motive for Arson. — Malice of the accused toward the owner of property stored in a building may be shown to prove a motive for burning the building. McAdory *v.* State, 62 Ala. 154; Hinds *v.* State, 55 Ala. 145; State *v.* Emery, 59 Vt. 84, 7 Atl. 129.

That some members of the family of one accused of arson disliked the wife of the owner of the building was held too remote to prove malice on the part of the accused against the owner. Bell *v.* State, 74 Ala. 420.

Grudge Against Parent. — An admission by one who had made defamatory charges against a woman that he did it because of a grudge against her father is evidence of malice in making the charges. Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935, *affirming* 37 Ill. App. 510.

Relations to Corporation. — The fact that ill-feeling existed between a plaintiff in attachment and a banking institution to which the defendant had transferred his business from the plaintiff was held not relevant to prove malice on the part of the plaintiff against the defendant. Hamer *v.* First Nat. Bank, 9 Utah 215, 33 Pac. 941.

Expressions of hostility against the officers of a church while engaged in the transaction of its business are competent evidence of malice against the church. People *v.* Ferguson, 119 Mich. 373, 78 N. W. 334.

Malice Against Firm. — A malicious act against a member of a firm may show the malice against the firm. Watts *v.* Rice, 75 Ala. 289.

Malice Against Inmate of House. Malice toward an inmate of a house

family.[12] But it may be proved by evidence of hostility or ill-will against the entire family[13] or against the faction, class or race[14] of which the particular person is a member.

4. Matter in Rebuttal. — A. INCAPACITY. — A person charged with an act or offense involving express malice may show that he was incapable of harboring malice by reason of insanity[15] or drunkenness.[16]

B. SELF-DEFENSE. — One charged with malice in the commission of an assault or homicide may show, of course, that the act was done in self-defense.[17] So one charged with malicious mischief may prove that the act complained of was done in defense of property[18] or for the preservation of health.[19]

C. HEARSAY. — A person charged with the commission of a malicious act may sometimes rebut an inference or evidence of malice by showing that he acted in good faith upon apparently trustworthy information, but evidence of facts unknown to him at the time of the act is not admissible for such purpose.[20] In an action for a malicious prosecution,[21] or any other where malice is the gist of

may tend to establish a motive for burning it. Oliver *v.* State, 33 Tex. Crim. 541, 28 S. W. 202; State *v.* Ward, 61 Vt. 153, 17 Atl. 483; State *v.* Rhodes, 111 N. C. 647, 15 S. E. 1038; Com. *v.* Crowe, 165 Mass. 139, 42 N. E. 563.

Malice against the owner of an adjoining building endangered by the fire may tend to prove a motive for arson. Bond *v.* Com., 83 Va. 581, 3 S. E. 149. Malice against his wife may tend to show that the owner of a building occupied by her burned it. Shepherd *v.* People, 19 N. Y. 537. Evidence of hostility to a servant may tend to prove malice against a person harboring him. Thomas *v.* Norris, 64 N. C. 780.

12. Northcot *v.* State, 43 Ala. 330 (malicious mischief); Bell *v.* State, 74 Ala. 420 (arson); Anderson *v.* State, 63 Ga. 675; York *v.* Pease, 2 Gray (Mass.) 282 (slander); State *v.* Moberly, 121 Mo. 604, 26 S. W. 364 (assault and battery). But see State *v.* Rhodes, 111 N. C. 647, 15 S. E. 1038 (arson). See article "HOMICIDE," Vol. VI, p. 644.

Threats Against Son. — Proof of threats by the accused against the son and grandson of the occupant of the premises burned was held slight evidence of a motive for arson, though the son and grandson did not reside on the premises. State *v.* Thompson, 97 N. C. 496, 1 S. E. 921.

13. State *v.* Thompson, 97 N. C. 496, 1 S. E. 921 (arson); People *v.* Walters, 98 Cal. 138, 32 Pac. 864 (homicide); State *v.* Phelps, 5 S. D. 480, 59 N. W. 471. See article "HOMICIDE," Vol. VI, p. 644.

14. See article "HOMICIDE," Vol. VI, p. 651.

15. See article "INSANITY," Vol. VII.

16. Engelhardt *v.* State, 88 Ala. 100, 7 So. 154. See articles "HOMICIDE," Vol. VI, p. 649; "INTENT," Vol. VII, p. 609.

17. See articles "ASSAULT AND BATTERY," Vol. I; "HOMICIDE," Vol. VI.

18. Wright *v.* State, 30 Ga. 325.

19. State *v.* Bush, 29 Ind. 110.

20. Palmer *v.* Mahin, 57 C. C. A. 41, 120 Fed. 737 (libel); Harrison *v.* Garrett, 132 N. C. 172, 43 S. E. 594 (libel); Josselyn *v.* McAllister, 25 Mich. 45 (false imprisonment).

21. Ewing *v.* Sandford, 21 Ala. 157; Griswold *v.* Griswold, 143 Cal. 617, 77 Pac. 672; Rigden *v.* Jordan, 81 Ga. 668, 7 S. E. 857; Cox *v.* McLean, 3 Ill. App. 45; Israel *v.* Brooks, 23 Ill. 526; Ammerman *v.* Crosby, 26 Ind. 451. See article "MALICIOUS PROSECUTION," this volume.

Rumors. — That common report charged the defendant with the commission of a crime may tend to rebut malice in prosecuting him for it. Bacon *v.* Towne, 4 Cush. (Mass.)

the action, such as a malicious attachment,[22] or false imprisonment,[23] the defendant may show the information upon which he acted to prove good faith and rebut malice. He may show that he acted upon the advice of counsel upon a fair statement of the facts.[24]

One who has caused the levy of a wrongful attachment may prove that he had information of the levy of prior attachments.[25] The information upon which a person acted in the publication of a libel or slander is admissible to disprove express malice.[26] The information upon which a public officer refused compliance with a demand made upon him may tend to rebut malice upon his part.[27] One who has done an act in reliance upon void or defective proceedings or process should be permitted to prove such fact as evidence of good faith.[28]

217; Smith *v.* Hyndman, 10 Cush. (Mass.) 554; Baron *v.* Mason, 31 Vt. 189; Wasson *v.* Canfield, 6 Blackf. (Ind.) 406. But see Wilson *v.* Bowen, 64 Mich. 133, 31 N. W. 81.

Inquiries. — It was held not evidence of malice that a prosecuting witness failed to make inquiries of the person prosecuted. Turner *v.* O'Brien, 11 Neb. 108, 7 N. W. 850. It is proper to show that the commitment of a person as insane was advised by the family physician. Griswold *v.* Griswold, 143 Cal. 617, 77 Pac. 672. See also Colby *v.* Jackson, 12 N. H. 526.

22. Yarborough *v.* Hudson, 19 Ala. 653; Flournoy *v.* Lyon, 70 Ala. 308; Mitchell *v.* Harcourt, 62 Iowa 349, 17 N. W. 581; Raver *v.* Webster, 3 Iowa 502, 66 Am. Dec. 96; Ponsony *v.* Debaillon, 6 Mart. (N. S.) (La.) 126; Hilfrich *v.* Meyer, 11 Wash. 186, 39 Pac. 455.

23. Botts *v.* Williams, 17 B. Mon. (Ky.) 687; Livingston *v.* Burroughs, 33 Mich. 511; Colby *v.* Jackson, 12 N. H. 526; Voltz *v.* Blackmar, 64 N. Y. 440; Woodward *v.* Ragland, 5 App. D. C. 220.

24. Lemay *v.* Williams, 32 Ark. 166 (malicious attachment); Fire Ass'n *v.* Flemming, 78 Ga. 733, 3 S. E. 420 (false imprisonment); Josselyn *v.* McAllister, 22 Mich. 300 (false imprisonment); Sloan *v.* Langert, 6 Wash. 26, 32 Pac. 1015. See article "Malicious Prosecution," this volume.

25. Lockhart *v.* Woods, 38 Ala. 631; Yarborough *v.* Hudson, 19 Ala. 653.

26. Hearne *v.* De Young, 132 Cal. 357, 64 Pac. 576; Swan *v.* Thompson, 124 Cal. 193, 56 Pac. 878; Conner *v.* Standard Pub. Co., 183 Mass. 474, 67 N. E. 596; Owen *v.* Dewey, 107 Mich. 67, 65 N. W. 8; Lewis *v.* Humphreys, 2 Mo. App. Rep. 1011; Schulze *v.* Jalonick, 18 Tex. Civ. App. 296, 44 S. W. 580. See article "Libel and Slander," this volume.

27. Brewer *v.* Watson, 71 Ala. 299, 46 Am. Rep. 318.

28. Woodall *v.* McMillan, 38 Ala. 622 (false imprisonment); Dorsey *v.* Manlove, 14 Cal. 553 (trespass); Carpenter *v.* Parker, 23 Iowa 450; Baltimore & O. R. Co. *v.* Boyd, 67 Md. 32, 10 Atl. 315, 1 Am. St. Rep. 362 (trespass); Vansickle *v.* Brown, 68 Mo. 627 (false imprisonment); Bradner *v.* Faulkner, 93 N. Y. 515 (false imprisonment); Hall *v.* O'Malley, 49 Tex. 70 (false imprisonment); Camp *v.* Camp, 59 Vt. 667, 10 Atl. 748 (trespass).

MALICIOUS MISCHIEF.

By J. H. Mahan.

CROSS-REFERENCES:

Damages;

Intent;

Malice;

Trespass.

I. THE ELEMENTS OF THE OFFENSE.

1. Presumptions and Burden of Proof. — A. In General. — The burden of proof in a prosecution for malicious mischief is upon the state to establish all the necessary elements of the offense.[1]

B. Ownership of Property. — The ownership of the property alleged to have been destroyed or injured must be established as charged.[2] It is not necessary, however, to prove title in support of the allegation of ownership; evidence of such ownership as would support an action for trespass to recover damages is sufficient.[3] Nor is it necessary on a charge of malicious trespass to prove that the owner of the crop or produce severed from the freehold is the owner in fee of the land on which it was growing; it is sufficient if it be shown that he was in actual or constructive possession of the premises.[4]

C. Injury. — Destruction of, or substantial injury to, the property must be proved.[5] But it is not necessary to prove the precise

1. State *v.* Clark, 20 N. J. L. 96; Gaskill *v.* State, 56 Ind. 550. And see cases cited in succeeding notes.

In Johnson *v.* State, 61 Ala. 9, where the defendant was charged with maliciously and willfully trespassing upon lands of another by cutting down or destroying wood or timber growing thereon, it was held unnecessary to prove any *asportavit* or that the trespass was committed *lucri causa*.

2. *Indiana.* — Powell *v.* State, 2 Ind. 550; Hughes *v.* State, 103 Ind. 344, 2 N. E. 956.

Iowa. — State *v.* Brant, 14 Iowa 180.

Massachusetts. — Com. *v.* Wellington, 7 Allen 299; Com. *v.* McAvoy, 16 Gray 235.

North Carolina. — State *v.* Hill, 79 N. C. 656.

South Carolina. — State *v.* Trapp, 14 Rich. L. 203.

Texas. — Smith *v.* State, 43 Tex. 433; Cleavenger *v.* State, 43 Tex. Crim. 273, 65 S. W. 89; Woodward *v.* State, 33 Tex. Crim. 554, 28 S. W. 204; Collier *v.* State, 4 Tex. App. 12.

3. *California.* — People *v.* Coyne, 116 Cal. 295, 48 Pac. 218.

Indiana. — Howe *v.* State, 10 Ind. 492.

Iowa. — State *v.* Senotin, 51 N. W. 1161.

Kansas. — State *v.* Gurnee, 14 Kan. 111.

Massachusetts. — Com. *v.* Wellington, 7 Allen 299.

Michigan. — People *v.* Ferguson, 119 Mich. 373, 78 N. W. 334.

New York. — People *v.* Horr, 7 Barb. 9.

Rhode Island. — State *v.* Gilligan, 23 R. I. 400, 50 Atl. 844.

Tennessee. — Malone *v.* State, 11 Lea 701.

Under a charge for maliciously tearing down and removing a house it was held sufficient to prove that the land on which the house stood did not belong to the defendant, but to the person alleged to be the owner. Ritter *v.* State, 33 Tex. 608.

4. State *v.* Gurnee, 14 Kan. 111, *distinguished* in State *v.* Haney, 32 Kan. 428, where neither of the matters referred to was attempted to be shown.

5. Pollet *v.* State, 115 Ga. 234, 41 S. E. 606; State *v.* McBeth, 49 Kan. 584, 31 Pac. 145; Com. *v.* Sullivan, 107 Mass. 218; United States *v.* Gideon, 1 Minn. 292; Dover *v.* State, 32 Tex. 84; Patterson *v.* State, 41 Tex. Crim. 412, 55 S. W. 338.

In a prosecution for malicious mischief under the Georgia Penal Code, § 729, making misdemeanors "all other acts of willful and malicious mischief in the injuring or destroying any other public or private property not herein enumerated," a conviction is not warranted unless the evidence shows that the property described in the indictment or accusation was either destroyed or suffered some material and substantial

amount of damage done to the property or injury inflicted on the owner.[6]

D. Value of the Property. — The value of the property injured or destroyed is immaterial, and need not be shown unless the statute expressly provides otherwise.[7]

E. Malice. — As a general rule it is necessary to prove malice upon the part of the defendant toward the supposed owner of the property.[8] Some of the courts, however, qualify this rule to the extent of holding that it is enough to show that the act was committed in a spirit of wantonness or with an evil or guilty purpose.[9] And in some jurisdictions, as a result of statutory enactment, malice against the owner of the property need not be shown.[10]

2. Substance and Mode of Proof. — A. In General. — As in other criminal prosecutions, direct evidence is frequently not avail-

injury. It is not enough to show merely that the accused committed an act which put the owner of the property to expense and annoyance, but which did not destroy and injure the property. Pollet *v.* State, 115 Ga. 234, 41 S. E. 606.

In State *v.* Green, 106 La. 440, 30 So. 898, under a charge of using a public building for indecent purposes, it was held that proof of urinating against the inside facing of the door of a courthouse was sufficient proof, and that actual injury or defacement need not be proven.

6. Harris *v.* State, 73 Ga. 41.

7. Stanton *v.* State (Tex. Crim.), 74 S. W. 771. See also Ashworth *v.* State, 63 Ala. 120.

8. *Alabama.* — Northcot *v.* State, 43 Ala. 330; Hobson *v.* State, 44 Ala. 380; Johnson *v.* State, 61 Ala. 9; Pippen *v.* State, 77 Ala. 81.

Minnesota. — United States *v.* Gideon, 1 Minn. 226.

Missouri. — State *v.* Underwood, 37 Mo. 225.

North Carolina. — State *v.* Newby, 64 N. C. 23.

Tennessee. — State *v.* Wilcox, 3 Yerg. 278, 24 Am. Dec. 569.

Texas. — Dover *v.* State, 32 Tex. 85; Newton *v.* State, 3 Tex. App. 245.

Proof of malice toward the special owner or bailee in possession is sufficient. Stone *v.* State, 3 Heisk. (Tenn.) 457.

9. State *v.* Foote, 71 Conn. 737, 43 Atl. 488; Gaskell *v.* State, 56 Ind. 550; State *v.* Phipps, 95 Iowa 491, 64 N. W. 411; State *v.* Lightfoot, 107 Iowa 344, 78 N. W. 41; Com. *v.* Williams, 110 Mass. 401; Com. *v.* Walden, 3 Cush. (Mass.) 558.

10. Bennefield *v.* State, 62 Ark. 365, 35 S. W. 790; Territory *v.* Crozier, 6 Dak. 8, 50 N. W. 124; Mosely *v.* State, 28 Ga. 190; Brown *v.* State, 26 Ohio St. 176; Funderburk *v.* State, 75 Miss. 20, 21 So. 658; State *v.* Gilligan, 23 R. I. 400, 50 Atl. 844.

Under the Statute of Kansas, which provides that "every punishment or forfeiture imposed on any person maliciously committing any offense prohibited, . . . shall equally apply and be in force, whether the offense shall be committed from malice conceived against the owner of the property in respect to which it shall be committed or otherwise," the word malicious means "wrongfully, intentionally, and without just cause or excuse," and therefore that it is not necessary to prove malice against the owner or any other person. State *v.* Boies, 68 Kan. 167, 74 Pac. 630.

In Connecticut a statute uses the word "willfully," and not "maliciously," and it is held that the former means maliciously in the sense of an injury done in a spirit of wantonness, or with an evil intent or guilty purpose, and in that sense is a necessary element of the offense, and must be proven. State *v.* Foote, 71 Conn. 737, 43 Atl. 488.

Under the Arkansas Statute it is malicious mischief to kill or wound an animal of another, the stealing of which is larceny, with or without malice toward the owner of the ani-

able in establishing all the elements or facts necessary to a conviction; and in such case circumstantial evidence may be resorted to.[11]

Evidence of Ill-Will Toward a Member of the Family of the owner is not admissible in proof of malice.[12]

B. Other Distinct Offenses. — Evidence, otherwise unobjectionable, which tends to establish the offense charged is not rendered incompetent because it tends also to prove another distinct and substantive offense.[13]

C. The Act, Its Nature and Character, Etc. — The criminal intent cannot be inferred from the act or injury merely.[14] The nature and character of the act of trespass, however, or the circumstances accompanying it, may be such as to warrant an inference of malice.[15] Thus malice may be inferred from the fact that the act

mal, if it be shown that the killing or wounding was done unlawfully, or wantonly. Bennefield *v.* State, 62 Ark. 365, 35 S. W. 790.

In Mosely *v.* State, 28 Ga. 190, it was held that in order to warrant conviction for malicious mischief under the Georgia code it is not necessary to prove actual ill-will or resentment toward the owner or possessor of the property, but that it is sufficient if it is shown that the act was done wantonly and recklessly, although the court said that injuries inflicted on personal property in a passion or under reasonable provocation stand perhaps on a different footing.

11. State *v.* Wideman, 68 S. C. 119, 46 S. E. 769; People *v.* Stites, 75 Cal. 570, 17 Pac. 693; People *v.* Boren, 139 Cal. 210, 72 Pac. 899.

In Com. *v.* Smith, 2 Allen (Mass.) 517, a prosecution for injuring a sloop in taking her from her moorings, it was held that evidence was not admissible to prove that several hours after the sloop was taken the defendants were pursued and when overtaken one of them made threats of personal violence against any one who should lay hands on him, because there was nothing in the case connecting the language used with the specific injuries which were the subject of the indictment.

12. Northcot *v.* State, 43 Ala. 330. See also State *v.* McDermott, 36 Iowa 107, where it was held that the jury could not, on the question of malice, consider, as a circumstance tending to establish that fact, ill-will or enmity existing between the owner and the family in which the defendant lived. *Compare* People *v.* Ferguson, 119 Mich. 373, 78 N. W. 334, where the defendant was charged with willful and malicious injury to the fence of a church, and it was held competent on the question of malice to show enmity of the defendant toward members and officers of the church society in their official capacity.

13. Brown *v.* State, 26 Ohio St. 176. See also Thayer *v.* Boyle, 30 Me. 475.

14. Newton *v.* State, 3 Tex. App. 245; Pippen *v.* State, 77 Ala. 81; State *v.* Underwood, 37 Mo. 225; State *v.* Kempf, 11 Mo. App. 88; Rose *v.* State, 19 Tex. App. 470.

15. *Alabama.* — State *v.* Pierce, 7 Ala. 728; Hill *v.* State, 43 Ala. 335; Hobson *v.* State, 44 Ala. 380; Pippen *v.* State, 77 Ala. 81.

Georgia. — Mosely *v.* State, 28 Ga. 190.

Iowa. — State *v.* McDermott, 36 Iowa 107; State *v.* Linde, 54 Iowa 139, 6 N. W. 168; State *v.* Williamson, 68 Iowa 315, 27 N. W. 259; State *v.* Phipps, 95 Iowa 491, 64 N. W. 411.

Massachusetts. — Com. *v.* Walden, 3 Cush. 558.

Michigan. — People *v.* Burkhardt, 72 Mich. 172, 40 N. W. 240.

Missouri. — State *v.* Underwood, 37 Mo. 225; State *v.* Kempf, 11 Mo. App. 88.

Ohio. — Brown *v.* State, 26 Ohio St. 176.

Rhode Island. — State *v.* Gilligan, 23 R. I. 400, 50 Atl. 844.

was committed wantonly;[16] that the act is unlawful in itself;[17] that the natural consequences of the act were necessarily injurious to the owner of the property;[18] in case of injury to animals, that the instrument used to inflict the injury was one which may produce death.[19] To show that the act was prompted by ill-will, spite, malevolence, wicked intention or enmity shows malice.[20]

Repetition of the Injurious Act has been held sufficient to warrant an inference of malicious intent.[21]

II. DEFENSES.

1. Authority or Consent of Owner. — A. In General. — The defendant may show in defense that he acted under authority of the owner,[22] but where authority of a person other than the owner is relied on it must be shown that defendant believed he was acting as agent for the owner.[23]

B. Burden of Proof. — The burden of showing want of consent of the owner of property is not upon the prosecution,[24] but the

South Carolina. — Doig *v.* State, 2 Rich. 179.

Tennessee. — State *v.* Council, 1 Overt. 305.

Texas. — Wallace *v.* State, 30 Tex. 758; Shirley *v.* State (Tex. Crim.), 22 S. W. 42.

Utah. — People *v.* Olsen, 6 Utah 284, 22 Pac. 163.

16. State *v.* Pierce, 7 Ala. 728; Hobson *v.* State, 44 Ala. 380; Mosely *v.* State, 28 Ga. 190; Brown *v.* State, 26 Ohio St. 176.

17. Hobson *v.* State, 44 Ala. 380; State *v.* Doig, 2 Rich. (S. C.) 179; State *v.* Council, 1 Overt. (Tenn.) 306.

18. State *v.* Linde, 54 Iowa 139, 6 N. W. 168; State *v.* Williamson, 68 Iowa 51, 27 N. W. 259; State *v.* Phipps, 95 Iowa 491, 64 N. W. 411; People *v.* Burkhardt, 72 Mich. 172, 40 N. W. 240; Wallace *v.* State, 30 Tex. 758.

19. Hill *v.* State, 43 Ala. 335; Hobson *v.* State, 44 Ala. 380; Com. *v.* Walden, 3 Cush. (Mass.) 558.

20. Pippen *v.* State, 77 Ala. 81.

On a prosecution for malicious mischief, evidence of ill-will between the owner of the property destroyed and the defendant is competent to show the motive for the crime. State *v.* Wideman, 68 S. C. 119, 46 S. E. 769.

21. Shirley *v.* State (Tex. Crim.), 22 S. W. 42; State *v.* McDermott, 36 Iowa 107.

22. Ritter *v.* State, 33 Tex. 608. See also Ashworth *v.* State, 63 Ala. 120.

In State *v.* Underwood, 37 Mo. 225, where the defendant was charged with maliciously pulling down a house, he offered to show that he acted on authority derived from the owner's wife, who had occupied it for some months alone, and it was held that the rejection of this evidence was error because under the circumstances the defendant might have supposed that his authority was sufficient.

Evidence that the act was done at the request of another who occupied and had apparent control of the premises upon which the trespass was committed is admissible to rebut the malicious intent. State *v.* Underwood, 37 Mo. 225; Barlow *v.* State, 120 Ind. 56, 22 N. E. 88.

Evidence that in exercising the authority given a mistake occurred, and that reparation was tendered, though after the act, was held competent to show the intent with which the act was committed. State *v.* Graham, 46 Mo. 490.

23. Wallace *v.* State, 30 Tex. 758.

24. Ritter *v.* State, 33 Tex. 608; State *v.* Whittier, 21 Me. 341, 38 Am. Dec. 272.

existence of consent is matter of defense, the burden of proof being on the defendant.[25]

2. Bona Fide Claim of Right. — Evidence tending to show that the act was done under a *bona fide* claim of right is admissible to repel the presumption of malicious intent,[26] and such evidence may

25. Ritter *v.* State, 33 Tex. 608; State *v.* Underwood, 37 Mo. 225. *Compare* Brumley *v.* State, 12 Tex. App. 609.

26. *Alabama.* — Pippen *v.* State, 77 Ala. 81.

Connecticut. — State *v.* Foote, 71 Conn. 737, 43 Atl. 488.

Georgia. — Carstarphen *v.* State, 112 Ga. 230, 37 S. E. 423.

Illinois. — Sattler *v.* People, 59 Ill. 68.

Indiana. — Dawson *v.* State, 52 Ind. 478; Windsor *v.* State, 13 Ind. 375; Hughes *v.* State, 103 Ind. 344, 2 N. E. 956; Barlow *v.* State, 120 Ind. 56, 22 N. E. 88; Palmer *v.* State, 45 Ind. 388.

Iowa. — State *v.* Flynn, 28 Iowa 26.

Kansas. — State *v.* McBeth, 49 Kan. 584, 31 Pac. 145.

Missouri. — State *v.* Newkirk, 49 Mo. 84.

New Jersey. — State *v.* Clark, 29 N. J. L. 96.

Pennsylvania. — Com. *v.* Drass, 146 Pa. St. 55, 23 Atl. 233.

Tennessee. — Hampton *v.* State 10 Lea 639; Malone *v.* State, 11 Lea 701; Goforth *v.* State, 8 Humph. 37.

Texas. — Woodward *v.* State, 33 Tex. Crim. 554, 28 S. W. 204; Adams *v.* State (Tex. Crim.), 81 S. W. 963; Camp *v.* State (Tex. Crim.), 57 S. W. 96.

In Malone *v.* State, 11 Lea (Tenn.) 701, where the defendant was indicted for destroying a house which the prosecuting witness had wrongfully, as was alleged, built upon the defendant's premises, the court said: "It would be clearly a good defense to the indictment to show that both the title and right of possession were in the party by whom or under whose order the act was done."

Any evidence which would constitute a lawful defense in a civil action of trespass would be competent upon the trial of an indictment for malicious mischief. State *v.* Clark, 29 N. J. L. 96.

In Brady *v.* State (Tex. Crim.), 26 S. W. 621, a prosecution by a tenant against his landlord for destroying hay, to rebut the inference of malice arising from the destruction of the property it was held competent to show that the hay was made of Johnson grass, was a nuisance, was stacked in the garden on the farm, and by its seed endangered the ground.

In People *v.* Severance, 125 Mich. 556, 84 N. W. 1089, a prosecution for destroying part of a boat house located in a stream at the foot of a street, so as to interfere with the free use of defendant's property, it was held that these facts were sufficient to warrant an abatement of the nuisance after notice and constituted a full defense.

In State *v.* Bush, 29 Ind. 110, a prosecution for cutting the banks of a reservoir, to rebut the inference of malice it was held competent to prove, in connection with other additional facts, that the reservoir had become a public nuisance in breeding disease, as tending to show that the cutting inflicted no substantial damage to the property.

In People *v.* Kane, 142 N. Y. 366, 37 N. E. 104, a prosecution under the New York Penal Code making it a crime, punishable as prescribed, for a person unlawfully to destroy or injure any real or personal property of another, it appeared that the prosecuting witness had unlawfully placed a boat upon a pond owned by the defendant; he had refused to remove it upon request of the defendant, and several times when the defendant had taken it out of the water he replaced it, and finally chained it to a tree to prevent further removal. The defendant, in order to protect his possession from the trespass for which the boat was brought to the pond and used, and acting under advice of counsel, openly and without concealment took the boat from the water and broke it up. The court, in holding the destruction of the boat to be

be received even though it subsequently transpire that the title or claim of right under which possession was had was not valid.[27] But a claim of right is not available as defense where it appears that the defendant did more damage than he could reasonably suppose to be necessary for the assertion or protection of his rights.[28] Nor will it avail against admitted or undisputed facts which show on their face that the act was done willfully and mischievously.[29] Sometimes the nature of the offense as defined by the statute is such as to preclude the defendant from showing such defense.[30]

Advice of Counsel. — Advice of counsel is admissible in support of such claim where the facts upon which the claim is based are such as to make it available.[31]

3. Discharge of Official Duty. — It may be shown in defense that in doing the act the defendant was discharging an official duty.[32]

4. Protecting Property From Trespassing Animals. — It may be shown, in defense of a prosecution for killing or wounding an animal, that the animal was found trespassing upon the defendant's premises, and that the act was done to protect property.[33]

justifiable under the circumstances, said: "How far one may go, what force he may use, what acts of defense are excusable in the protection of premises or property are usually mixed questions of law and fact to be submitted to the jury under proper instructions from the court, because always dependent upon the facts and circumstances of the particular case, such as the manner and character of the trespass, the instrumentalities through which it is accomplished, and the opportunities or reasonable means of defense. What we decide now is that upon the undisputed evidence in this record, and under the peculiar and specific circumstances disclosed, there was no ground for convicting the defendant of a criminal offense."

In Com. *v.* Wellington, 7 Allen (Mass.) 299, a prosecution for desecrating a public burying ground, it was held to be no defense to show that the defendant was the owner of the fee of small lots within it under titles derived from various persons to whom they had been conveyed to be used for burial ground, and that hence evidence of that fact was inadmissible.

27. Windsor *v.* State, 13 Ind. 375; Howe *v.* State, 10 Ind. 492.

28. Reg. *v.* Clemens (1898), 1 Q. B. 556.

29. That is, that the act was done in utter disregard of the rights of the injured party, and with intent to injure and annoy. Camp *v.* State (Tex. Crim.), 57 S. W. 96.

30. Such evidence is not available under the Alabama statute providing penalty for entering the premises of another without legal cause or good excuse after a warning not to enter. Watson *v.* State, 63 Ala. 19.

31. Dawson *v.* State, 52 Ind. 478. In Watson *v.* State, 63 Ala. 19, a prosecution for trespass after warning under the Alabama statute (Code, § 4419), evidence of advice of counsel was rejected for all purposes.

32. Schott *v.* State, 7 Tex. App. 616. See also North Carolina *v.* Vanderford, 35 Fed. 282.

33. Wright *v.* State, 30 Ga. 325, 76 Am. Dec. 656; McMahan *v.* State, 29 Tex. App. 348, 16 S. W. 171; Brewer *v.* State, 28 Tex. App. 565, 13 S. W. 1004. *Contra.* — Snap *v.* People, 19 Ill. 80, 68 Am. Dec. 582, where the court said: "It is a violation of the common law, as well as of this statute, for a person to shoot or wound stock found trespassing upon his premises. He may expel them from his premises, and use the necessary force for that purpose, doing them no unnecessary damage; or he may take them up *damage feasant*, if need be, to protect his crops or close, but the law of right, as well as humanity, forbids him to inflict

5. Tender of Compensation. — Where the statute provides that a tender of full compensation to the owner of an animal killed or injured before prosecution is commenced is a bar thereto, it is incumbent upon the defendant to show an actual tender of full compensation or an excuse for not making a tender.[34]

6. Accident. — It is competent to prove as a full defense that the act complained of was the result of accident,[35] notwithstanding the fact that at the time of the act the defendant was engaged in another unlawful enterprise, and the injury complained of was the immediate result of the pursuit thereof.[36]

an unnecessary injury upon the brute. The owner of the animal may be liable for the damage committed by it, but the injured party may not inflict injury in return. He may not take the law into his own hands, and thus retaliate upon the owner, and wreak his vengeance upon the animal, which but follows the instinct of nature in seeking food where it is most inviting."

In Wright *v.* State, 30 Ga. 325, 76 Am. Dec. 656, a prosecution for shooting a mule, it was held a good defense to show that the shooting was done with the motive of protecting the property of the accused, and not from ill-will toward the owner or cruelty to the animal, and that it was accordingly proper to show that the mule was in the corn field of the accused at the time of the shooting, the evidence further showing that the mule had a habitual proclivity toward such mischief.

In Arkansas, however, under the statutory provisions, it cannot be shown in defense of killing a horse that the animal was trespassing at the time of the killing, nor that the horse was breechy and had previously trespassed upon defendant's premises, unless it is further proven that the premises were inclosed with a lawful fence. But evidence that he was breechy and had previously trespassed upon defendant's premises is admissible in mitigation. Bennefield *v.* State, 62 Ark. 365, 35 S. W. 790.

Stock Running at Large. — In North Carolina it is held that the fact that the stock law prevails is no excuse for inflicting willful and wanton injury on stock running at large; and where the defense on a prosecution for injury to stock was that the stock law prevailed where the offense was committed, and the prosecutor did not keep his stock up, that it trespassed on the crops of the defendant is no defense. State *v.* Brigman, 94 N. C. 888.

34. Ashworth *v.* State, 63 Ala. 120; Roe *v.* State, 82 Ala. 68, 3 So. 2.

35. Com. *v.* Walden, 3 Cush. (Mass.) 558; Niblo *v.* State (Tex. App.), 79 S. W. 31.

36. Niblo *v.* State (Tex. App.), 79 S. W. 31.

MALICIOUS PROSECUTION.

CROSS-REFERENCES:

Admissions;

Intent;

Malice;

Principal and Agent; Presumptions.

I. PROBABLE CAUSE.

1. Existence of Probable Cause. — A. GENERAL RULE. — Under a plea of probable cause it is competent for defendant to show any facts or circumstances that would excite the belief in a reasonable man that the plaintiff was guilty of the crime charged;[1] but they must not be such that the existence of probable cause would be merely a conjecture therefrom.[2] Any information of defendant connecting plaintiff with the offense may be shown.[3]

B. BAD REPUTATION OF PLAINTIFF. — Evidence of the bad reputation of plaintiff is admissible to rebut proof of want of probable cause;[4] but defendant's knowledge of such reputation must be

1. Brown *v.* Master, 104 Ala. 451, 16 So. 443; McLaren *v.* Birdsong, 24 Ga. 265; Harpham *v.* Whitney, 77 Ill. 32; Leidig *v.* Rawson, 2 Ill. 272, 29 Am. Dec. 354; Ammerman *v.* Crosby, 26 Ind. 451.

Reason for Rule. — "It is the duty of every citizen, knowing a criminal offense has been committed, to give notice thereof to the authorities, and if a prosecution is instituted and fails, he ought to be allowed to go into an examination of all the facts and circumstances attending the case, in order to his own justification. Were not this so, but few persons would be found willing to incur the risk of a prosecution against a suspected malefactor, an action for a malicious prosecution to ensue upon his acquittal. . . . In such actions great latitude of inquiry is, and should be, indulged." Collins *v.* Hayte, 50 Ill. 337, 99 Am. Dec. 521.

2. Cohn *v.* Saidel, 71 N. H. 518, 53 Atl. 800.

3. Ahrens & Ott. Mfg. Co. *v.* Hoeher, 106 Ky. 692, 51 S. W. 194.

4. *Alabama.* — Martin *v.* Hard-

shown.[5] Evidence tending to show that defendant considered his source of information unreliable is admissible on the questions of probable cause and malice.[6]

C. Conduct of Accused Unconnected With Prior Proceeding. — Probable cause cannot be shown by proof that the accused has been guilty of different offenses;[7] but similar acts may be shown

esty, 27 Ala. 458, 62 Am. Dec. 773.

Connecticut. — Sherwood *v.* Reed, 35 Conn. 450, 95 Am. Dec. 284.

Indiana. — Lockwood *v.* Beard, 4 Ind. App. 505, 30 N. E. 15; Walker *v.* Pittman, 108 Ind. 341, 9 N. E. 175.

Missouri. — Gregory *v.* Chambers, 78 Mo. 294, *affirming* 8 Mo. App. 557; Miller *v.* Brown, 3 Mo. 127, 23 Am. Dec. 693.

Oregon. — Gee *v.* Culver, 13 Or. 598, 11 Pac. 302.

West Virginia. — Vinal *v.* Core, 18 W. Va. 1.

Similar Acts. — In an action for malicious prosecution for charging one with obtaining money under false pretenses it is competent to show that defendant knew of plaintiff's obtaining other money under the same pretense. Barron *v.* Mason, 31 Vt. 189.

The reputation of plaintiff among a particular class of persons is inadmissible. Eschbach *v.* Hurtt, 47 Md. 61.

Rule Stated. — "We think that evidence of the general bad reputation of the plaintiff was admissible. In 3 Sutherland on Damages, page 708, it is said: 'According to the better authorities, the defendant may prove the general bad reputation of the plaintiff, both to rebut the proof of want of probable cause and in mitigation of damages.' In Israel *v.* Brooks, 23 Ill. 575, an action for a malicious prosecution, it was held that previous good character may be shown as one evidence of want of probable cause, and bad character may be shown as a reason for probable cause. . . . If the witness knew the general reputation of the plaintiff in the place where he resided at the time of the arrest we think it was proper evidence for the consideration of the jury to rebut the proof of want of probable cause, and also in mitigation of damages. Bacon *v.* Towne, 4 Cush. 240; Pullen *v.* Glidden, 68 Me. 563." Rosenkrans *v.* Barker, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169.

Where a mother and her minor son are arrested for larceny and acquitted, and the son brings action for malicious prosecution, evidence of the bad reputation of the mother is inadmissible. Bruce *v.* Tyler, 127 Ind. 468, 26 N. E. 1081.

5. Sherwood *v.* Reed, 35 Conn. 450, 95 Am. Dec. 284. See also cases cited under last preceding note.

6. **Knowledge of Crime of Person Informing Defendant.** — A witness was permitted to testify that he had heard that defendant, before the complaint was made, said that he had heard that the person from whom he received information of plaintiff's guilt had been in jail. *Held*, that if "that statement tended to show, as against the defendant, that she was less credible than other persons, it was competent evidence upon the question whether there was probable cause for the prosecution. If it had no proper bearing upon her credibility, but at the same time indicated distrust of her on the part of defendant, it was competent on the question whether the prosecution was malicious." McIntire *v.* Levering, 148 Mass. 546, 20 N. E. 191, 12 Am. St. Rep. 594, 2 L. R. A. 517.

7. Killebrew *v.* Carlisle, 97 Ala. 535, 12 So. 167; Riley *v.* Gourley, 9 Conn. 154; Mitchinson *v.* Cross, 58 Ill. 366; Gregory *v.* Thomas, 2 Bibb. (Ky.) 286, 5 Am. Dec. 608; Stevens *v.* Metropolitan L. Ins. Co., 2 Misc. 584, 21 N. Y. Supp. 1024.

Carrying Concealed Weapons. Assault. — An action instituted by defendant charging plaintiff with an assault was alleged to have been malicious and without probable cause, and action was commenced for recovery upon those grounds. At the trial defendant offered to prove information that plaintiff carried concealed weapons and had been prosecuted therefor, which evidence was

where defendant proves he has knowledge of them.[8] A failure to

rejected. *Held*, that it had no tendency to prove that he had probable cause for believing that the plaintiff had committed an assault upon him. Bullock *v.* Lindsay, 9 Gray (Mass.) 30.

Removing Fences. — The boundary line between the land of plaintiff and defendant was settled by arbitration. Subsequently defendant brought a criminal action charging plaintiff with maliciously removing the fence. In an action for malicious prosecution growing out of such prosecution evidence of prior removals of the fence by plaintiff was inadmissible. Tillotson *v.* Warner, 3 Gray (Mass.) 574.

Plaintiff was prosecuted by defendant for maliciously breaking down shade trees and disturbing a religious meeting. The evidence showed that the meeting had not been disturbed, but that there was probable cause for the arrest on the charge of breaking down trees. The defendant offered to show in justification of his charge of disturbing a religious meeting that at the time of the alleged breaking down of the trees plaintiff had made an indecent exposure to defendant's family. *Held*, to have been properly excluded. Carson *v.* Edgeworth, 43 Mich. 241, 5 N. W. 282.

8. Ward *v.* Green, 11 Conn. 455; McRae *v.* Oneal, 13 N. C. 166; Thaule *v.* Krekeler, 81 N. Y. 428; Sebastian *v.* Cheney, 86 Tex. 497, 25 S. W. 691. *Contra.* — See Anderson *v.* Cowles, 72 Conn. 335, 44 Atl. 477; Rosenfeld *v.* Stix, 67 Mo. App. 582.

Selling Railroad Tickets Fraudulently. — In an action for malicious prosecution on a charge of fraudulently selling railroad tickets it is competent for defendant to show that he had knowledge of other fraudulent sales by plaintiff prior to the charge. Thelin *v.* Dorsey, 59 Md. 539.

Embezzlement. — "The plaintiff had been the manager of a hotel owned by the defendant, and in running it had been allowed to use a large part of the furnishings therein, belonging also to the defendant. The complaint, in form for larceny, was in fact for the embezzlement of some of these furnishings, as also was the indictment. At the trial the evidence tended to show that the defendant had reason to believe that certain of these furnishings owned by him, including those named in the complaint and indictment, were wrongfully taken from the hotel by the plaintiff, and that the charges made in the complaint and in the indictment were for this unlawful taking. The excluded evidence would have tended to show that the plaintiff at about the same time also removed from the hotel, without the defendant's consent, other articles belonging to the defendant besides those charged in the complaint and the indictment, and that the defendant knew of this, as well as of the removal of the articles the larceny of which was charged, when he preferred the charges, and that he was influenced by such knowledge. Evidence of the embezzlement of other articles at about the same time, from the same owner, and under the same general circumstances, would have been competent in the trial of the complaint and of the indictment to prove the plaintiff's guilt by showing the intent with which he removed from the hotel the articles which he rightfully could use in running the hotel. Commonwealth *v.* Tuckerman, 10 Gray 173, 197-201; Commonwealth *v.* Shepard, 1 Allen 575; Commonwealth *v.* Russell, 156 Mass. 196. Evidence competent upon the trial of the charge is competent at the trial of the action for malicious prosecution. Bacon *v.* Towne, 4 Cush. 217, 241; Bullock *v.* Lindsay, 9 Gray 30, 32. That about the same time the plaintiff, without the defendant's consent, had removed other articles from the hotel was a circumstance which naturally and properly might affect defendant's mind and lead him to a reasonable belief that the plaintiff had taken with guilty intent the articles charged in the prosecutions, and to show also that the defendant acted in good faith, and with the honest purpose of bringing an offender to justice, and so without malice. See Ripley *v.*

perform a duty imposed by statute has been held admissible.[9]

D. Conduct of Accused Connected With Prior Proceeding. The voluntary waiver of a preliminary examination and entry into a recognizance conditioned for the appearance of plaintiff at the next term is evidence of probable cause;[10] but the fact that a recognizance recites probable cause is not sufficient to establish it.[11] The fact that plaintiff moved to dismiss the action is in no sense an admission of his guilt.[12]

E. Statements of Prosecutor. — When part of the *res gestae*, statements of the prosecutor are admissible to prove probable cause.[13]

F. Information From Third Parties. — To establish probable cause defendant may show that he received information from a reliable source tending to show the guilt of plaintiff,[14] and may state

McBarron, 125 Mass. 272; Falvey *v.* Faxon, 143 Mass. 284; Commonwealth *v.* Lubinsky, *ante* 142, and cases cited." Perkins *v.* Spaulding, 182 Mass. 218, 65 N. E. 72.

Selling Mortgaged Property. Where the action for malicious prosecution grows out of a charge of selling mortgaged property consisting of a wagon and harness, it is competent to show that plaintiff had previously secreted some of the harness, which fact defendant knew. Eastman *v.* Keasor, 44 N. H. 518.

Must Not Be Remote. — Evidence of another offense is incompetent on the question of probable cause unless there is some clear connection between the two offenses by which the guilt of the one may be clearly inferred from the guilt of the other. Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380.

9. St. Johnsbury & L. C. R. Co. *v.* Hunt, 59 Vt. 294, 7 Atl. 277.

10. "It has been held that a commitment of the plaintiff is *prima facie* evidence of probable cause. Graham *v.* Noble, 13 Serg. R. 233; Bacon *v.* Towne, 4 Cush. 217. If the finding of the magistrate on the facts proved before him makes a *prima facie* case, surely waiving an examination and voluntarily entering into recognizance amounts to a confession by the accused that there is probable cause. *Vide* State *v.* Railey, 35 Mo. 168." Vansickle *v.* Brown, 68 Mo. 627; Jones *v.* Wilmington & W. R. Co., 125 N. C. 227, 34 S. E. 398. See also Brady *v.* Stiltner, 40 W. Va. 289, 21 S. E. 729.

11. Van De Wiele *v.* Callanan, 7 Daly (N. Y.) 386.

12. Wheeler *v.* Hanson, 161 Mass. 370, 37 N. E. 382, 42 Am. St. Rep. 408.

13. Goodrich *v.* Warner, 21 Conn. 432. See also Long *v.* Rogers, 17 Ala. 540; Lamb *v.* Galland, 44 Cal. 609.

14. Ammerman *v.* Crosby, 26 Ind. 451; Pennsylvania Co. *v.* Weddle, 100 Ind. 138.

General Suspicion. —"It is not allowable to the defendant, for the purpose of proving probable cause, to show that the accused were generally suspected, or were generally believed, to be guilty of the crime charged." Brainerd *v.* Brackett, 33 Me. 580.

Opinions of Third Parties. —A third party told defendant's agent what he had observed in the conduct of plaintiff, and that "from what he had seen he believed the defendants were about to fraudulently dispose of their property." *Held*, incompetent as mere matter of opinion. Gimbel *v.* Gomprecht (Tex. Civ. App.), 36 S. W. 781.

Reason for Rule. — "The question is not whether the plaintiff was actually guilty, but whether the defendant had reasonable grounds, from the facts known to him and the communications made to him, to believe, and did actually believe, that the plaintiff was guilty. . . . The policy of the law will no more permit the individual who, in good faith, institutes a criminal prosecution upon information thus acquired, and which, addressed to a reasonable

what that information was, but a mere rumor is inadmissible.[15] Defendant may show that communications were made by one person to another with instructions that they be transmitted to him, and that they were in fact communicated to him before the institution of the prosecution.[16] Representations by third parties, though afterward proved to be unfounded, to the effect that plaintiff was guilty are competent.[17] Statements of one who assisted the plaintiff in the act complained of are admissible.[18] Information coming to the knowledge of defendant after the institution of the prosecution is admissible.[19]

C. Truth of Charge. — Evidence of the guilt of the accused is competent to establish the existence of probable cause;[20] but the truth is no defense if the facts offered to be proved do not constitute a crime.[21]

mind, would induce the belief of guilt of the accused, to be mulcted in damages because of a failure to establish the guilt, on the trial, than it will because of the same result when he acts upon his own knowledge." Anderson *v.* Friend, 71 Ill. 475.

Rule Stated. — "In Addison on Torts (Dudley & B. Ed. 766), it is said that, in order to show good faith on the part of defendant, it is competent for him to prove any communication that may have been made to him prior to the communication of the grievance, to show the impression made on his mind, and the materials he has before him in forming an opinion. A like view was taken in Bacon *v.* Towne, 4 Cush. 217, 240, and in Lamb *v.* Galland, 44 Cal. 609." English *v.* Major, 59 Hun 317, 12 N. Y. Supp. 935.

15. Lamb *v.* Galland, 44 Cal. 609.

16. Tucker *v.* Wilkins, 105 N. C. 272, 11 S. E. 575.

17. Bacon *v.* Towne, 4 Cush. (Mass.) 217.

18. French *v.* Smith, 4 Vt. 363, 24 Am. Dec. 616.

19. Cecil *v.* Clarke, 17 Md. 508. See also Olson *v.* Berg, 87 Minn. 277, 91 N. W. 1103.

20. Maynard *v.* Sigman, 65 Neb. 590, 91 N. W. 576; Barge *v.* Weems, 109 Ga. 685, 35 S. E. 65. See also Neys *v.* Taylor, 12 S. D. 488, 81 N. W. 901.

"In Galloway *v.* Stewart, 49 Ind. 156, it was held that the facts constituting probable cause must be known to the prosecutor at the time he prefers the charge, and it was said: 'That the facts constituting probable cause must be known to the party preferring the charge is expressly stated in some of the cases in this court, and is clearly implied in others.'" Pennsylvania Co. *v.* Weddle, 100 Ind. 138.

21. Swindell *v.* Houck, 2 Ind. App. 519, 28 N. E. 736; Durham *v.* Jones, 119 N. C. 262, 25 S. E. 873; Bigelow *v.* Sickles, 80 Wis. 98, 49 N. W. 106, 27 Am. St. Rep. 25; Murphy *v.* Martin, 58 Wis. 276, 16 N. W. 603.

Guilt Conclusive of Probable Cause. — "The charge contained the following: 'The fact that an offense was committed does not necessarily justify the defendant.' This language of the charge was excepted to by defendant. The court, by this and other language used in the charge, intended to have the jury understand that a person guilty of a crime might sustain an action for malicious prosecution or false imprisonment against one who should initiate criminal proceedings against him therefor. We do not so understand the law. Actual guilt is conclusive evidence of probable cause. The action in such case cannot be sustained, however much malice may be shown or however improper may have been the motives for the prosecution. (Miller *v.* Milligan, 48 Barb. 30; Hall *v.* Suydam, 6 *id.* 83, 86; 1 Hillard on Torts [3d Ed.] 427, 428; Thompson *v.* Lumley, 1 Abb. [N. C.] 254, *affirmed* in Ct. of Ap. 64 N. Y. 631; Jennings *v.* Davidson, 13 Hun. 393; Fagnan *v.* Knox, 66 N.

H. Belief of Defendant. — The defendant, in an action for malicious prosecution, may testify directly as to his belief at the time of instituting the prosecution, relative to the guilt of the plaintiff,[22] and the same rule obtains where the prior action was a civil proceeding.[23]

I. Legal Advice of Counsel. — Evidence tending to prove that the prior proceeding was commenced after consultation with, and upon the advice of, counsel is admissible,[24] and it is unnecessary to prove advice to prosecute,[25] for whatever advice was given is competent,[26] but it must be made to appear that the defendant made a full and fair statement of the case to counsel before instituting the prosecution,[27] and the facts disclosed to counsel must be testified to.[28]

Y. 525, 528.)" Turner *v.* Dinnegar, 20 Hun (N. Y.) 465. See also Whitehurst *v.* Ward, 12 Ala. 264.

Facts Not Known at the Time of instituting the prosecution may be allowed to protect defendant, if they show or tend to show that the plaintiff is guilty. Johnson *v.* Chambers, 32 N. C. 287.

"The defendant is entitled to protect himself by additional facts tending to show that plaintiff was guilty, though he may not have known them when he began the prosecution." Thurber *v.* Eastern Bldg. & Loan Ass'n, 118 N. C. 129, 24 S. E. 730.

Former Acquittal. — "According to the weight of authority, the rule appears to be that if the defendant can satisfy the jury that the plaintiff, notwithstanding his acquittal, was in fact guilty of the crime with which he was charged, no recovery can be had. Bacon *v.* Towne, 4 Cush. 239; Adams *v.* Lisher, 3 Blackf. 241; Whitehurst *v.* Ward, 12 Ala. 264; Bell *v.* Pearcy, 5 Ired. 83; Johnson *v.* Chambers, 10 *id.* 287." Parkhurst *v.* Masteller, 57 Iowa 474, 10 N. W. 864.

22. Smith *v.* Deaver, 49 N. C. 513.

23. *Michigan.* — Spalding *v.* Lowe, 56 Mich. 366, 23 N. W. 46.

Minnesota. — Garrett *v.* Mannheimer, 24 Minn. 193.

Missouri. — Sparling *v.* Conway, 75 Mo. 510, *affirming* 6 Mo. App. 283.

Nebraska. — Turner *v.* O'Brien, 5 Neb. 542.

New York. — Leak *v.* Carlisle, 75 N. Y. Supp. 382.

Ohio. — White *v.* Tucker, 16 Ohio St. 468.

Tennessee. — Greer *v.* Whitfield, 4 Lea 85.

Rule Stated. — "It is settled law in this state that, where the character of the transaction depends upon the intent of the party, it is competent, when the party is a witness, to inquire of him what his intention was." Heap *v.* Parrish, 104 Ind. 36, 3 N. E. 549.

24. Garrett *v.* Mannheimer, 24 Minn. 193.

The rule that the facts upon which defendant founded his belief should be stated in order to render such belief admissible, is enunciated in Perrenoud *v.* Helm, 65 Neb. 77, 90 N. W. 980.

25. *California.* — Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380; Levy *v.* Brannan, 39 Cal. 485; Potter *v.* Seale, 8 Cal. 218.

Illinois. — Collins *v.* Hayte, 50 Ill. 337, 99 Am. Dec. 521.

Iowa. — Donnelly *v.* Burkett, 75 Iowa 613, 34 N. W. 330.

Michigan. — Thurston *v.* Wright, 77 Mich. 96, 43 N. W. 860.

New York. — Hall *v.* Suydam, 6 Barb. 83.

Rhode Island. — St. Pierre *v.* Warner, 24 R. I. 295, 53 Atl. 41.

Texas. — Hurlbut *v.* Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446.

26. Sharp *v.* Johnson, 59 Mo. 557.

27. Collins *v.* Hayte, 50 Ill. 337, 99 Am. Dec. 521.

Where No Advice Is Given. Where it appears that no advice was given by counsel, but that defendant was referred to the United States officers, evidence that he consulted an attorney is inadmissible. Holden *v.* Merritt, 92 Iowa 707, 61 N. W. 390.

28. Davidoff *v.* Wheeler & Wilson

J. Admissions of Plaintiff. — Any statements of plaintiff going to prove probable cause are admissible on that issue.[29]

2. Want of Probable Cause. — A. Admissions of Defendant. Statements made by the defendant showing that he did not believe that he had sufficient reliable information upon which to base his action are admissible to establish a want of probable cause.[30]

B. Good Reputation of Plaintiff. — Plaintiff's good reputation may be shown to sustain the allegation of want of probable cause where the proceeding is founded on a criminal prosecution;[31] but knowledge by defendant of such reputation must be shown in order to render evidence tending to establish it competent.[32]

Mfg. Co., 16 Misc. 31, 37 N. Y. Supp. 661, *affirming* 14 Misc. 456, 35 N. Y. Supp. 1019.

Under Statute providing that advice of counsel is no protection in an action for malicious prosecution, evidence that defendant consulted counsel and took his advice before instituting the prosecution is competent on the issues of probable cause and malice. Fox *v.* Davis, 55 Ga. 298.

Expert Opinion on Different State of Facts. — "Where one lays all the facts before counsel, and acts in good faith upon an opinion given, he is not liable to an action, even though it turns out that he was mistaken; but in order that he may obtain indemnity he must have made a full and fair statement of all the facts known to him. McCarthy *v.* Kitchen, 59 Ind. 500, and cases cited; Center *v.* Spring, 2 Iowa 393. The prosecuting attorney having testified that, upon a certain hypothesis or state of facts communicated to him by the appellants, he, as a lawyer and an officer of the law, advised the institution of criminal proceedings against Watts, it was competent to ask him as an expert whether or not, if the hypothesis or facts upon which he proceeded had been changed, . . . he would have arrived at a different conclusion. This was only another way of showing the materiality of the facts assumed to have been withheld from the prosecuting attorney." Paddock *v.* Watts, 116 Ind. 146, 18 N. E. 518, 9 Am. St. Rep. 832. But see Noble *v.* White, 103 Iowa 352, 72 N. W. 556. See also Cuthbert *v.* Galloway, 35 Fed. 466; Grimes *v.* Bowerman, 92 Mich. 258, 52 N. W. 751; Norrel *v.* Vogel, 39 Minn. 107, 38 N. W. 705.

29. Wuest *v.* American Tobacco Co., 10 S. D. 394, 73 N. W. 903.

Burden of Proof. — Where the advice of counsel is relied upon, the burden is on defendant to establish it. Perrenoud *v.* Helm, 65 Neb. 77, 90 N. W. 980.

30. Israel *v.* Brooks, 23 Ill. 526; Leach *v.* Wilbur, 9 Allen (Mass.) 212; Barron *v.* Mason, 31 Vt. 189.

Remote Declaration. — Evidence that plaintiff had declared that some years previously he had inflicted a beating on his wife is incompetent on the question of probable cause for procuring an indictment against him for beating his wife, from the effects of which she had died. Sims *v.* McLendon, 3 Strob. (S. C.) 557. *Contra.* — Hurlbut *v.* Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446.

31. Patterson *v.* Garlock, 39 Mich. 447; Scott *v.* Dennett Surpassing Coffee Co., 51 App. Div. 321, 64 N. Y. Supp. 1016; Driggs *v.* Burton, 44 Vt. 124; Woodworth *v.* Mills, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135. See also Holden *v.* Merritt, 92 Iowa 707, 61 N. W. 390.

32. McLeod *v.* McLeod, 75 Ala. 483; Coleman *v.* Heurich, 2 Mack. (D. C.) 189; Blizzard *v.* Hays, 46 Ind. 166, 15 Am. Rep. 291; Miller *v.* Brown, 3 Mo. 127, 23 Am. Dec. 693; Funk *v.* Amor, 4 Ohio Cir. Ct. 271; Woodworth *v.* Mills, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135.

Limits of Rule. — "There are many cases in which it is held that in actions of slander, the general bad reputation of the plaintiff may be shown in mitigation of damages. There are

C. Falsity of Charge. — Plaintiff may introduce evidence to show that he was innocent of the crime with which he was charged;[33] and may himself testify to his innocence;[34] but knowledge of the falsity of the charge should first be brought home to defendant.[35]

also decisions that in suits for malicious prosecution such reputation may be shown to meet the allegation of want of probable cause. Brown *v.* Towne, 4 Cush. 241; Pullen *v.* Gildden, 68 Me. 559; Barron *v.* Mason, 31 Vt. 189; Rodriguez *v.* Tadmire, 2 Esp. 721; Gregory *v.* Thomas, 2 Bibb. 286; Bostick *v.* Rutherford, 4 Hawks 83; Gregory *v.* Chambers, 78 Mo. 294; Rosekranz *v.* Barker, 115 Ill. 331, 3 N. E. Rep. 93. But the cases do not go so far as to permit proof of particular instances of bad conduct. In determining whether there is probable cause for a prosecution for the commission of a crime the known character and reputation of the person suspected is always an element of some importance; for, as was said by Chief Justice Shaw in Bacon *v.* Towne, *supra*. 'The same facts which would raise a strong suspicion in the mind of a cautious man against a person of notoriously bad character for honesty and integrity, would make a slighter impression if they tended to throw a charge of guilt upon a man of good reputation.'" McIntire *v.* Levering, 148 Mass. 546, 20 N. E. 191, 12 Am. St. Rep. 594, 2 L. R. A. 517.

Plaintiff Showing His Own Reputation. — In an action for malicious prosecution for a criminal action, or for an offense which imputes moral turpitude or want of integrity, it is competent for the plaintiff, in making his case in chief, to show his previous good character as bearing directly on the question of probable cause, where such reputation was known to the defendant, or was of such general notoriety that he will be presumed to have known it. Bank of Miller *v.* Richmon, 64 Neb. 111, 89 N. W. 627. *Contra.* — Kennedy *v.* Holladay, 25 Mo. App. 503. See also Goodrich *v.* Warner, 21 Conn. 432.

33. Sherwood *v.* Reed, 35 Conn. 450, 95 Am. Dec. 284; Bank of Miller *v.* Richmon, 64 Neb. 111, 89 N. W. 627. See also "Probable Cause," "Malice," "Damages," *infra* this article.

34. *Illinois.* — Ledig *v.* Rawson, 2 Ill. 272, 29 Am. Dec. 354.

Indiana. — Winemiller *v.* Thrash, 125 Ind. 353, 25 N. E. 350.

Michigan. — Patterson *v.* Garlock, 39 Mich. 447.

Nevada. — Fenstermaker *v.* Page, 20 Nev. 290, 21 Pac. 322.

Pennsylvania. — Katterman *v.* Stitzer, 7 Watts 189.

Rhode Island. — King *v.* Colvin, 11 R. I. 582.

The General Reputation of plaintiff for honesty is admissible in evidence to prove the plaintiff's innocence of the offense with which he was charged. San Antonio & A. P. R. Co. *v.* Griffin (Tex. Civ. App.), 48 S. W. 542.

"The guilt of plaintiff being a proper issue for the defendant, there appears no good reason why the plaintiff may not rebut such evidence given or anticipated, and show that she was innocent of the charge; and if the defendant may do this without showing any previous knowledge of the testimony, why may not the plaintiff? But it seems to be held in the cases cited by the learned counsel of the appellants that such evidence is proper for the plaintiff if the defendants had knowledge of it before they commenced the prosecution. Cecil *v.* Clarke, 17 Md. 508; King *v.* Colvin, 11 R. I. 582." Bigelow *v.* Sickles, 80 Wis. 98, 49 N. W. 106, 27 Am. St. Rep. 25.

Perjury. — "It was proper to permit appellee to prove the character of the transaction upon which the appellant based the charge of a criminal offense, and as the offense charged was perjury it was proper to show facts tending to prove that the testimony given by the appellee was true." Winemiller *v.* Thrash, 125 Ind. 353, 25 N. E. 350.

35. Cecil *v.* Clarke, 17 Md. 508; Patterson *v.* Garlock, 39 Mich. 447; Fenstermaker *v.* Page, 20 Nev. 290, 21 Pac. 322; Katterman *v.* Stitzer, 7 Watts (Pa.) 189; King *v.* Colvin,

Where the charge is disturbing the peace, and the complaint is made upon information and belief, the plaintiff may introduce evidence to establish his reputation for peace and quietude, but if the charge is made upon defendant's own knowledge such evidence is inadmissible.[36]

II. MALICE.

1. **From Circumstances.** — Proof of malice need not be direct, but the jury may infer it from circumstances, taking into consideration all the facts of the case;[37] as where there is no excuse or reasonable ground for the action.[38] It may be inferred from ill-will

11 R. I. 582; Bigelow *v.* Sickles, 80 Wis. 98, 49 N. W. 106, 27 Am. St. Rep. 25.

36. Fenstermaker *v.* Page, 20 Nev. 290, 21 Pac. 322; Katterman *v.* Stitzer, 7 Watts. (Pa.) 189; King *v.* Colvin, 11 R. I. 582; Bigelow *v.* Sickles, 80 Wis. 98, 49 N. W. 106, 27 Am. St. Rep. 25.

37. Complaint on Defendant's Own Knowledge. — "The prosecution out of which the action springs was for a riot, and the prosecuting witness made complaint, on his own knowledge, and not on information and belief, and it is urged the court below erred in permitting appellee to call witnesses to prove her character for peace and quiet. We are at a loss to see how that could tend in any manner to prove the issue. Had the charge been made on information and belief, then such evidence would have been proper, to enable the jury to determine whether the prosecuting witness had reasonable ground for entertaining the belief, in the face of her known character. Where a person has an unblemished character it requires more evidence to create a reasonable belief of guilt than where the accused has a bad character; and in cases where the prosecution is based on belief this character of evidence is proper for the purpose indicated, but the reason of the rule ceases where the charge is based on knowledge of facts. This evidence should not, therefore, have been admitted." Skidmore *v.* Bricker, 77 Ill. 164.

38. *United States.* — Sonneborn *v.* Stewart, 2 Woods 599, 22 Fed. Cas. No. 13,176; Tiblier *v.* Alford, 12 Fed. 262.

California. — Hahn *v.* Schmidt, 64 Cal. 284, 30 Pac. 818.

Illinois. — Collins *v.* Hayte, 50 Ill. 337, 99 Am. Dec. 521.

Indiana. — Richter *v.* Kaster, 45 Ind. 440.

Louisiana. — Deslonde *v.* O'Hern, 39 La. Ann. 14, 1 So. 286.

Massachusetts. — Pierce *v.* Thompson, 6 Pick. 193.

Michigan. — Thurston *v.* Wright, 77 Mich. 96, 43 N. W. 860.

Missouri. — Lalor *v.* Byrne, 51 Mo. App. 578; Christian *v.* Hanna, 58 Mo. App. 37.

New York. — Laird *v.* Taylor, 66 Barb. 139.

Criminal Action to Collect Debt. Malice will be inferred from the resort to a criminal prosecution to collect a debt. Ross *v.* Langworthy, 13 Neb. 492, 14 N. W. 515.

Zeal in Prosecution. — "Malice can be inferred from the conduct, zeal and activity of a party in conducting the prosecution." *Citing* Turner *v.* Wallace, 3 Gill & J. (Md.) 329; Straus *v.* Young, 36 Md. 246.

"Where, in an action brought for the malicious prosecution of a civil suit, the evidence tended to prove that it was brought without probable cause, and that the plaintiff therein, without any other apparent reason, permitted the suit to be dismissed without trial, *held,* that evidence of the subsequent commencement by him of another suit against the same defendant, upon the same cause of action, is admissible to show malice." Severens *v.* Brainerd, 61 Minn. 265, 63 N. W. 477.

Falsity of Affidavit. — "From the falsity of an affidavit upon which an arrest was procured, malice and want

or unfriendly feelings of defendant for plaintiff,[39] but these of themselves are not sufficient to establish malice.[40]

2. From Want of Probable Cause. — Malice may be inferred from a clear want of probable cause;[41] and may be inferred by the jury from the same facts which show a want of probable cause.[42]

of probable cause may be inferred." Navarino *v.* Dudrap, 66 N. J. L. 620, 50 Atl. 353.

Pendency of a Suit. — "This particular malice may be proven by positive testimony of threats or expressions of ill-will, used by the defendant in reference to the plaintiff, or it may be *inferred* from the want of probable cause and other circumstances, such as that set out in the conclusion of the case — the pendency of a law suit between the parties, which is apt to engender angry feelings." Brooks *v.* Jones, 33 N. C. 260.

Negligence in Making Inquiries. "Malice may not only be presumed from the total absence of probable cause, but also from the gross and culpable negligence in omitting to make suitable and reasonable inquiries. *A fortiori,* it may be properly inferred where the party has been guilty of gross misstatements for the purpose of misleading the prosecuting officers of the government." Wiggin *v.* Coffin, 3 Story 1, 29 Fed. Cas. No. 17,624.

39. Blunk *v.* Atchison T. & S. F. R. Co., 38 Fed. 311; Travis *v.* Smith, 1 Pa. St. 234, 44 Am. Dec. 125.

40. Long *v.* Rodgers, 19 Ala. 321; Lalor *v.* Byrne, 51 Mo. App. 578.

41. Tiblier *v.* Alford, 12 Fed. 262; Lalor *v.* Byrne, 51 Mo. App. 578.

42. *United States.* — Blunt *v.* Little, 3 Mason 102, 3 Fed. Cas. No. 1578.

Alabama. — Bennett *v.* Black, 1 Stew. 39; Long *v.* Rodgers, 19 Ala. 321; O'Neal *v.* McKinna, 116 Ala. 606, 22 So. 905.

Colorado. — Murphy *v.* Hobbs, 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366.

Connecticut. — Stone *v.* Stevens, 12 Conn. 219, 30 Am. Dec. 611.

Georgia. — Southwestern R. Co. *v.* Mitchell, 80 Ga. 438, 5 S. E. 490.

Illinois. — McBean *v.* Ritchie, 18 Ill. 114; Ames *v.* Snider, 69 Ill. 376; Harpham *v.* Whitney, 77 Ill. 32.

Indiana. — McCasland *v.* Kimberlin, 100 Ind. 121; Heap *v.* Parrish, 104 Ind. 36, 3 N. E. 549.

Iowa. — Center *v.* Spring, 2 Iowa 393; Parker *v.* Parker, 102 Iowa 500, 71 N. W. 421.

Kentucky. — Holburn *v.* Neal, 4 Dana 120; Fullenwider *v.* McWilliams, 7 Bush 389.

Louisiana. — Grant *v.* Deuel, 3 Rob. 17, 38 Am. Dec. 238; Senecal *v.* Smith, 9 Rob. 418; McCormick *v.* Conway, 12 La. Ann. 53; Hayes *v.* Hayman, 20 La. Ann. 336; Decoux *v.* Lieux, 33 La. Ann. 392; Brown *v.* Vitter, 47 La. Ann. 607, 17 So. 193.

Maine. — Ulmer *v.* Leland, 1 Me. 135, 10 Am. Dec. 329.

Maryland. — Straus *v.* Young, 36 Md. 246; Torsch *v.* Dell, 88 Md. 459, 41 Atl. 903.

Michigan. — Carson *v.* Edgeworth, 43 Mich. 241, 5 N. W. 282.

Minnesota. — Chapman *v.* Dodd, 10 Minn. 350; Cole *v.* Andrews, 70 Minn. 230, 73 N. W. 3.

Missouri. — Casperson *v.* Sproule, 39 Mo. 39; Moore *v.* Sauborin, 42 Mo. 490; Holliday *v.* Sterling, 62 Mo. 321; Callahan *v.* Caffarata, 39 Mo. 136; Christian *v.* Hanna, 58 Mo. App. 37; Hickam *v.* Griffin, 6 Mo. 37; Williams *v.* Vanmeter, 8 Mo. 339; Sappington *v.* Watson, 50 Mo. 83; Sharpe *v.* Johnson, 59 Mo. 575, 76 Mo. 660.

New York. — Burhans *v.* Sanford, 19 Wend. 417; Hall *v.* Suydam, 6 Barb. 83; Wanser *v.* Wyckoff, 9 Hun 178; Brounstein *v.* Wile, 65 Hun 623, 20 N. Y. Supp. 204; Brown *v.* McBride, 24 Misc. 235, 52 N. Y. Supp. 620.

North Carolina. — Brooks *v.* Jones, 33 N. C. 260; McGowan *v.* McGowan, 122 N. C. 145, 29 S. E. 97.

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

Pennsylvania. — Prough *v.* Entriken, 11 Pa. St. 81; Beach *v.* Wheeler, 24 Pa. 212.

Rhode Island. — King *v.* Colvin, 11 R. I. 582; Mowry *v.* Whipple, 8 R. I. 360.

Although malice does not follow as a conclusion of law from want of probable cause,[43] yet, such want being shown, malice may be inferred as matter of fact.[44]

3. To Overcome Inference. — A. General Rule. — The defendant is entitled to prove any facts or circumstances which tend in the slightest degree to overcome the inference of malice;[45] and no fact should be excluded from the jury unless the court is satisfied that the jury can draw no rational inference from it.[46]

South Carolina. — Hogg *v.* Pickney, 16 S. C. 387; Caldwell *v.* Bennett, 22 S. C. 1.

South Dakota. — Wuest *v.* American Tobacco Co., 10 S. D. 394, 73 N. W. 903.

Tennessee. — Kendrick *v.* Cypert, 10 Humph. 291.

Texas. — Gulf C. & S. F. R. Co. *v.* James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743.

Virginia. — Spengler *v.* Davy, 15 Gratt. 381; Scott *v.* Shelor, 28 Gratt. 891.

Wisconsin. — Lauterbach *v.* Netzo, 111 Wis. 322, 87 N. W. 230.

Where contradicted by other circumstances, malice will not be inferred from want of probable cause. Emerson *v.* Cochran, 11 Pa. St. 619, 4 Atl. 498.

43. Hays *v.* Hayman, 20 La. Ann. 336; Holburn *v.* Neal, 4 Dana (Ky.) 120.

"It was competent for defendants in error, upon their theory of the case, to show, if they could, that no crime had been committed by them, and that the plaintiffs in error knew the fact. This, if true — and the jury were the sole judges — would tend to show a want of probable cause, and that the prosecution was malicious." Casebeer *v.* Rice, 18 Neb. 203, 24 N. W. 693.

44. *Alabama.* — Jordan *v.* Alabama G. S. R. Co., 81 Ala. 220, 8 So. 191.

California. — Levy *v.* Brannan, 39 Cal. 485; Harkrader *v.* Moore, 44 Cal. 144.

Indiana. — Newell *v.* Downs, 8 Blackf. 523; Ammerman *v.* Crosby, 26 Ind. 451; Oliver *v.* Pate, 43 Ind. 132.

Kansas. — Malone *v.* Murphy, 2 Kan. 250.

Mississippi. — Whitfield *v.* Westbrook, 40 Miss. 311.

Missouri. — Van Sickle *v.* Brown, 68 Mo. 627; Grant *v.* Reinhart, 33 Mo. App. 74.

North Carolina. — Bell *v.* Pearcy, 27 N. C. 83; Johnson *v.* Chambers, 32 N. C. 287.

Tennessee. — Greer *v.* Whitfield, 4 Lea 85.

Texas. — Griffin *v.* Chubb, 7 Tex. 603, 58 Am. Dec. 85; Willis *v.* McNeill, 57 Tex. 465.

Rule Stated. — "Malice being a condition of the mind, may be shown to exist by direct proof, like any other fact, or it may be inferred from other facts proved. It may be inferred from want of probable cause. Hickman *v.* Griffin, 6 Mo. 31; Williams *v.* Van Meter, 8 Mo. 339; Casperson *v.* Sproule, 36 Mo. 39; Sappington *v.* Watson, 50 Mo. 83; Sharpe *v.* Johnson, 59 Mo. 575, 76 Mo. 660. It will be seen that, according to these authorities, malice may be inferred from the facts that go to establish want of probable cause; but it cannot be deduced as an inference of law from want of probable cause." Christian *v.* Hanna, 58 Mo. App. 37.

"Malice is not a legal inference from want of probable cause. It may be, but is not necessarily, inferred as a matter of fact from the want of probable cause. The question of malice, as well as that of probable cause, is for the jury to determine from the evidence. The jury may find from the evidence want of probable cause, and yet find that there was no malice in prosecuting the legal proceedings complained of, and in such case their verdict should be for the defendant. Oliver *v.* Pate, 43 Ind. 132." Strickler *v.* Greer, 95 Ind. 596.

45. Lyon *v.* Hancock, 35 Cal. 372; Scovill *v.* Glasner, 79 Mo. 449; Hall *v.* Kehoe, 54 Hun 638, 8 N. Y. Supp. 176; Barron *v.* Mason, 31 Vt. 189.

46. Lyon *v.* Hancock, 35 Cal. 372.

B. Facts Showing Belief of Guilt and Probable Cause. The inference of malice is subject to rebuttal by proof that the prosecutor instituted the prosecution under an honest belief that the plaintiff was guilty of the offense charged;[47] and the facts upon which the belief is founded are competent.[48]

C. Advice of Counsel. — The inference of malice arising from a want of probable cause may be overcome by proof that defendant acted upon advice of competent counsel after a full and fair disclosure of all the material facts known to him at the time.[49] While this is strong evidence of the absence of malice,[50] it is not conclusive,[51] for the advice must be based upon a full disclosure of all the facts in the defendant's knowledge,[52] or which with due diligence

47. Ewing *v.* Sanford, 21 Ala. 157; Casebeer *v.* Rice, 18 Neb. 203, 24 N. W. 693.

48. Lunsford *v.* Dietrich, 86 Ala. 250, 5 So. 461, 11 Am. St. Rep. 37; Stone *v.* Stevens, 12 Conn. 219, 30 Am. Dec. 611; Wood *v.* Weir, 5 B. Mon. (Ky.) 544; Digard *v.* Michaud, 9 Rob. (La.) 387; Emerson *v.* Cochran, 111 Pa. St. 619, 4 Atl. 498; Barron *v.* Mason, 31 Vt. 189.

49. *Arkansas.* — Lemay *v.* Williams, 32 Ark. 166.

California. — Wild *v.* Odell, 56 Cal. 136.

Colorado. — Brooks *v.* Bradford, 4 Colo. App. 410, 36 Pac. 303.

Illinois. — Palmer *v.* Richardson, 70 Ill. 544.

Iowa. — Myers *v.* Wright, 44 Iowa 38.

Louisiana. — Womack *v.* Fudikar, 47 La. Ann. 33, 16 So. 645.

Maine. — Soule *v.* Winslow, 66 Me. 447.

Maryland. — Turner *v.* Walker, 3 Gill & J. 377, 22 Am. Dec. 329.

New Hampshire. — Eastman *v.* Keasor, 44 N. H. 518.

North Carolina. — Beal *v.* Robeson, 30 N. C. 276; Davenport *v.* Lynch, 51 N. C. 545.

Pennsylvania. — McClafferty *v.* Philp, 151 Pa. St. 86, 24 Atl. 1042.

Texas. — Hurlbut *v.* Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446; Ramsey *v.* Arrott, 64 Tex. 320; Scott Grocer Co. *v.* Kelly, 14 Tex. Civ. App. 136, 36 S. W. 140; Glasgow *v.* Owen, 69 Tex. 167, 6 S. W. 527; Young *v.* Jackson (Tex. Civ. App.), 29 S. W. 1111.

West Virginia. — Vinal *v.* Core, 18 W. Va. 1.

50. Skidmore *v.* Bricker, 77 Ill. 164; Murphy *v.* Larsen, *id.* 172.

51. Cuthbert *v.* Galloway, 35 Fed. 466; Brewer *v.* Jacobs, 22 Fed. 217; Lytton *v.* Baird, 95 Ind. 349; Flora *v.* Russell, 138 Ind. 153, 37 N. E. 593; Glasgow *v.* Owen (Tex.), 6 S. W. 527; Brown *v.* McBride, 24 Misc. 235, 52 N. Y. Supp. 620.

52. Lemay *v.* Williams, 32 Ark. 166; Brooks *v.* Bradford, 4 Colo. App. 410, 36 Pac. 303; Palmer *v.* Richardson, 70 Ill. 544; Womack *v.* Fudikar, 47 La. Ann. 33, 16 So. 645; Davidoff *v.* Wheeler & Wilson Mfg. Co. 16 Misc. 31, 37 N. Y. Supp. 661; Young *v.* Jackson (Tex. Civ. App.), 29 S. W. 1111.

"'When the prosecutor submits the facts to an attorney at law, who advises they are sufficient, and he acts thereon in good faith, such advice is often called probable cause, and is a defense to an action for malicious prosecution, but, in strictness, the taking the advice of counsel and acting thereon rebuts the inference of malice arising from the want of probable cause.'" Emerson *v.* Cochran, 111 Pa. St. 619, 4 Atl. 498.

How Far Conclusive. — "Advice of counsel, when fully informed, will not absolutely repel the presumption of malice, and the jury should be so instructed. Malice and the want of probable cause are questions of fact to be found by the jury from all the facts and circumstances, taken in connection with such advice. Jacobs *v.* Arrott, 64 Tex. 322." Glasgow *v.* Owen, 69 Tex. 167, 6 S. W. 527.

he might have known.[53] In order that the advice of counsel may be admissible it must appear that the question asked was one of law, or that some legal proposition was involved.[54] The same rule applies where defendant acted upon the advice of the district attorney,[55] and whether or not all the material facts were submitted is a question of fact for the jury.[56]

D. OTHER ADVICE. — Evidence that defendant acted upon the advice of one not an attorney at law is incompetent to disprove malice.[57]

Effect of Incomplete Disclosure. "The defense that defendant consulted counsel and acted upon his advice is entirely overcome by evidence that he [defendant] did not state the facts of his case to his counsel." Wild *v.* Odell, 56 Cal. 136.

The defendant, before complaint was made, went several times to the office of his attorney in regard to the case, and took his advice and followed it in prosecuting the plaintiff further before the court. *Held*, this was competent to go to the jury on the question of malice, and that its weight was for the jury. Hopkins *v.* McGillicuddy, 69 Me. 273.

Attorney Without Professional Sign. — "It is complained that the court permitted evidence as to whether there was a business sign or advertisement as a lawyer or an attorney at law at the office of Newton Sleeper. The witness, Sleeper, was the attorney to whom appellant went for advice as to whether or not he should begin the criminal action against appellee out of which grew the present suit. . . . It seems to us that evidence which tended to prove in any manner that the witness did not hold himself out to the public as a lawyer would be competent as tending to show that the defendant acted upon the advice of one who was not a lawyer." Atkinson *v.* Vancleave, 25 Ind. App. 508, 57 N. E. 731.

53. Cooper *v.* Utterbach, 37 Md. 282.

54. Laird *v.* Taylor, 66 Barb. (N. Y.) 139.

55. Thompson *v.* Lumley, 50 How. Pr. (N. Y.) 105.

56. Johnson *v.* Miller, 63 Iowa 529, 17 N. W. 34, 50 Am. Rep. 758.

57. McCullough *v.* Rice, 59 Ind. 580; Beal *v.* Robeson, 30 N. C. 276.

"The law wisely requires that a party who has instituted a groundless suit against another should show that he acted upon the advice of a person who by his professional training and experience and as an officer of the court may be reasonably supposed to be competent to give safe and prudent counsel on which a party may act honestly and in good faith, although to the injury of another. But it would open the door to great abuses of legal process if shelter and protection from the consequences of an unfounded prosecution could be obtained by proof that a party acted on the irresponsible advice of one who could not be presumed to have better means of judgment of the rights and duties of the prosecutor on a given state of facts than the prosecutor himself." Olmstead *v.* Partridge, 16 Gray (Mass.) 381.

Advice of Justice of Peace. — Burgett *v.* Burgett, 43 Ind. 78; Straus *v.* Young, 36 Md. 246; Chapman *v.* Dunn, 56 Mich. 31, 22 N. W. 101; Brobst *v.* Ruff, 100 Pa. St. 91; Gee *v.* Culver (Or.), 6 Pac. 775. *Contra.* Sutton *v.* McConnell, 46 Wis. 269, 50 N. W. 414.

"The fact that he made a full statement of the transaction to the magistrate, to obtain his views of the guilt of the party to be charged in the prosecution, before making the affidavit, tends to show that he proceeded, if not from a sense of duty only, with some degree, at least, of conviction of the truth of the charge preferred; and this conviction may have been so far strengthened by the opinion expressed by the magistrate that he instituted the prosecution in the belief that the charge was true and would

4. Result of Prosecution. — Neither the acquittal of accused,[58] nor a voluntary dismissal of the prosecution by the prosecutor,[59] raises an inference of malice. A committal or binding over under the prosecution alleged to be malicious has no weight to negative malice.[60]

5. Evidence Admissible on Part of Plaintiff. — For the purpose of establishing malice it is competent for plaintiff to show that no crime had been committed by him, and defendant knew it.[61] Evidence of any fact tending to prove malice is generally admissible;[62]

be sustained." White *v.* Tucker, 16 Ohio St. 468.

58. McBean *v.* Ritchie, 18 Ill. 114; Campbell *v.* Threlkeld, 2 Dana (Ky.) 425; Staub *v.* Van Benthuysen, 36 La. Ann. 467; Leyser *v.* Field, 5 N. M. 356, 23 Pac. 173.

The fact that an order of arrest is vacated is not evidence of malice. Sheahan *v.* National S. S. Co., 66 Hun 48, 20 N. Y. Supp. 740.

Contra. — Sappington *v.* Watson, 50 Mo. 83, to the effect that the dismissal was evidence of want of probable cause, and that from the want of probable cause malice may be inferred.

59. Joiner *v.* Ocean S. S. Co., 86 Ga. 238, 12 S. E. 361.

Where the first charge is dismissed by the examining magistrate for want of jurisdiction, and the second one is *nolle prosed* with the consent of the prosecutor on the advice of counsel that the second case is not within the jurisdiction of the court, no inference of malice is raised. McClafferty *v.* Philp, 151 Pa. St. 86, 24 Atl. 1042.

60. "The fact that there was a committal or binding over under the prosecution alleged to be malicious is an important matter of defense, but such committal or binding over does not negative the alleged malice of the prosecutor, but only the want of probable cause. A committal or binding over, under a prosecution for a criminal offense, is not an adjudication upon the motive of the prosecutor, but only the want of probable cause." Lewton *v.* Hower, 35 Fla. 58, 16 So. 616. See also Ganea *v.* Southern Pac. R. Co., 51 Cal. 140.

61. In Casebeer *v.* Rice, 18 Neb. 203, 24 N. W. 693, the court says: "It is next insisted that the court erred in permitting defendants in error to testify as to their guilt or innocence of the offense as charged in the criminal complaint. . . . But we are not prepared to say that, in a case like the one at bar, the investigation was not proper, even if it had been resisted by plaintiffs in error. The proof shows that the plaintiffs in error, at the time of filing the complaint, . . . had full knowledge of the real facts constituting the alleged crime. It was competent for defendants in error, upon their theory of the case, to show, if they could, that no crime had been committed by them, and that plaintiffs in error knew that fact. This, if true — and of that the jury were the sole judges — would tend to show a want of probable cause, and that the prosecution was malicious." See also Long *v.* Rogers, 17 Ala. 540.

62. Lyon *v.* Hancock, 35 Cal. 372. Smith *v.* Hyndman, 10 Cush. (Mass.) 554.

Defendant charged plaintiff with stealing his check-reins, knowing that it was not possible plaintiff had stolen them. Defendant called twice on the justice to get process for the recovery of the reins, at the time of the first visit stating that he was satisfied they were not stolen by the plaintiff. At the time of the second visit, and on the same day, he swore to the belief that plaintiff stole his property. *Held,* "This . . . made it necessary for the defendant to disclose whatever information he may have acquired intermediate to the first and second applications for process, which induced him to change his opinion. But no additional facts tending to show the plaintiff's guilt were discovered. The only new light he had obtained was the advice of

evidence of express malice is admissible,[63] and plaintiff may testify directly as to his motive in doing the alleged wrongful act.[64] Statements made by defendant are proper to be considered on the question of malice[65] and the value of the property involved is proper matter for consideration in determining the animus of defendant in filing the information.[66] The manner of plaintiff's arrest has been held competent.[67]

6. Motive and Feeling. — Defendant may testify to his belief in the guilt of plaintiff,[68] but plaintiff cannot testify to the motive of defendant in instituting the prosecution.[69] Evidence of hostility on the part of defendant toward plaintiff before instituting the prosecution is admissible,[70] and if connected with the matter in controversy

counsel having no personal knowledge of the matter, and whose advice was given on the facts stated to him by defendant. Aside from the advice of counsel there could be no room for doubt but that the charge of larceny was malicious. It was made with full knowledge that the plaintiff not only was not, but so far as defendant then knew, could not have been, guilty of taking the property." Laird *v.* Taylor, 66 Barb. (N. Y.) 139.

Acts Showing Zeal. — "Any acts or declarations of the defendant tending to show zeal or persistency in the prosecution, or a purpose to vex or oppress the plaintiff, are competent evidence. The motives which influence the prosecution may be inferred from subsequent conduct." Marks *v.* Hastings, 101 Ala. 165, 13 So. 297.

63. Levy *v.* Brannan, 39 Cal. 485; Murphy *v.* Hobbs, 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366; Humphries *v.* Parker, 52 Me. 502; Smith *v.* Hyndman, 10 Cush. (Mass.) 554; Grant *v.* Denel, 3 Rob. (La.) 17, 38 Am. Dec. 228; Willis *v.* Knox, 5 Rich. (S. C.) 474.

64. Parker *v.* Parker, 102 Iowa 500, 71 N. W. 421.

65. Woodworth *v.* Mills, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135. Plaintiff's furniture was illegally attached by defendant, and evidence was offered at the trial for malicious prosecution founded on such attachment proceeding that the defendant had said after the levy, and upon being told that the attachment was illegal, "They would not stay without their furniture; they would come around and settle." *Held* admissible to show malice. Walkup *v.* Pickering, 176 Mass. 174, 57 N. E. 364.

66. Parker *v.* Parker, 102 Iowa 500, 71 N. W. 421; Olmstead *v.* Partridge, 16 Gray (Mass.) 381.

Larceny. — Where plaintiff was charged with the larceny of a water wheel of the value of $300, to establish malice it is competent to show that the wheel is of a value of from $2 to $3. Woodworth *v.* Mills, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135.

67. Jeremy *v.* St. Paul Boom Co., 84 Minn. 516, 88 N. W. 13.

68. Spalding *v.* Lowe, 56 Mich. 366, 23 N. W. 46; Sparling *v.* Conway, 75 Mo. 510; White *v.* Tucker, 16 Ohio St. 468; Turner *v.* O'Brien, 5 Neb. 542; McKown *v.* Hunter, 30 N. Y. 625; Greer *v.* Whitfield, 4 Lea (Tenn.) 85.

69. "In the case at bar the witness was asked in substance to state whether the respondent had any other motive or reason to procure the issuance of the writ than a desire to collect the debt. This was asking for the opinion of the witness as to the motive of another individual, and yet it does not appear from the record that the respondent ever communicated his motive to the witness, and therefore the witness could simply draw his conclusion from the facts and circumstances known to him, and thus invade the province of the jury, besides being liable to give an erroneous conclusion, through bias and prejudice, being an interested witness." Hamer *v.* First Nat. Bank, 9 Utah 215, 33 Pac. 941.

70. Holden *v.* Merritt, 92 Iowa 707, 61 N. W. 390.

"Plaintiff had a right not to leave

it is admissible, if subsequent to the commencement of the action.[71]

7. Proceedings in Former Action. — Any proceedings in the former action are competent on the issue of malice.[72]

8. Evidence Admissible on Part of Defendant. — Evidence showing that plaintiff was generally reputed to be guilty of acts similar to the one with which he was charged,[73] or the particular one with which he was charged,[74] is competent to disprove malice. Reports of suspicious circumstances[75] are competent for that purpose.

9. Defendant's Own Testimony. — It is competent to inquire of defendant what his intention or motive was in commencing the alleged malicious prosecution.[76]

the question of malice to inference, and accordingly offered evidence of express malice. To show this she introduced testimony as to the relations of the parties, feelings of hostility and enmity entertained by defendant toward plaintiff, his acts, conduct and declarations, all of which were proper to show the presence or absence of malice in making the arrest." Merchant *v.* Pielke, 10 N. D. 48, 84 N. W. 574.

Conversation. — "A witness for plaintiff was permitted to testify, against defendant's objection, to a conversation had with defendant sometime before the prosecution was instituted, in which defendant declared that he intended to assist another in a law suit against such person and plaintiff; that he believed that plaintiff was wronging his adversary, and that he believed that plaintiff was a rascal. . . . The evidence in question tends to show hostility and unfriendly feeling entertained by defendant toward plaintiff, which it would be proper for the jury to consider in determining the *animus* of defendant in instituting the prosecution. The court did not err in admitting the evidence." Bruington *v.* Wingate, 55 Iowa 140, 7 N. W. 478.

71. "The plaintiff was allowed to show upon the trial exhibition of feeling on the part of defendant after suit was brought. This was objected to. We think this was proper, as having some tendency to show motive, if connected with the matter in controversy, though not without it was connected." Thurston *v.* Wright, 77 Mich. 96, 43 N. W. 860. See also Marks *v.* Hastings, 101 Ala. 165, 13 So. 297.

72. Dreux *v.* Domec, 18 Cal. 83; Thurston *v.* Wright, 77 Mich. 96, 43 N. W. 860; Reynolds *v.* Haywood, 77 Hun 131, 28 N. Y. Supp. 467.

73. Barron *v.* Mason, 31 Vt. 189.

74. Ammerman *v.* Crosby, 26 Ind. 451; Bacon *v.* Towne, 4 Cush. (Mass.) 217.

"It is incumbent upon the plaintiff to prove the existence of malice in fact to the satisfaction of the jury. And, on the other hand, the existence of malice does not establish want of probable cause. The defendant then is at liberty upon his plea of not guilty to offer any evidence which fairly tends to show either that there was probable cause for the prosecution which he commenced, or that in what he did he was acting honestly and without malice. Does the fact, if it exists, that it was the common report in the town where the parties lived that the plaintiff was guilty of the offense before the defendant, having knowledge thereof, instituted the prosecution, have any bearing upon either of these points? We think it was competent upon both, though not, perhaps, of the highest importance." Pullen *v.* Glidden, 68 Me. 559.

75. Hall *v.* Kehoe, 54 Hun 638, 8 N. Y. Supp. 176.

In an action for malicious prosecution to rebut malice it is competent to show that a clerk of plaintiff informed defendant of plaintiff's business and financial affairs and his efforts to borrow money. Le Clear *v.* Perkins, 103 Mich. 131, 61 N. W. 357, 26 L. R. A. 627. See Campbell *v.* Threlkeld, 2 Dana (Ky.) 425.

76. *District of Columbia.* — Coleman *v.* Heurich, 2 Mack. 189.

III. PRESUMPTIONS.

1. Conclusive of Probable Cause. — Generally. — Where it is admitted by the pleadings that the accused was convicted of the offense charged, and no proof is offered showing upon what evidence the conviction was had, a conclusive presumption of probable cause is raised.[77] The verdict and the judgment of conviction are, as a general rule, held to be conclusive of the existence of probable cause,[78] even though the case is shown to have been reversed on appeal.[79] Some states have adopted the rule that when the defendant sets up that the conviction was obtained by fraud or other illegal methods the record of conviction is no longer conclusive.[80]

Indiana. — Heap *v.* Parrish, 104 Ind. 36, 3 N. E. 549.

Missouri. — Vansickle *v.* Brown, 68 Mo. 627.

Nebraska. — Turner *v.* O'Brien, 5 Neb. 542.

New York. — McCormack *v.* Perry, 47 Hun 71; Schwarting *v.* Van Wie New York Grocery Co., 60 App. Div. 475, 69 N. Y. Supp. 978.

Tennessee. — Greer *v.* Whitfield, 4 Lea 85.

Wisconsin. — Sherburne *v.* Rodman, 51 Wis. 474, 8 N. W. 414.

"The better rule, in our judgment, and the one supported by the weight of modern authority, is this: Whenever the motive, belief or intention of any person is a material fact to be proved under the issue on trial, it is competent to prove it by the direct testimony of such person, whether he happens to be a party to the action or not." Garrett *v.* Mannheimer, 24 Minn. 193, *quoting* Berkey *v.* Judd, 22 Minn. 287.

77. Bowman *v.* Brown, 52 Iowa 437, 3 N. W. 609.

78. *Indiana.* — Adams *v.* Bicknell, 126 Ind. 210, 25 N. E. 804.

Maine. — Waltham *v.* Gowen, 14 Me. 362; Payson *v.* Casewell, 22 Me. 212; Severance *v.* Judkins, 73 Me. 376.

Massachusetts. — Parker *v.* Farley, 10 Cush. 279; Whitney *v.* Peckham, 15 Mass. 243; Cloon *v.* Gerry, 13 Gray 201; Parker *v.* Huntington, 7 Gray 36, 66 Am. Dec. 455; Dennehey *v.* Woodsum, 100 Mass. 195.

Michigan. — Labar *v.* Crane, 49 Mich. 561, 14 N. W. 495; Phillips *v.* Kalamazoo, 53 Mich. 33, 18 N. W. 547.

Nebraska. — Murphy *v.* Ernest, 46 Neb. 1, 64 N. W. 353.

New York. — Oppenheimer *v.* Manhattan R. Co., 63 Hun 633, 18 N. Y. Supp. 411.

North Carolina. — Griffis *v.* Sellars, 19 N. C. 492, 31 Am. Dec. 422; Griffis *v.* Sellars, 20 N. C. 315.

Virginia. — Womack *v.* Circle, 32 Gratt. 324.

Wisconsin. — Lawrence *v.* Cleary, 88 Wis. 473, 60 N. W. 793.

79. Morrow *v.* Wheeler & Wilson Mfg. Co., 165 Mass. 349, 43 N. E. 105; Phillips *v.* Kalamazoo, 53 Mich. 33, 18 N. W. 547; Griffis *v.* Sellars, 19 N. C. 492, 31 Am. Dec. 422; Griffis *v.* Sellars, 20 N. C. 315; Womack *v.* Circle, 32 Gratt. (Va.) 324. *Contra.* — Labar *v.* Crane, 49 Mich. 561, 14 N. W. 495.

Reason for Rule. — Plaintiff had been indicted at the instance of defendant, had been tried before a jury, convicted, sentenced and imprisoned. He offered to prove on the trial for malicious prosecution that the judgment against him was reversed, and that defendant had prosecuted him maliciously and without probable cause. The evidence was rejected, the appellate court holding the cause must have been such that the judge who tried the cause, and the jury, believed him guilty in law, and as they erred as to law the defendant was excused from participating in that error; their judgment, although made under error of law, showing there was probable cause for the charge. Miller *v.* Deere, 2 Abb. Pr. (N. Y.) 1.

80. Sharpe *v.* Johnson, 76 Mo. 660; Johnson *v.* Girdwood, 7 Misc. 651, 28 N. Y. Supp. 151; *ib.* 143 N.

2. Prima Facie Presumption of Probable Cause. — A. Generally. Plaintiff's conviction by a petit jury is *prima facie* evidence of probable cause, notwithstanding the granting of a new trial and a subsequent dismissal of the prosecution;[81] and two trials of the accused, each resulting in a hung jury, have been held to raise presumption of probable cause.[82]

B. Committing at Preliminary Hearing. — That a magistrate committed or bound accused in a recognizance to appear at court and answer to the charge is sufficient evidence that the prosecution was with probable cause to raise a *prima facie* presumption thereof.[83]

C. Indictment by Grand Jury. — The finding of a true bill against accused by the grand jury raises a *prima facie* presumption of the existence of probable cause.[84]

Y. 660, 39 N. E. 21; Maynard *v.* Sigman, 65 Neb. 590, 91 N. W. 576; Nehr *v.* Dobbs, 47 Neb. 863, 66 N. W. 864.

On appeal the ground for objection was based by defendant's counsel upon the premises that as plaintiff was convicted by the justice the record of conviction was conclusive to establish probable cause. *Held*, the conviction was evidence of probable cause, which could be contradicted by proof showing that the judgment was based on false proof and was without foundation in law. The judgment of conviction was *prima facie* evidence, and if uncontradicted would establish probable cause. Olson *v.* Neal, 63 Iowa 214, 18 N. W. 863.

81. Knight *v.* International & G. N. R. Co., 61 Fed. 87; Goodrich *v.* Warner, 21 Conn. 432; Bowman *v.* Brown, 32 Iowa 437, 3 N. W. 609; Johnson *v.* Miller, 63 Iowa 529, 17 N. W. 34, 50 Am. Rep. 758. *Contra.* Richter *v.* Koster, 45 Ind. 440.

82. Disagreement of Jury. — "In Smith *v.* McDonald, 3 Espinasse 7, it is said that if the evidence on the trial of the criminal charge is such as to cause the jury to hesitate as to an acquittal, it is evidence of probable cause. In the case at bar the jury were unable to agree as to the guilt or innocence of defendant. It followed, of course, that the jury, or some of them, must have believed the plaintiff to be guilty. The fact that he was acquitted by another jury cannot affect the result which must necessarily follow because the first jury failed to acquit. We think the evidence offered was admissible because it tended to show probable cause. It was not conclusive, and like any other *prima facie* evidence was subject to be explained. The question is not whether the plaintiff was guilty, but whether the defendants had reasonable cause so to believe. If the finding of an indictment is evidence of probable cause, . . . it seems to us the inability of the jury to agree must have the same effect." Johnson *v.* Muller, 63 Iowa 529, 17 N. W. 34, 50 Am. Rep. 758; Kaye *v.* Kean, 18 B. Mon. (Ky.) 839.

83. *California.* — Diemer *v.* Herber, 75 Cal. 287, 17 Pac. 205. See also Ganea *v.* Southern Pac. R. Co., 51 Cal. 140.

Indiana. — Louisville N. A. & C. R. Co. *v.* Hendricks, 13 Ind. App. 10, 40 N. E. 82.

Iowa. — Ritchey *v.* Davis, 11 Iowa 124; Arnold *v.* Moses, 48 Iowa 694; Moffatt *v.* Fisher, 47 Iowa 473; Flackler *v.* Novak, 94 Iowa 634, 63 N. W. 348.

Kansas. — Ross *v.* Hixon, 46 Kan. 550, 26 Pac. 955, 12 L. R. A. 760.

Kentucky. — Dean *v.* Noel, 24 Ky. L. Rep. 969, 70 S. W. 406.

Massachusetts. — Bacon *v.* Towne, 4 Cush. 217.

Michigan. — Spalding *v.* Lowe, 56 Mich. 366, 23 N. W. 46.

Nebraska. — Bechel *v.* Pacific Exp. Co., 65 Neb. 826, 91 N. W. 853.

84. Where Indictment Is Procured by Perjury. — "It was insisted that the binding over by the justice of the peace and subsequent indictment by the grand jury showed probable cause in themselves, but

D. Ignoring by Grand Jury. — The refusal by the grand jury to find a true bill raises a *prima facie* presumption of want of probable cause.[85] But where the defendant may appear before a grand jury with his witnesses, and its deliberations are not merely an examination of the case for the prosecution, the ignoring of a charge by the grand jury has no effect as evidence of a want of probable cause.[86]

E. Committal by Magistrate and Ignoring by Grand Jury. Where there has been a committal by the magistrate and the grand jury refuses to find a true bill, one presumption rebuts the other so

whatever force there is in the proposition as a general one, there is none in a case like this, where the whole proceedings were founded upon the acts and testimony of the defendants, which were alleged to have been malicious and false, and this was the very issue tried. Certainly the defendants should not be allowed to avoid responsibility upon such grounds if the very proceedings set up in defense were based and founded upon their own perjured testimony, as could have been nothing less under the circumstances of this case." Jones *v.* Jenkins, 3 Wash. 17, 27 Pac. 1022.

Waiver of Examination, Indictment, Long Deliberation of Jury and Acquittal. — Defendant's counsel requested the court to charge that the fact that the police magistrate entertained the complaint in the criminal prosecution, and issued a warrant for plaintiff's apprehension; that the plaintiff waived a preliminary examination in the police court; that he was subsequently indicted by the grand jury; that on trial of the indictment the question of plaintiff's guilt was submitted to a jury; and that the jury deliberated some time before arriving at a verdict of plaintiff's acquittal, constituted conclusive evidence of probable cause for plaintiff's prosecution, and on refusal so to charge exception was taken. As the matters mentioned however, at most were *prima facie* evidence of probable cause, the request was properly refused. Stevens *v.* Metropolitan L. Ins. Co., 2 Misc. 584, 21 N. Y. Supp. 1024.

85. Amos *v.* Atchison T. & S. F. R. Co., 114 Fed. 317; Potter *v.* Casterline, 41 N. J. L. 22; Barber *v.* Gould, 20 Hun (N. Y.) 446; Vinal *v.* Core, 18 W. Va. 1. *Contra.* — Magowan *v.* Rickey, 64 N. J. L. 402, 45 Atl. 804; Fulmer *v.* Harmon, 3 Strob. (S. C.) 576; Taylor *v.* Dominick, 36 S. C. 368, 15 S. E. 591.

Reason for Rule. — In Casperson *v.* Sproule, 39 Mo. 39, the court, *quoting* from Brant *v.* Higgins, 10 Mo. 728, said: "The verdict of a jury upon the trial of a civil action is essentially different from the discharge of a supposed criminal by the examining magistrate, or upon a bill of indictment ignored by a grand jury. Even in a criminal proceeding, the final acquittal of the accused can have but little weight as evidence of *probable cause* compared with an acquittal or discharge before the magistrate or grand jury. The magistrate and grand jury have the very question of *probable cause* to try; and the evidence on the side of the prosecution is alone examined, and the proceeding is entirely *ex parte*. Under such circumstances the refusal of the examining tribunal to hold the accused over till trial must necessarily be very persuasive evidence that the prosecution is groundless." The court further held that, adopting the reasoning of this opinion, return of no bill by the grand jury raises a presumption of the want of probable cause.

86. Ganea *v.* Southern Pac. R. Co., 51 Cal. 140.

"If you examine witnesses on both sides you do not confine your consideration to the probable grounds of charge, but engage completely in the trial of the cause; and your return must consequently be tantamount to a verdict of acquittal or condemnation. Therefore, if the grand jury, by reason of misconduct or procurement of anyone, hears the

as to render neither *prima facie* evidence of the existence or want of probable cause.[87]

F. Voluntary Dismissal. — The voluntary dismissal of an action is *prima facie* evidence of a want of probable cause in commencing the same.[88]

3. Conclusive of Malice. — One who acts wantonly, rashly or wickedly in charging another with crime is conclusively presumed to have acted maliciously.[89]

IV. BURDEN OF PROOF.

1. Commencement of Prosecution. — The burden is on plaintiff to prove that the original action or prosecution was commenced by defendant, or that he instigated its commencement[90] or its continuation.[91]

evidence both against and for the accused, their examination ceases to be confined to the question of probable cause, and their return as quoted above is 'tantamount to a verdict of acquittal or condemnation,' and in case of acquittal should not be held to be *prima facie* evidence of want of probable cause." Brady *v.* Stiltner, 40 W. Va. 289, 21 S. E. 729.

87. Brady *v.* Stiltner, 40 W. Va. 289, 21 S. E. 729; Miller *v.* Chicago, M. & St. P. R. Co., 41 Fed. 898.

88. Wetmore *v.* Mellinger (Iowa), 14 N. W. 722; Green *v.* Cochran, 43 Iowa 544; Emerson *v.* Cochran, 111 Pa. St. 619, 4 Atl. 498. *Contra.* — Smith *v.* Burrus, 106 Mo. 94, 16 S. W. 881, 27 Am. St. Rep. 329, 13 L. R. A. 59.

89. Travis *v.* Smith, 1 Pa. St. 234, 44 Am. Dec. 125; Vinal *v.* Core, 18 W. Va. 1. See also Laird *v.* Taylor, 66 Barb. (N. Y.) 139; Brooks *v.* Jones, 33 N. C. 260.

Inferred From Wantonness. While malice is to be proved, yet the jury may infer it from evidence satisfying them of wantonness and oppressive conduct on the part of the defendant. Tablier *v.* Alford, 12 Fed. 262.

Ejectment. — Defendant leased to plaintiff a dwelling house for one year for $480, at $40 a month; and was paid in advance $320; in the month of December following the date of contract (October 1st), he was paid $20 more, but notwithstanding these payments he sued plaintiff for installments of the rents, and had his furniture seized; he also sued to have plaintiff evicted, and obtained judgment against him ordering his eviction, but agreed not to execute the judgment, and to permit him to remain on the premises, if he would pay costs and the entire rent, except $40 thereof, which plaintiff would have done and offered to do, but defendant declined to produce the rent notes, and refused to accept subsequent offers of payment, and in violation of his agreement, and in spite of the willingness manifested by plaintiff to comply with the agreement to the very letter, defendant persisted in the execution of his writ of ejection until compelled to desist by writ of injunction. *Held*, there was such an entire lack of justifiable cause for defendant's acts and proceedings against plaintiff that the law would impute them to be promoted by malice. Deslonde *v.* O'Hern, 39 La. 14, 1 So. 286.

90. Wheeler *v.* Nesbitt, 24 How. (U. S.) 544; Rhodes *v.* Silvers, 1 Har. (Del.) 127; Wells *v.* Parsons, 3 Har. (Del.) 505; Hurd *v.* Shaw, 20 Ill. 354; Grant *v.* Dluel, 3 Rob. (La.) 17; Blass *v.* Gregor, 15 La. Ann. 421; Hurlbut *v.* Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446; Klug *v.* McPhee, 16 Colo. App. 39, 63 Pac. 709; Merchant *v.* Pielke, 10 N. D. 48, 84 N. W. 574.

91. Wetmore *v.* Mellinger (Iowa), 14 N. W. 722.

2. Want of Probable Cause. — General Rule. — In an action for malicious prosecution the burden is on plaintiff to clearly show by a preponderance of evidence that the prosecution was instituted without probable cause.[92] It will not be inferred from the mere fact of prosecution.[93]

92. *United States.* — Wheeler *v.* Nesbitt, 24 How. 544.

Alabama. — Lunsford *v.* Dietrich, 93 Ala. 565, 19 So. 308, 30 Am. St. Rep. 79.

Arkansas. — Foster *v.* Pitts, 63 Ark. 387, 38 S. W. 1114. See also Sexton *v.* Brock, 15 Ark. 345.

California. — Potter *v.* Seale, 8 Cal. 218; Levy *v.* Brannan, 39 Cal. 485; Lacey *v.* Porter, 103 Cal. 597, 37 Pac. 635; Grant *v.* Moore, 29 Cal. 644; Dwain *v.* Descalso, 66 Cal. 415, 5 Pac. 903; Jones *v.* Jones, 71 Cal. 89, 11 Pac. 817; Ganea *v.* Southern Pac. R. Co., 51 Cal. 140.

Delaware. — Wells *v.* Parsons, 3 Har. 505.

Georgia. — Sledge *v.* McLaren, 29 Ga. 64; Joiner *v.* Ocean S. S. Co., 86 Ga. 238, 12 S. E. 361.

Illinois. — Palmer *v.* Richardson, 70 Ill. 544; Davie *v.* Wisher, 72 Ill. 262; Calef *v.* Thomas, 81 Ill. 478; Ross *v.* Inns, 35 Ill. 487; Ames *v.* Snider, 69 Ill. 376.

Indiana. — Carey *v.* Sheets, 67 Ind. 375.

Iowa. — Center *v.* Spring, 2 Iowa 393; Barber *v.* Scott, 92 Iowa 52, 60 N. W. 497; Hidy *v.* Murray, 101 Iowa 65, 69 N. W. 1138.

Kansas. — Wright *v.* Hayter, 5 Kan. App. 638, 47 Pac. 546.

Kentucky. — Lancaster *v.* Langston, 18 Ky. L. Rep. 299, 36 S. W. 521.

Louisiana. — Digard *v.* Michaud, 9 Rob. 387; Mosley *v.* Yearwood, 48 La. Ann. 334, 19 So. 274; Monroe *v.* H. Weston Lumb. Co., 50 La. Ann. 142, 23 So. 247.

Maine. — Morton *v.* Young, 55 Me. 24, 92 Am. Dec. 565.

Massachusetts. — Brigham *v.* Aldrich, 105 Mass. 212; Stone *v.* Crocker, 24 Pick. 81.

Michigan. — Hamilton *v.* Smith, 39 Mich. 222.

Minnesota. — Burton *v.* St. Paul M. & M. R. Co., 33 Minn. 189, 22 N. W. 300; Olson *v.* Tvete, 46 Minn. 225, 48 N. W. 914.

Missouri. — Matlick *v.* Crump, 62 Mo. App. 21.

Nebraska. — Tucker *v.* Cannon, 32 Neb. 444, 49 N. W. 435.

Nevada. — Cassinelli *v.* Cassinelli, 24 Nev. 182, 51 Pac. 252.

New York. — Young *v.* Lyall, 23 N. Y. St. 215, 5 N. Y. Supp. 11; Kutner *v.* Fargo, 34 App. Div. 317, 54 N. Y. Supp. 332; Shipman *v.* Learn, 92 Hun 558, 36 N. Y. Supp. 969; Gorton *v.* DeAngelis, 6 Wend. 418; Thompson *v.* Lumley, 50 How. Pr. 105.

North Carolina. — Johnson *v.* Lance, 29 N. C. 448.

Pennsylvania. — Beach *v.* Wheeler, 30 Pa. St. 69; Sutton *v.* Anderson, 103 Pa. St. 151; Walter *v.* Sample, 25 Pa. St. 275.

Texas. — Griffin *v.* Chubb, 7 Tex. 603, 58 Am. Dec. 85.

Virginia. — Scott *v.* Shelor, 28 Gratt. 891.

West Virginia. — Vinal *v.* Core, 18 W. Va. 1; Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

Wisconsin. — Spain *v.* Howe, 25 Wis. 625; Messman *v.* Shlenfeldt, 89 Wis. 585, 62 N. W. 522; Cullen *v.* Hanisch, 114 Wis. 24, 89 N. W. 900.

93. Monroe *v.* H. Weston Lumb. Co., 50 La. Ann. 142, 23 S. W. 247.

The fact that plaintiff was acquitted or the prosecution abandoned is not sufficient proof to sustain an allegation of probable cause. Lancaster *v.* Langston, 18 Ky. L. Rep. 299, 36 S. W. 521.

Rule Stated. — To support an action for malicious criminal prosecution the plaintiff must prove, in the first place, the fact of prosecution, and that the defendant was himself the prosecutor, or that he instigated its commencement, and that it finally terminated in his acquittal. He must also prove that the charge preferred against him was unfounded, and that it was made without reasonable or probable cause, and that the defendant in making or instigating it was actuated by malice. . . . The bur-

3. Shifting the Burden of Proof for Probable Cause. — A. In Civil Actions. — The voluntary dismissal of a civil action casts upon the defendant the burden of showing probable cause,[94] but not where the grounds for the action have been admitted by plaintiff.[95]

B. In Criminal Actions. — Discharge by Committing Magistrate. — The discharge of the plaintiff by the committing magistrate is *prima facie* evidence of the want of probable cause, and the burden of proof is shifted to the defendant.[96]

den of proof in the first instance is upon the plaintiff to make out his case, and if he fails to do so in any one of these particulars the defendant has no occasion to offer any evidence in his defense." Wheeler *v.* Nesbitt, 24 How. (U. S.) 544. See also Hurlbut *v.* Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446, for general rule.

Acquittal Without Delay. — Plaintiff is not bound to prove that he was acquitted by the jury promptly, without hesitation, delay or deliberation. Bacon *v.* Towne, 4 Cush. (Mass.) 217.

General Traverse. — Appellee affirmatively pleaded facts constituting probable cause and a denial of want of probable cause, and admitted the release and discharge of appellant by the examining magistrate. *Held*, such facts amounted to a general traverse, and the burden of proof remained on plaintiff. Lucas *v.* Hunt, 91 Ky. 279, 15 S. W. 781.

Prosecution, Malice and Want of Probable Cause. — Damage. — To maintain an action for malicious prosecution the plaintiff must prove (1) that he has been prosecuted by the defendant, either criminally or in a civil suit, and the prosecution is at an end; (2) that it was instituted maliciously and without probable cause, and (3) that he has thereby sustained damage. Blass *v.* Gregor, 15 La. Ann. 421.

To Sustain an Action for Malicious Attachment of property it is necessary to prove want of probable cause, malice and damage to the plaintiff from the issuing of the attachment. Jones *v.* Fruin, 26 Neb. 76, 42 N. W. 283.

94. Green *v.* Cochran, 43 Iowa 544; Wetmore *v.* Mellinger (Iowa), 14 N. W. 722; Burhans *v.* Sanford, 19 Wend. (N. Y.) 417. *Contra.* — Smith *v.* Burrus, 106 Mo. 94, 16 S. W. 881, 27 Am. St. Rep. 329, 13 L. R. A. 59.

95. Wise *v.* Nichols, 63 Mo. App. 141.

Mistake in Entering Judgment. It is competent for defendant to show that a judgment was entered by inadvertence or mistake, where plaintiff relies upon a non-prosecution or a discontinuance of the proceeding complained of. Roberts *v.* Bayles, 1 Sandf. (N. Y.) 47.

96. Brown *v.* Vittur, 47 La. Ann. 607, 17 So. 193; Frost *v.* Holland, 75 Me. 108; Sappington *v.* Watson, 50 Mo. 83; Sharpe *v.* Johnson, 76 Mo. 660; Miles *v.* Walker, 66 Neb. 738, 92 N. W. 1014; Bostick *v.* Rutherford, 11 N. C. 83; Vinal *v.* Core, 18 W. Va. 1. *Contra.* — Israel *v.* Brooks, 23 Ill. 526.

While acquittal by the examining magistrate is very persuasive evidence of the want of probable cause it does not establish it *per se*. Christian *v.* Hanna, 58 Mo. App. 37.

"We think the authorities preponderate in favor of the introduction of the judgment of discharge, both as evidence that the proceedings were ended, and as *prima facie* evidence of a want of probable cause. . . . We must hold, therefore, that the above instruction of the court to the jury that 'the judgment of the justice discharging the plaintiff on the examination is *prima facie* evidence of want of probable cause,' was correct." Bigelow *v.* Sickles, 80 Wis. 98, 49 N. W. 106, 27 Am. St. Rep. 25.

Reason for Rule. — "Whether there be probable cause for the prosecution must depend on all the circumstances of the case; but that which indicates its absence most strongly is the discharge by the

4. Burden of Proof of Malice. — The burden of proving malice is on plaintiff,[97] and the proof must be clear and by a preponderance of evidence.[98] The plaintiff must prove that the conduct of the defendant was not such as to lead to the inference that the prosecu-

magistrates after a full and fair examination of the evidence. This discharge proves a presumption in favor of the plaintiff's innocence; for until it took place it could not be inferred that the charge against him was without probable cause. Hence the necessity of always stating in the declaration that the plaintiff had been discharged from the prosecution, and when that is proved, as it always must be, it certainly amounts to *prima facie* evidence of the want of probable cause." Johnston *v.* Martin, 7 N. C. 248.

Difference Between Discharge by Magistrate and Acquittal by Jury. "In case of a discharge the inference is that there is not probable cause to believe either the commission of the offense or the guilt of the party charged. In case of an acquittal on a trial by jury it is altogether different; there the guilt of the defendant must be established beyond all reasonable doubt. All the authorities agree that an acquittal by jury is not evidence of want of probable cause, and the same rule obtains where a defendant is discharged by a magistrate for want of prosecution." Chapman *v.* Dodd, 10 Minn. 350.

Under Statute it was provided that the costs of the preliminary hearing were to be paid by the prosecuting witness in the event of a dismissal by the examining magistrate unless he should find there was probable cause for the prosecution. The magistrate found there was probable cause, but dismissed the accused. *Held,* the dismissal raised a *prima facie* presumption of want of probable cause. Stubbs *v.* Mulholland, 168 Mo. 47, 67 S. W. 650. *Contra.* — Brady *v.* Stiltner, 40 W. Va. 289, 21 S. E. 729.

Discharged by United States Commissioner. — Where plaintiff was arrested on a warrant issued by a United States commissioner, and on an examination by such commissioner discharged, a *prima facie* presumption of the want of probable cause arose. Jones *v.* Finch, 84 Va. 204, 4 S. E. 342.

97. *United States.* — Wheeler *v.* Nesbitt, 24 How. 544.

Arkansas. — Foster *v.* Pitts, 63 Ark. 387, 38 S. W. 1114.

Delaware. — Rhodes *v.* Silvers, 1 Har. 127.

Illinois. — Wade *v.* Walden, 23 Ill. 369; Calef *v.* Thomas, 81 Ill. 478.

Iowa. — Barber *v.* Scott, 92 Iowa 52, 60 N. W. 497.

Kansas. — Wright *v.* Hayter, 5 Kan. App. 638, 47 Pac. 546.

Louisiana. — Blass *v.* Gregor, 15 La. Ann. 421; Maloney *v.* Doane, 15 La. 278, 35 Am. Dec. 204; Laville *v.* Biguenaud, 15 La. Ann. 605; Womack *v.* Fudickar, 47 La. 43, 16 So. 645.

Maryland. — Cecil *v.* Clarke, 17 Md. 508.

Michigan. — Le Clear *v.* Perkins, 103 Mich. 131, 61 N. W. 557, 26 L. R. A. 627.

Missouri. — Grant *v.* Reinhart, 33 Mo. App. 74; Christian *v.* Hanna, 58 Mo. App. 37; Finley *v.* St. Louis Refrigerator & Wooden Gutter Co., 99 Mo. 559, 13 S. W. 87; Matlick *v.* Crump, 62 Mo. App. 21.

New York. — Richardson *v.* Virtue, 2 Hun 208.

Pennsylvania. — Travis *v.* Smith, 1 Pa. St. 234, 44 Am. Dec. 125; Sutton *v.* Anderson, 103 Pa. St. 151.

South Carolina. — Horn *v.* Boon, 3 Strob. 307.

Texas. — Griffin *v.* Chubb, 7 Tex. 603, 58 Am. Dec. 85; Ramsey *v.* Arrott, 64 Tex. 320.

Vermont. — Driggs *v.* Burton, 44 Vt. 124.

Virginia. — Scott *v.* Shelor, 28 Gratt. 891.

West Virginia. — Vinal *v.* Core, 18 W. Va. 1.

98. Christian *v.* Hanna, 58 Mo. App. 37; Barber *v.* Scott, 92 Iowa 52, 60 N. W. 497; Maloney *v.* Doane, 15 La. 278, 35 Am. Dec. 204.

tion was undertaken from public motives.[99] It is sufficient if plaintiff thus proves that the defendant either commenced or continued the former proceeding maliciously.[1]

5. Termination of Former Proceeding. — The burden is on plaintiff to prove that the prosecution terminated in his favor;[2] but this rule does not apply to a case arising from obtaining a peace warrant.[3]

V. COMPETENCY AND RELEVANCY OF EVIDENCE UNDER PLEADINGS.

1. Under General Issue. — A. PROBABLE CAUSE. — The facts showing probable cause may be given in evidence under the general issue.[4]

B. FACTS SHOWING THE NON-EXISTENCE OF MALICE are admissible under the general issue.[5]

99. Cecil *v.* Clarke, 17 Md. 508.

1. Finley *v.* St. Louis Refrigerator & Wooden Gutter Co., 99 Mo. 559, 13 S. W. 87.

2. *United States.* — Wheeler *v.* Nesbitt, 24 How. 544.

California. — Grant *v.* Moore, 29 Cal. 644.

Delaware. — Rhodes *v.* Silvers, 1 Har. 127.

Illinois. — McBean *v.* Ritchie, 18 Ill. 114.

Indiana. — Lytton *v.* Baird, 95 Ind. 349.

Kentucky. — Wood *v.* Laycock, 3 Metc. 192.

Louisiana. — Davis *v.* Stuart, 47 La. Ann. 378, 16 So. 871; Blass *v.* Gregor, 15 La. Ann. 421.

North Carolina. — Hewit *v.* Wooten, 52 N. C. 182.

Wisconsin. — Pratt *v.* Page, 18 Wis. 335.

3. Hyde *v.* Greuch, 62 Md. 577.

4. Sheehee *v.* Resler, 21 Fed. Cas. No. 12,739, *affirmed* 1 Cranch C. C. 42; Brown *v.* Connelly, 5 Blackf. (Ind.) 390; Trogden *v.* Deckard, 45 Ind. 572; Harlan *v.* Jones, 16 Ind. App. 398, 45 N. E. 481; Folger *v.* Washburn, 137 Mass. 60; Brigham *v.* Aldrich, 105 Mass. 212; Steadman *v.* Keets, 129 Mich. 669, 89 N. W. 555; Kellogg *v.* Scheuerman, 18 Wash. 293, 51 Pac. 344. *Contra.* — Fant *v.* McDaniel, 1 Brev. (S. C.) 173, 2 Am. Dec. 660.

"A party is required to plead only the issuable facts which constitute his cause of action, and is not required to plead the evidence by which such facts are to be established. The issuable facts in this case were that the defendant had caused a prosecution against the plaintiff; that the action was at an end; that there was no probable cause for the prosecution; that it was instigated by malice; that the plaintiff had been damaged thereby. Griffin *v.* Chubb, 7 Tex. 603. The want of probable cause and malice were issuable facts, and not mere conclusions of law; and plaintiff was not required to go beyond the averment of these facts, and to allege the evidence by which he expected to establish them. In the case cited it is said: 'It is incumbent on the plaintiff to allege the want of probable cause and malice. The denial of these averments puts in issue the facts. It further devolves on the plaintiff to prove the truth of his averments. And when the issue has been thus formed, and the proofs adduced by the plaintiff which conduce to establish the issue on his side, no reason is perceived why the defendant may not maintain his side of the issue by the proof of any facts which go to rebut or repel the evidence introduced by the plaintiff, without specially pleading them.'" Sutor *v.* Wood, 76 Tex. 403, 13 S. W. 321.

5. Harlan *v.* Jones, 16 Ind. App. 398, 45 N. E. 481.

C. The Guilt of Plaintiff may be established under the general issue.[6]

D. Advice of Counsel. — In an action for malicious prosecution the defendant may, under a general denial, show that in setting the prosecution on foot he acted in good faith, on the advice of an attorney, after having made a full disclosure of all the material circumstances of which he had knowledge.[7]

E. In Mitigation of Damages. — Defendant may introduce circumstantial evidence, under the general issue, to prove in mitigation of damages that he was not actuated by malice.[8]

2. Under Pleadings in General. — A. Under General Allegation of Damages. — In an action for malicious prosecution, evidence is inadmissible, under a general allegation of damages, of injury resulting from plaintiff's inability, on account of sickness, caused by such prosecution, to perform a certain contract of employment;[9]

6. "In an action for malicious prosecution the right on the part of the defendant to show the guilt of the plaintiff seems generally to have been recognized as existing under the general issue. Whether it could be properly so held if the guilt consisted of facts *not known* to the prosecutor at the time the prosecution was commenced, we are not called upon to determine." Bruley *v.* Rose, 57 Iowa 651, 11 N. W. 629. See also Brigham *v.* Aldrich, 105 Mass. 212.

7. Maynard *v.* Sigman, 65 Neb. 590, 9 N. W. 576; Levy *v.* Brannan, 39 Cal. 485; Griffin *v.* Chubb, 7 Tex. 603, 58 Am. Dec. 85.

Reason for Rule. — "Evidence on behalf of the defendant that in instituting the previous prosecution he acted in good faith, under the advice of counsel, is competent under a general denial, because it tends to rebut the plaintiff's allegation of malice and want of probable cause. This is not a substantive fact in avoidance of the action; it does not admit and avoid facts alleged by the plaintiff, but disproves them." Folger *v.* Washburn, 137 Mass. 60.

"But that the facts that the respondent in good faith consulted competent counsel, disclosed all the circumstances, received the advice and acted upon it, believing it sound, were facts tending to show both want of malice and the existence of probable cause is apparent. The point of appellant's objection seems to be that in spite of these facts there may be no probable cause. Let this be admitted. The counsel who gives the advice may be mistaken, and the facts, as such, may not warrant prosecution. It by no means follows that the matter in regard to the advice of counsel does not tend to prove probable cause — still less that it does not tend to prove want of malice. . . . But again, one element of probable cause is the suspicion or belief of the defendant. The question is not as to the guilt of accused, but as to the facts as affecting the mind of a reasonable man. Now the evidence in regard to the advice of counsel may directly bear upon the question as to the grounds for suspicion or belief, and it cannot, therefore, be said that such evidence has no tendency to prove probable cause. . . . It was not essential, therefore, that the respondent should have pleaded this evidence." Sparding *v.* Conway, 6 Mo. App. 283, *affirmed* 75 Mo. 510.

8. Hitchcock *v.* North, 5 Rob. (La.) 328, 39 Am. Dec. 540.

9. "In the case at bar it did not necessarily follow that, because the plaintiff was arrested and prosecuted upon a charge of false pretenses, he would become ill, and thereby lose time from his business There was nothing in the complaint to apprise the defendant of the fact. Nor was there any averment to apprise the defendant that the plaintiff had a special contract with the insurance company, which he was compelled to

or of damages caused by such sickness;[10] but, to show mental anguish, evidence may be introduced to prove the condition of plaintiff's family.[11] Allegations that by reason of such prosecution plaintiff sustained special damages in the depreciation of the value of property levied on, and the expenditure of large sums of money in the action, and as general damages that his business was destroyed and his credit and reputation impaired, are broad enough to admit proof of all injuries to the matters alleged.[12]

B. Alleging Injury to Credit. — Where the declaration alleges an injury to plaintiff's credit it is competent to show that the creditors

surrender on account of the prosecution. It would be manifestly unfair to the defendant to require him to meet such evidence when it was not within the issues." Oldfather *v.* Zent, 14 Ind. App. 89, 41 N. E. 555. Damages arising from loss of boarders growing out of plaintiff's arrest cannot be proved unless specially pleaded. Horne *v.* Sullivan, 83 Ill. 30.

10. Oldfather *v.* Zent, 14 Ind. App. 89, 14 N. E. 555. See also Davis *v.* Seeley, 91 Iowa 583, 60 N. W. 183, 51 Am. St. Rep. 356.

11. "Mental pain and suffering is an element of actual or compensatory damages in this class of cases. Parkhurst *v.* Masteller, 57 Iowa 480, 10 N. W. 864. Whatever may, then, legitimately tend to show the character and extent of such pain and anguish is clearly admissible. It needs no argument to show that one's mental condition may, and generally will, be affected more or less by his immediate surroundings. If, as in this case, a man is arrested and charged with crime, and he has a family depending upon him for support, one of whom is sick and needing his care, it would be natural that such circumstances should tend to increase his mental anguish." Davis *v.* Seeley, 91 Iowa 583, 60 N. W. 183, 51 Am. St. Rep. 356.

Evidence was introduced over defendant's objection that plaintiff was, at the time of the arrest, living with his parents, and that his mother was in poor health. That when the sheriff informed her of his intention to arrest her son she fainted. *Held*, not to be error, as the principal basis of recovery in such actions is for mental suffering and distress, and if the arrest was made in the presence of friends and relatives, thereby causing him shame and humiliation, it was a proper matter for consideration as bearing upon the subject of mental pain, and that the fact of his mother fainting was competent proof of the same condition. Flam *v.* Lee, 116 Iowa 289, 90 N. W. 70.

12. Lawrence *v.* Hagerman, 56 Ill. 68, 8 Am. Rep. 674.

Plaintiff was a young lawyer who had been arrested at the instance of defendant on a charge of disorderly conduct while a passenger on one of defendant's cars. On the trial for malicious prosecution he was allowed to testify over objection that he had received about $200 in the three weeks prior to his arrest. The allegation of damages was as follows: "That by reason of the acts of defendant hereinbefore complained of this plaintiff was greatly injured in his health, credit and reputation, and was exposed to and suffered great pain, both of body and of mind, and was prevented from transacting and performing his necessary affairs and business in the said time required to be transacted; and this plaintiff has been damaged thereby in the sum of twenty-five thousand ($25,000) dollars." In ruling upon the objection the appellate court says: "It is to be observed that there is no allegation that the plaintiff suffered any injury in his business or profession, or that his earnings were in any wise reduced, as a consequence of the false imprisonment and malicious prosecution of which he complains." Judgment reversed. Evins *v.* Metropolitan St. R. Co., 47 App. Div. 511, 62 N. Y. Supp. 495.

refused any further credit;[13] and for defendant to show that plaintiff was not of good credit.[14]

C. Alleging Injury to Character. — The bad reputation of plaintiff may be shown by defendant in mitigation of damages where the declaration charges injury to character.[15]

D. Alleging Facts Constituting Probable Cause. — Where the plea sets out specifically facts and circumstances from which the existence of probable cause may be inferred, and denies malice, it is competent to show that counsel advised the prosecution.[16] An allegation of the non-existence of probable cause will admit evidence to overthrow the presumption of its existence arising from the fact that plaintiff was bound over by the committing magistrate,[17] but on a plea of probable cause plaintiff's general character cannot be given in evidence;[18] nor is evidence of specific acts of dishonesty admissible unless specifically pleaded.[19]

VI. DOCUMENTARY EVIDENCE.

1. Record. — A. General Rule. — The record of the court in which plaintiff was tried, showing his arrest, hearing and acquittal,[20] or that a civil suit terminated favorably to plaintiff, is admissible,[21] and if the action is against two defendants the complaint should not be rejected because signed by one defendant only.[22]

B. Containing Improper Matter. — The record containing improper matter for the jury's consideration may be admitted under an instruction to the jury to disregard such improper matter.[23]

13. Fine *v.* Navarre, 104 Mich. 93, 62 N. W. 142.

14. Finley *v.* St. Louis Refrigerator & Wooden Gutter Co., 99 Mo. 559, 13 S. W. 87.

15. O'Brien *v.* Frasier, 47 N. J. L. 349, 1 Atl. 465, 54 Am. Rep. 170.

16. Ventress *v.* Rosser, 73 Ga. 534.

17. Louisville N. A. & C. R. Co. *v.* Hendricks, 13 Ind. App. 10, 40 N. E. 82, 41 N. E. 14.

18. Gregory *v.* Thomas, 2 Bibb (Ky.) 286, 5 Am. Dec. 608.

19. Gregory *v.* Thomas, 2 Bibb (Ky.) 286, 5 Am. Dec. 608.

20. Mass *v.* Meire, 37 Iowa 97; Wright *v.* Fansler, 90 Ind. 492; Anderson *v.* Keller, 67 Ga. 58; Brainerd *v.* Brackett, 33 Me. 580; Metcalf *v.* Bockoven, 62 Neb. 877, 87 N. W. 1055; John *v.* Bridgman, 27 Ohio St. 22.

Premature Action. — Where the action for malicious prosecution is commenced before the termination of the prosecution complained of, the record is inadmissible for any purpose on the part of plaintiff. Feazle *v.* Simpson, 2 Ill. 30.

21. Magmer *v.* Renk, 65 Wis. 364, 27 N. W. 26.

Where the Termination Is Proved by Parol Evidence, and there is no objection interposed by defendant in the action for malicious prosecution, the proof is sufficient. The record is the best evidence, yet when a fact provable by writings is permitted to be proved by parol it is established. Louisville N. A. & C. R. Co. *v.* Hendricks, 13 Ind. App. 10, 40 N. E. 82, 41 N. E. 14.

22. Casebeer *v.* Drahoble, 13 Neb. 465, 14 N. W. 397.

23. "The transcript of the record in the trespass suit was correctly received in evidence. Before the plaintiff below could produce any evidence of malice it was incumbent on him to prove, by legal evidence, the institution of the trespass suit, his arrest in that suit, and the subsequent termination of the cause.

C. Copy of Record. — A copy of the record is competent to prove that the plaintiff was acquitted and that the defendant prosecuted.[24]

2. Affidavit and Warrant. — The affidavit made by the prosecuting witness is competent on behalf of plaintiff, and formerly on behalf of defendant also,[25] and the warrant issued thereon,[26] with the return indorsed upon it,[27] is admissible; and this though the warrant is technically defective.[28] The original warrant issued by the justice

This proof could only be made by the production of the record or a transcript. If this transcript had been rejected, the foundation of the plaintiff's action would have been gone, and he would have been under the necessity of submitting to a nonsuit. If the transcript contained any matter not pertinent to the issue on trial, the proper course would have been to have applied to the court below to have prevented the reading in evidence of the improper matter, or to instruct the jury to disregard it." Granger *v.* Warrington, 8 Ill. 299.

24. Sayles *v.* Briggs, 4 Metc. (Mass.) 421; Katterman *v.* Stitzer, 7 Watts (Pa.) 189; Olmstead *v.* Partridge, 16 Gray (Mass.) 381, lays down the rule that a certified copy of the records is the only proper way of proving the institution of the prosecution.

Omission of Clerk to Certify Correctly the transcript in the prior proceeding is immaterial, as the certificate is not evidence of the facts. Ward *v.* Sutor, 70 Tex. 343, 8 S. W. 51, 8 Am. St. Rep. 606.

25. Hooper *v.* Lee, 12 Ark. 779; Turpin *v.* Remy, 3 Blackf. (Ind.) 210; Collins *v.* Love, 7 Blackf. (Ind.) 416.

As Evidence for Defendant. — "It is well settled that in actions of this kind the oath of defendant is evidence for him. Moody *v.* Pender, 2 Hay 29; Swain *v.* Stafford, 3 Ired. 293. The good sense of the rule cannot be doubted, for, in many cases, the facts, which make out probable cause, are known to the prosecutor only, and to exclude his oath in relation to them would be to hand him over to the mercy of the person charged, whenever there happened not to be a conviction; and all who escaped the whipping post would turn around and bring an action for malicious prosecution." Johnson *v.* Chambers, 32 N. C. 287.

Insufficient Affidavit. — The appellee offered in evidence the appellant's affidavit on which the prosecution was founded, which was objected to on the ground that it did not charge a larceny, but a trespass merely, and therefore did not support the complaint. The objection was overruled. *Held*, "Whether or not this affidavit sufficiently charged the appellee with the crime of grand larceny is a question we need not decide in this case. It is clear that it was the appellant's intention to charge the appellee with the larceny of said cattle in and by said affidavit; and although it may have been informal and insufficient in law, yet the consequences to the appellee were precisely the same as they would have been if the affidavit had contained a formal, clear and sufficient charge of grand larceny. Upon the affidavit, a warrant was issued for the appellee's arrest, and he was arrested; and to him the scandal, vexation and expense of the prosecution were none the less, for the reason, if it existed, that the prosecution was founded upon an insufficient affidavit. Stancliff *v.* Palmeter, 18 Ind. 321." McCullough *v.* Rice, 59 Ind. 580.

That the original affidavits instead of copies were admitted is no objection. Conduit *v.* Dicken, 3 Blackf. (Ind.) 216.

26. Hooper *v.* Lee, 12 Ark. 779; Conduit *v.* Dicken, 3 Blackf. (Ind.) 216; Cooney *v.* Chase, 81 Mich. 203, 45 N. W. 833.

27. Hooper *v.* Lee, 12 Ark. 779.

28. Turpin *v.* Remy, 3 Blackf. (Ind.) 210; Womack *v.* Circle, 29 Gratt. (Va.) 192.

Discharge of Action for Defect. Defendant charged plaintiff with larceny of money, the complaint was found defective, and plaintiff discharged, and the warrant returned. The plaintiff then commenced this

on a charge of felony, with the acquittal of the person charged therein duly indorsed thereon, and signed by the justices who sat at the trial, is evidence of the acquittal.[29]

3. Indictment. — The original indictment in an action for malicious prosecution is admissible in evidence,[30] and such indictment may be authenticated by the verbal testimony of the clerk.[31] The indorsement on the indictment is competent evidence.[32]

4. Information. — It is not error to admit in evidence the information on which the warrant for the arrest of plaintiff was issued.[33]

5. Judgment. — That part of the judgment showing malice and want of probable cause is not admissible in evidence for the purpose of proving such elements in an action for malicious prosecution,[34]

action for malicious prosecution, and two days later defendant made another complaint for embezzlement and larceny against plaintiff, and his arrest followed. The admissibility of the recorder's docket entry, the warrant and complaint was disputed by defendant on the ground that the recorder, having been advised of all the facts, drew the first complaint and warrant, and that it was his fault that they were not in proper form, and that second complaint, warrant and docket entries were incompetent as having been made after the suit for malicious prosecution was instituted. *Held*, "No error. The first warrant was admissible as being the basis of the present action and the second as tending to show malice." Cooney *v.* Chase, 81 Mich. 203, 45 N. W. 833.

Warrants and Affidavits must be satisfactorily proved to have been lost before parol evidence of their contents is admissible. Whitehall *v.* Smith, 24 Ill. 166. See also Brown *v.* Randall, 36 Conn. 56.

29. Dougherty *v.* Dorsey, 4 Bibb (Ky.) 207.

30. Watts *v.* Clegg, 48 Ala. 561; Winemiller *v.* Thrash, 125 Ind. 353, 25 N. E. 350.

31. Watts *v.* Clegg, 48 Ala. 561.

32. Winemiller *v.* Thrash, 125 Ind. 353, 25 N. E. 350.

33. Mass *v.* Meire, 37 Iowa 97; Beihofer *v.* Leffert, 159 Pa. St. 365, 28 Atl. 217.

Where Admitted in Answer. "Exhibits A and B were the information filed with the justice, and the warrant issued thereon. There was no error in excluding these, because the answer admits filing the information, and that an arrest and trial followed." Sutton *v.* Thayer (Iowa), 84 N. W. 680.

34. Sweeney *v.* Perney, 40 Kan. 102, 19 Pac. 328. See also Bacon *v.* Towne, 4 Cush. (Mass.) 217.

"Over defendant's objection the court admitted in evidence the following judgment entered in the criminal proceeding: 'It appearing to the court that this prosecution was found at the instance of a private prosecutor, to-wit: Thomas J. Johnson, as shown by his own uncontradicted testimony, and the court being satisfied that the prosecution was instigated by malice and without probable cause, the costs herein are taxed to said Thomas J. Johnson, and the judgment rendered herein against him therefor, to which said Thomas J. Johnson excepts.' We have serious doubts of the admissibility of this evidence, in any view of the case." *Held* incompetent, as Johnson's name was not indorsed on the indictment as required by statute. McAllister *v.* Johnson, 108 Iowa 42, 78 N. W. 790.

Judgment in a Third Suit. Plaintiff was prosecuted for trespass on the lands of defendant, was acquitted and brought action for malicious prosecution. On the trial he offered in evidence a judgment against defendants for the recovery of the land alleged to have been trespassed upon. This evidence was admitted over the objection of defendants and assigned as error on appeal. *Held*, "The evidence was clearly competent as tending to show, not only the right of the appellee to

but it is competent to prove the acquittal of accused.[35] And the verdict and judgment are the best evidence that the prosecution is ended.[36]

6. Magistrate's Docket. — The docket of the magistrate who issued the warrant is admissible in so far as it contains those things required by law to be entered therein;[37] but unwarranted recitals therein are inadmissible.[38]

7. Transcript of Record. — A transcript of the record is competent evidence of recitations properly contained therein.[39]

8. Pleadings and Decree. — The pleadings and decree in former actions between the same parties, where the same facts were relied

the possession out of which arose the prosecution for which damages are asked in this action, but also to show malice and want of probable cause on the part of the appellant, in the prosecution." 'Keesling *v.* Doyle, 8 Ind. App. 43, 35 N. E. 126. See also Marshall *v.* Betner, 17 Ala. 832; Thomas *v.* Smith, 51 Mo. App. 605.

35. Judgment Entered Nunc Pro Tunc. — It was shown on the trial that the respondent was discharged by the circuit court prior to the time he commenced the action, but through the negligence of the clerk the judgment of discharge had not been entered. The judgment was subsequently entered, and plaintiff was permitted to use the judgment entry as evidence of his discharge before he commenced his action. Holmes *v.* Horger, 96 Mich. 408, 56 N. W. 3.

Parol Evidence of Acquittal is admissible where no record is kept, or entry made, or where the records are lost. In such cases the rule that the action of a court can be proved only by the record has no application, as it would deprive one party of his just rights and screen the other from the consequences of his illegal and wrongful acts. Brown *v.* Randall, 36 Conn. 56. But see Sayles *v.* Briggs, 4 Metc. (Mass.) 421.

Discharge on Habeas Corpus. Plaintiff was arrested on a charge of obtaining goods under false pretenses, and was discharged on a writ of *habeas corpus*. *Held*, that the discharge effectually put an end to the prosecution; that plaintiff could maintain his action for malicious prosecution; and that the record of his discharge on *habeas corpus* proceedings was admissible to show the termination of the prosecution in his favor. Zebley *v.* Storey, 117 Pa. St. 478, 12 Atl. 569.

36. Sutor *v.* Wood, 76 Tex. 403, 13 S. W. 321; Winn *v.* Peckham, 42 Wis. 493.

37. Cooney *v.* Chase, 81 Mich. 203, 45 N. W. 833; Fletcher *v.* Chicago & N. W. R. Co., 109 Mich. 363, 67 N. W. 330. *Contra.* — In Casey *v.* Sevatson, 30 Minn. 516, 16 N. W. 407, it was held that an entry in a justice's docket that the prosecution was malicious and without probable cause was made by the justice in conformity with a provision of § 158, ch. 65, Gen. Stat. 1878; that this provision was evidently framed for the sole purpose of relieving the public of costs by saddling them upon the complainant, through whose unjustifiable action they have been incurred. It could never have been intended that the certificate should have the effect of an adjudication in favor of the party complained of, and against the complainant, that the complaint was malicious and without probable cause, for first, the proceeding in which it is made is not between those parties, but as respects the complainant, purely *res inter alios*; and, second, it is not the result of any proceeding which can be called trial — as respects the complainant. The court erred in receiving the docket."

38. Fletcher *v.* Chicago & N. W. R. Co., 109 Mich. 363, 67 N. W. 330.

39. Sweeney *v.* Perney, 40 Kan. 102, 19 Pac. 328; Harper *v.* Harper, 49 W. Va. 661, 39 S. E. 661; Ward *v.* Sutor, 70 Tex. 343, 8 S. W. 51, 8 Am. St. Rep. 606. *Contra*, Katterman *v.* Stitzer, 7 Watts (Pa.) 189.

upon, are admissible on the question of probable cause,[40] but the rule is different where the former suit was between different parties.[41] The pleadings and judgment in the alleged malicious action are not admissible to show want of probable cause, but are admissible to show commencement and termination of the action.[42]

9. Special Findings by Jury. — Special findings by jury showing that the former proceedings were without probable cause are incompetent.[43]

10. Extra-Judicial Writings. — Newspaper articles which give publicity to the charge alleged to have been maliciously preferred are admissible to show injury to plaintiff's reputation.[44] A recorded contract of sale[45] or a deed[46] is admissible to show title where the accused was charged with interference with the property of another. In an action for malicious prosecution under a city ordinance, such ordinance is admissible;[47] and the rules of a water company delivered to its patrons have been held admissible to show notice to accused.[48]

40. Flackler *v.* Novak, 94 Iowa 634, 63 N. W. 348.

41. Clements *v.* Odorless Excavating Apparatus Co., 67 Md. 461, 605, 10 Atl. 442, 13 Atl. 632, 1 Am. St. Rep. 409.

42. McKenna *v.* Heinlen, 128 Cal. 97, 60 Pac. 668.

43. Obernalte *v.* Johnson, 36 Neb. 772, 55 N. W. 220.

Findings by Magistrate. — A finding by the justice at the preliminary hearing that the prosecution was with malice and without probable cause is incompetent. Farwell *v.* Laird, 58 Kan. 402, 49 Pac. 518.

44. Driggs *v.* Burton, 44 Vt. 124.

Reason for Rule. — "A plain, uncolored statement of such proceedings in a newspaper is a privileged publication, and not in itself a tort. Such a publication is a natural and probable consequence, and a direct consequence of the institution of the prosecution; and the fact that the prosecution resulted in such a publication may properly be shown to aid the jury in estimating the damages." Tiler *v.* Smith, 96 Mich. 347, 55 N. W. 999." Minneapolis Threshing Mach. Co. *v.* Regier, 51 Neb. 402, 70 N. W. 934.

Limits to the Admissibility of Newspaper Articles. — "Objection was made to the admission of a certain newspaper article upon the arrest of plaintiff and Hier. It reads as follows: 'The Northwestern Tracing Department is going to make it decidedly hot for certain light-fingered people who live on the Interior branch. For some months past a series of petty robberies have been committed against the company, the climax being reached when two men, named Fletcher and Hier, were placed under arrest at the instance of the company's detective, charged with stealing merchandise from the platform of the Watersmeet depot. Conductor Lyon, Messenger Reid and Brakemen Lavigne and Durke went to Watersmeet Wednesday to appear as witnesses against the alleged robbers, but the hearing was postponed until next Tuesday, January 30th. The company proposes to push the matter to the limit.' So far as this article stated the fact of the arrest it was admissible, under the authorities; but in so far as it stated what the company proposed to do it was clearly incompetent. There was nothing to show that the article was prompted by the company or by an agent thereof." Fletcher *v.* Chicago & N. W. R. Co., 109 Mich. 363, 67 N. W. 330.

45. Neys *v.* Taylor, 12 S. D. 488, 81 N. W. 901.

46. Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380.

47. Sweeney *v.* Bienville Water Supply Co., 121 Ala. 454, 25 So. 575; Minneapolis Threshing Mach. Co. *v.* Regier, 51 Neb. 402, 70 N. W. 934.

48. Sweeney *v.* Bienville Water Supply Co., 121 Ala. 454, 25 So. 575.

Wills and letters testamentary have been held admissible to show want of probable cause when they tend to disprove the charge preferred against accused.[49] Books of account are admissible to show the wealth and influence of defendant.[50] Where it was alleged that a criminal action was maliciously instituted for the purpose of collecting a debt, a letter demanding payment was held admissible.[51]

VII. EVIDENCE GIVEN IN, AND CIRCUMSTANCES OF, FORMER PROCEEDING.

1. Instructions to Officer. — The statements of the officer at the time of executing a warrant are admissible to show his instructions from plaintiff if it is made to appear that he acted under plaintiff's direction;[52] but the instructions of the justice issuing the warrant are incompetent.[53]

2. Custody of Accused. — Evidence pertaining to the custody of the accused is part of the *res gestae,* and hence admissible.[54]

3. Excessive Bail Bond. — Evidence that an excessive bail was required by the committing magistrate is inadmissible unless there is proof that his action was induced by defendant.[55]

4. Deliberations of Grand Jury. — Evidence that the grand jury deliberated for some time before finding "no bill" cannot be given by one of the grand jurors for the purpose of showing probable cause.[56]

5. Former Evidence. — A. General Rule. — In an action for malicious prosecution the relevant evidence given on the prosecution is admissible for the purpose of showing reasonable and probable cause.[57]

49. Cecil *v.* Clarke, 17 Md. 508.

50. Womack *v.* Circle, 29 Gratt. (Va.) 192.

51. Strehlow *v.* Pettit, 96 Wis. 22, 71 N. W. 102.

52. "The defendant placed the warrant for the arrest of the plaintiff in the hands of the officer, Lake, and directed him that, in case he could induce the plaintiff to pay or secure a demand the defendant had against plaintiff, he need not execute the warrant. Plaintiff was permitted, against the objection of defendant, to prove what the officer, Lake, said to plaintiff and others who were present at the time of the arrest as to what he was instructed by the defendant to do, or not to do, provided the plaintiff would pay or secure the debt. Most of the evidence complained of was competent as bearing upon the question of the defendant's malice. He was manifestly engaged in an attempt to use the criminal process to enforce the collection of a civil debt, and it was competent to show what his agent, Lake, said and did in carrying out his instructions." Reynolds *v.* Haywood, 77 Hun 131, 28 N. Y. Supp. 467.

53. Womack *v.* Circle, 29 Gratt. (Va.) 192.

54. See "Damages" *infra* this article.

55. Davis *v.* Seeley, 91 Iowa 583, 60 N. W. 183, 51 Am. St. Rep. 356.

56. Scotten *v.* Longfellow, 40 Ind. 23.

57. Goodrich *v.* Warner, 21 Conn. 432; Lautman *v.* Pepin (Ind. App.), 59 N. E. 1073.

Irrelevant Evidence given in the former proceedings is wholly inadmissible. Kellogg *v.* Scheuerman, 18 Wash. 293, 51 Pac. 344.

B. Magistrate's Testimony. — Generally the magistrate before whom the prosecution was instituted cannot, for the purpose of showing probable cause, testify to the evidence given before him,[58] nor are his reasons for discharging plaintiff admissible.[59]

C. To Prove Oath. — The magistrate by whom the warrant was issued is a competent witness to prove that it was issued upon the oath of the prosecutor, and to prove the contents of the oath where it was oral.[60]

D. Testimony Given in Former Proceeding. — A witness may not be called to state the testimony given by witnesses at the former proceeding, except perhaps where such witnesses are no longer available.[61] Where the defendant is disqualified from testifying because

58. Burr *v.* Place, 4 Wend. (N. Y.) 591; Larrence *v.* Lanning, 2 Ind. 256.

Reason for Rule. — The court under objection permitted the justice before whom the hearing was had to testify to the facts sworn to before him. *Held*, "The evidence admitted was clearly inadmissible. The witnesses who testified before the justice should have been called to testify to the facts that they narrated before him. His recollection of what they stated upon oath was of inferior authority to their own statements to the jury. . . . To substitute the relation of the justice as to their testimony before him was a violation of the plainest rules of evidence, that the best evidence within the power of the party should be given, and that secondary evidence shall never be admitted unless it is made manifest that that which is better cannot be obtained." Richards *v.* Foulke, 3 Ohio 52.

59. Thompson *v.* Richardson, 96 Ala. 488, 11 So. 728; Richards *v.* Houlke, 3 Ohio 52; Larrence *v.* Lanning, 2 Ind. 256; Burr *v.* Place, 4 Wend. (N. Y.) 591; Chapman *v.* Dodd, 10 Minn. 350.

"The question upon this trial was malice and want of probable cause. The judgment of the magistrate discharging the plaintiff was admissible, but any reason given for that judgment should not have been admitted as evidence in this case. The plaintiff was entitled to its legal effect, but nothing more." Anderson *v.* Keller, 67 Ga. 58.

"The first exception presented is that his honor excluded the testimony offered by defendant to prove the motive that induced Justice Stanley, who tried the last warrant, to dismiss the same. It is alleged in the complaint and admitted in the answer that upon both the first and second trials the plaintiff was adjudged not guilty, and the warrants were dismissed at the cost of the prosecutor. The entry of the judgment must speak for itself, and unless reversed is conclusive. It has been held that a juror will not be heard to impeach a verdict of a jury, but the testimony for that purpose must come from some other source (State *v.* Smallwood, 78 N. C. 560), and we know of no authority . . . that will warrant a judge or justice of the peace to state the motive by which he was governed." Hinson *v.* Powell, 109 N. C. 534, 14 S. E. 301.

"We are further of opinion that the court erred in permitting the justice of the peace to testify that in the alleged criminal prosecution against Kelley he discharged Kelley, because in his opinion there was not sufficient evidence to sustain the charge. We think the result of the prosecution was immaterial, and the opinion of the justice of the peace as to the sufficiency of the evidence was clearly incompetent, and calculated to injure the defendant." Dempsey *v.* State (Tex. App.), 11 S. W. 372.

60. Spears *v.* Cross, 7 Port. (Ala.) 437.

61. Thompson *v.* Richardson, 96 Ala. 488, 11 So. 728; Richards *v.* Foulke, 3 Ohio 52; Burr *v.* Place, 4 Wend. (N. Y.) 591; John *v.* Bridgman, 27 Ohio St. 22.

of interest in the action against him, relative to his testimony in the former proceeding, he may always prove by others what his testimony then was.[62] When parties were incompetent it was held that the defendant's testimony in the former proceeding might be introduced in his behalf in the action for malicious prosecution, where the matters testified to would have been known only to himself and the plaintiff.[63]

E. By Plaintiff. — The plaintiff may prove what defendant's testimony was on the prior proceeding,[64] and may himself testify what the prosecutor stated.[65]

F. Depositions taken in the former proceeding showing that defendant could have ascertained facts exonerating plaintiff are admissible.[66]

G. Other Actions. — Proceedings in actions other than the one alleged to be malicious are generally inadmissible to prove malice.[67]

62. John *v.* Bridgman, 27 Ohio St. 22; Burr *v.* Place, 4 Wend. (N. Y.) 591; Hickam *v.* Griffin, 6 Mo. 37.

63. Riney *v.* Vanlandingham, 9 Mo. 816; Burr *v.* Place, 4 Wend. (N. Y.) 591; Scott *v.* Wilson, 3 Tenn. 315. See also Paukett *v.* Livermore, 5 Iowa 277.

Richey *v.* McBean, 17 Ill. 62. This was a suit to recover money for ferriage. McBean was a witness for Richey to prove an alleged contract between them, and testified to its non-existence, whereupon Richey charged McBean with perjury; after a hearing McBean was dismissed and brought action against Richey for malicious prosecution. Richey, on the hearing for the prosecution for perjury, testified that a contract was made between McBean and him as to the charge to be made for the ferriage; that McBean testified on the trial of the civil action between them that no contract was ever made relating thereto, and that the testimony of McBean was untrue. *Held*, "From all that appears in this case, the contract, if one existed, was known only to the parties, and it would seem to follow, upon grounds of public policy and of necessity, that the testimony of the defendant, given upon the hearing of the prosecution, touching the existence and character of the alleged contract, should be admitted in his defense of an action brought against him for such prosecution. If this is not the law, no citizen would be safe in prosecuting another for crime, where the offense is peculiarly within his knowledge, and not attended with circumstances susceptible of proof by others. The policy of the law is to favor prosecutions for crimes, and it will afford such protection to the citizen prosecuting as is essential to public justice."

64. Evansville & T. H. R. Co. *v.* Talbot, 131 Ind. 221, 29 N. E. 1134.

65. Watt *v.* Greenlee, 7 N. C. 246; Evansville & T. H. R. Co. & Talbot, 131 Ind. 221, 29 N. E. 1134.

66. Wetmore *v.* Mellinger (Iowa), 14 N. W. 722.

67. Ray *v.* Law, 1 Pet. C. C. 207, 20 Fed. Cas. No. 11,592.

Between Different Parties. — "The court ruled out evidence tending to show that the plaintiff had been arrested in another action upon a similar charge, and had settled the debt to procure her own release, and complaint is made of that ruling. It was decided in Hill *v.* Palm, 38 Mo. 13-20, that it is not competent to show, in support of probable cause, that the plaintiff was guilty of another and different offense. But the above testimony offered and rejected by the court in this case had not even a tendency to show that the plaintiff was guilty of another offense, unless an inference can be drawn that a debt which is justly due has been feloniously contracted because it was paid after arrest." Eagleton *v.* Kabrich, 66 Mo. App. 231.

To Establish Title. — The record

VIII. DAMAGES.

1. Confinement. — Evidence of imprisonment resulting from the malicious prosecution is held by some authorities to be admissible,[68] while the position is taken by others that defendant cannot be held responsible for the acts of officers over whom he has no control.[69]

2. Mental Suffering. — The rule is also laid down that it is competent to show mental suffering caused by the confinement.[70]

3. Reputation. — It is competent to show, in an action for mali-

of a former action is admissible to prove title to property, the taking of or interference with which was the foundation of the alleged malicious prosecution, and it tends to show guilt or innocence. Proctor Coal Co. *v.* Moses, 19 Ky. L. Rep. 419, 40 S. W. 681. See also Magmer *v.* Renk, 65 Wis. 364, 27 N. W. 26.

Previous Indictment to Show Probable Cause. — An indictment was introduced showing that plaintiff and a witness had been indicted on a charge of conspiracy to defraud the government, and in support of the ruling of the court admitting the indictment it was urged that as defendant knew of this indictment and that the witness had pleaded guilty thereto, the circumstances would naturally and of right lead him to believe that plaintiff would engage in another conspiracy to defraud. *Held,* incompetent. Peck *v.* Chouteau, 91 Mo. 138, 3 S. W. 577, 60 Am. Rep. 236.

68. Schwarting *v.* Van Wie New York Grocery Co., 60 App. Div. 475, 69 N. Y. Supp. 978; Anderson *v.* Callaway, 2 Houst. (Del.) 324; Bauer *v.* Clay, 8 Kan. 580; Driggs *v.* Morgan, 10 Rob. (La.) 119; Graves *v.* Dawson, 133 Mass. 419; Nicholson *v.* Sternberg, 61 App. Div. 51, 70 N. Y. Supp. 212; Spear *v.* Hiles, 67 Wis. 350, 30 N. W. 506.

"Upon the trial the plaintiff was permitted to testify, upon the question of damages, against the defendant's objection, that after waiving an examination before the trial justice, upon the complaint against him, he was taken back to jail and remained there two or three days before getting bail. . . . The defendant contends this testimony ought not to have been admitted, because if the plaintiff had submitted to an examination and been adjudged guilty, that judgment would have been a valid defense against this suit; and if he had been adjudged not guilty, he would have been discharged and not subjected to subsequent imprisonment; that having thus by his own act deprived the defendant of a valid defense and caused his own imprisonment, he ought not to recover. . . . We see no reason why it was not competent to go to the jury, unless it appeared, which is not claimed, that the plaintiff's motive in declining an examination was to subject himself to further imprisonment for the purpose of increasing his claim for damages in a prospective suit against defendant." King *v.* Colvin, 11 R. I. 582.

Bad Condition of Jail. — "In an action for malicious prosecution the plaintiff may show the bad condition of the jail in which he was confined, and any other discomfort or deprivation, in aggravation of damages." Drumm *v.* Cessnum, 61 Kan. 467, 59 Pac. 1078.

69. Zebley *v.* Storey, 117 Pa. St. 478, 12 Atl. 569.

70. Flam *v.* Lee, 116 Iowa 289, 90 N. W. 70; Parkhurst *v.* Masteller, 57 Iowa 474, 10 N. W. 864; Ambs *v.* Atchison T. & S. F. R. Co., 114 Fed. 317; Vinal *v.* Core, 18 W. Va. 1; Wheeler *v.* Hanson, 161 Mass. 370, 37 N. E. 382, 42 Am. St. Rep. 408; Willard *v.* Holmes, 2 Misc. 303, 21 N. Y. Supp. 998.

Outrage on Feelings. — "Where a lessor in illegally issuing a writ of ejectment was actuated by malice, he is liable to lessee for damages as recompense for an outrage upon his rights and feelings as a citizen and as a man." Deslonde *v.* O'Hern, 39 La. Ann. 14, 1 So. 286.

cious prosecution, as an element of damages, injuries to plaintiff's reputation,[71] and he may for that purpose prove newspaper publications containing plain accounts of the prosecution without comment thereon.[72] Evidence tending to show loss of social standing is admissible.[73]

4. Manner of Arrest. — Testimony to prove the number of persons present when the officer went to arrest plaintiff,[74] or that the arrest was made in an insulting manner,[75] unless it is shown that the arrest was directed by defendant or that he participated in it, is inadmissible.[76]

5. Counsel Fees and Expenses of Trial. — Plaintiff may prove counsel fees paid in defending the original action,[77] and other

71. French *v.* Guyot, 30 Colo. 222, 70 Pac. 683; Minneapolis Threshing Mach. Co. *v.* Regier, 51 Neb. 402, 70 N. W. 934; Sheldon *v.* Carpenter, 4 N. Y. 579, 55 Am. Dec. 301; Willard *v.* Holmes, 2 Misc. 303, 21 N. Y. Supp. 998.

Rule Stated. — In considering the damages resulting to plaintiff from malicious prosecution the jury may consider "any loss of time and expenditure of money in defense of himself; any injury to his reputation, character, standing or feelings directly brought about by the wrong of the defendant, not exceeding, however, the amount claimed in the petition." Ambs *v.* Atchison T. & S. F. R. Co., 114 Fed. 317.

72. "Malicious prosecution is frequently classified with slander and libel as an injury to the reputation, and it has been so recognized by this court. Painter *v.* Ives, *supra* [4 Neb. 122]. Whether or not this classification is technically accurate, there is no doubt that the injury to one's reputation arising from an unfounded criminal prosecution is an element of damages. A plain, uncolored statement of such proceedings in a newspaper is a privileged publication, and not in itself a tort. Such a publication is a natural and probable consequence and a direct consequence of the institution of the prosecution; and the fact that the prosecution resulted in such a publication may properly be shown to aid the jury in estimating the damages." *Citing* Filer *v.* Smith, 96 Mich. 347, 55 N. W. 999. Minneapolis Threshing Mach. Co. *v.* Regier, 51 Neb. 402, 70 N. W. 934.

73. Flam *v.* Lee, 116 Iowa 289, 90 N. W. 70.

74. Marks *v.* Hastings, 101 Ala. 165, 13 So. 297.

Publicity Given to Charge. "During the trial the plaintiff offered to prove that pursuant to the regular and uniform custom of the detective police department his name was entered upon the detective police annals of said city, and open to the inspection and use of the police force, as tending to show the publicity of said charge and the consequent injury to plaintiff." *Held,* not admissible unless there was shown to be some law requiring such a record to be kept, or that appellee (defendant) knew that the name would be so entered. Garvey *v.* Wayson, 42 Md. 178.

75. Van Sickle *v.* Brown, 68 Mo. 627.

76. Marks *v.* Hastings, 101 Ala. 165, 13 So. 297; Van Sickle *v.* Brown, 68 Mo. 627.

77. *United States.* — Blunk *v.* Atchison T. & S. F. R. Co., 38 Fed. 311; Ambs *v.* Atchison T. & S. F. R. Co., 114 Fed. 317.

Alabama. — Marshall *v.* Betner, 17 Ala. 832; Killebrew *v.* Carlisle, 97 Ala. 535, 12 So. 167.

Georgia. — Farrar *v.* Brackett, 86 Ga. 463, 18 S. E. 296; Slater *v.* Kimbro, 91 Ga. 217, 12 S. E. 686.

Illinois. — Krug *v.* Ward, 77 Ill. 603; Lawrence *v.* Hagerman, 56 Ill. 68, 8 Am. Rep. 674.

Kansas. — Drumm *v.* Cessnum, 61 Kan. 467, 59 Pac. 1078.

Kentucky. — Woods *v.* Finnell, 13 Bush 628.

Minnesota. — Hlubek *v.* Pinske, 84

expenses and charges necessarily incident to the proceedings.[78]

6. **Injuries to Business.** — Any injury to the business of plaintiff that is the proximate, direct and natural result of the malicious prosecution may be shown.[79]

7. **To Mitigate Damages.** — The general bad reputation of plain-

Minn. 363, 87 N. W. 939; Mitchell *v.* Davies, 51 Minn. 168, 53 N. W. 363.

Texas. — Hughes *v.* Brooks, 36 Tex. 379.

Wisconsin. — Magmer *v.* Renk, 65 Wis. 364, 27 N. W. 26.

Not Necessary to Prove Actual Payment. — "It is well settled, upon the authorities, that in actions of the general class to which this belongs, expenses necessarily incurred may be taken into consideration in the assessment of damages, without proof of actual payment of such expenses. Whether such expenses have been actually paid in any given case raises a merely collateral question, with which the defendant has no concern." Walker *v.* Pittman, 108 Ind. 341, 9 N. E. 175.

78. *United States.* — Ambs *v.* Atchison T. & S. F. R. Co., 114 Fed. 317.

Arkansas. — Lavender *v.* Hudgens, 32 Ark. 763.

Illinois. — Lawrence *v.* Hagerman, 56 Ill. 68, 8 Am. Rep. 764.

Massachusetts. — Wheeler *v.* Hanson, 161 Mass. 370, 37 N. E. 382, 42 Am. St. Rep. 408; Zinn *v.* Rice, 161 Mass. 571, 37 N. E. 747.

Michigan. — Grimes *v.* Bowerman, 92 Mich. 258, 52 N. W. 751.

Minnesota. — Hlubek *v.* Pinske, 84 Minn. 363, 87 N. W. 939.

New York. — Willard *v.* Holmes, 2 Misc. 303, 21 N. Y. Supp. 998.

Pennsylvania. — Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574.

West Virginia. — Vinal *v.* Core, 18 W. Va. 1.

Wisconsin. — Magmer *v.* Renk, 65 Wis. 364, 27 N. W. 26.

79. Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59.

Rule Stated. — "As the suit of February 29th was found to be malicious and without probable cause, all the loss which plaintiff sustained in his business as the direct and natural result of that suit, the extraordinary costs as between attorney and client, as well as all other expenses necessarily incurred in the defense, are to be taken into the estimate of damages. Taxable costs would be no compensation for the damages which the plaintiff sustained by reason of the malicious suit." Magmer *v.* Renk, 65 Wis. 364, 27 N. W. 26.

Contributing to Injury. — In Fletcher *v.* Chicago & N. W. R. Co., 109 Mich. 363, 67 N. W. 330, the court, in speaking of the recovery of damages in an action for malicious prosecution, says: "A person cannot recover for the alleged wrong of another, when it clearly appears, from his own admissions, that his own indiscreet and negligent conduct has contributed to the injury, or when such injury can with more reason be attributed to the latter than to the former."

Remote Injury. — It was charged that a garnishment prevented a certain payment to plaintiff's firm; that by its non-payment they were unable to meet certain dues, and in consequence thereof their business was ruined. The injury to the business was held not to be the proximate result of the garnishment, and the damage too remote. O'Neill *v.* Johnson, 53 Minn. 439, 55 N. W. 601, 39 Am. St. Rep. 615.

Where plaintiff's integrity was unimpeachable before the malicious prosecution against him, he having been a person rated high in financial and mercantile circles, and having been solicited to assume the presidency of a banking institution, besides holding equally important fiduciary positions in several manufacturing corporations, and the loss of these offices was directly attributed to defendant's prosecution, the jury justly considered the loss of these offices; the actual expenses incurred in his vindication; and any general impairment of his integrity in social and mercantile standing; and the shame and humiliation endured; and a judgment of $31,700 will not be set

tiff may be shown in mitigation of damages,[80] but where he is accused of a specific crime, evidence that he committed a similar crime is not admissible.[81]

8. Conduct of Plaintiff. — Suspicious actions of plaintiff tending to justify defendant in commencing the proceeding complained of may be shown to mitigate damages.[82] Plaintiff's voluntary surrender, when not subject to arrest;[83] advice of counsel to defendant upon a full disclosure of the facts;[84] a statement to a magistrate of the facts upon which the action is based, and his advice to prosecute,[85] are matters competent to be shown in mitigation of damages.

9. Financial Condition of Defendant. — It is competent for plaintiff to prove the financial condition of defendant and his ability to respond to a judgment.[86] Evidence of the financial condition of

aside on appeal as excessive. Willard *v.* Holmes, 2 Misc. 303, 21 N. Y. Supp. 998.

Evidence of inquiries made of plaintiff, following the attachment, by mercantile agencies, and by people who sold him goods; of inquiries by neighbors and employes as to what the attachment meant; of the fact that a creditor attempted to collect through a lawyer a claim of which payment had been remitted; a copy of a mercantile paper containing a notice of the attachment, and evidence of that paper's circulation and of the reports of commercial and trade agencies — was held competent as being the direct and probable consequence of the attachment. Zinn *v.* Rice, 161 Mass. 571, 37 N. E. 747.

80. *Illinois.* — Rosenkrans *v.* Barker, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169.

Maine. — Fitzgibbon *v.* Brown, 43 Me. 169; Pullen *v.* Glidden, 68 Me. 559.

Massachusetts. — Bacon *v.* Towne, 4 Cush. 217.

New Jersey. — O'Brien *v.* Frasier, 47 N. J. L. 349, 1 Atl. 465, 54 Am. Rep. 170.

North Carolina. — Bostick *v.* Rutherford, 11 N. C. 83.

Oregon. — Gee *v.* Culver, 13 Or. 598, 11 Pac. 302.

West Virginia. — Vinal *v.* Core, 18 W. Va. 1.

Defendant charged plaintiff before a justice of the peace with the crime of arson. "Defendant attempted to prove plaintiff's reputation for honesty and integrity in the neighborhood was bad. This testimony was excluded by the trial court, but defendant was allowed to show the reputation of plaintiff as that of a dangerous man, and that his reputation as a law-abiding citizen was bad. . . . We have no doubt that it was competent for defendant to show that fact [general bad reputation for honesty and integrity], at least in mitigation of damages. A man of honesty and integrity would not seemingly be guilty of the crime of arson, and if plaintiff was entitled to damages for injury to his good name and character, which was involved directly in the issue, and had a bad reputation in those respects, defendant's accusation against him could not have been as injurious as if his reputation had been good." Hlubek *v.* Pinske, 84 Minn. 363, 87 N. W. 939.

81. Patterson *v.* Garlock, 39 Mich. 447. *Contra.* — Bostick *v.* Rutherford, 11 N. C. 83.

82. Forrest *v.* Collier, 20 Ala. 175, 56 Am. Dec. 190.

83. Chatfield *v.* Bunnell, 69 Conn. 511, 37 Atl. 1074.

84. Shores *v.* Brooks, 81 Ga. 468, 8 S. E. 429, 12 Am. St. Rep. 332.

85. White *v.* Tucker, 16 Ohio St. 468.

Dismissal by Defendant. — Evidence that the proceedings were dismissed at the instance of defendant is inadmissible to mitigate damages. Owens *v.* Owens, 81 Md. 518, 32 Atl. 247.

86. French *v.* Guyot, 30 Colo. 222, 70 Pac. 683; Sexson *v.* Hoover, 1 Ind. App. 65, 27 N. E. 105; Cole-

defendant's family is inadmissible to assist the jury in imposing punitive damages.[87]

man *v.* Allen, 79 Ga. 637, 5 S. E. 204, 11 Am. St. Rep. 449; Peck *v.* Small, 35 Minn. 465, 29 N. W. 69; Winn *v.* Peckham, 42 Wis. 493; Atchison *v.* Vancleave (Ind.), 57 N. E. 731. *Contra.* — Under statute, Southern Car & Foundry Co. *v.* Adams, 131 Ala. 147, 32 So. 503.

87. Reisan *v.* Mott, 42 Minn. 49, 43 N. W. 691, 18 Am. St. Rep. 489. See "Evidence Admissible Under Pleadings," *supra* this article.

MALPRACTICE. — See Attorney and Client; Physician and Surgeon.

MANSLAUGHTER. — See Homicide.

MAPS.

By A. P. Rittenhouse.

CROSS-REFERENCES:

Ancient Documents;

Boundaries;

Diagrams;

Photographs.

I. SCOPE OF TREATMENT.

This article treats of maps, official and unofficial, made and published generally, without reference to controversies existing at the time of their publication. It does not include diagrams, nor representations of places or buildings made for the purpose of being used in the trial of causes, nor plats of land or town sites made for merely private purposes.

II. OFFICIAL MAPS.

1. Generally. — Maps made by authority of law and filed in the proper office constitute public documents, and when they come from the proper custodian, are receivable in evidence.[1]

2. Authentication. — An official map duly certified to by its legal custodian is sufficiently authenticated.[2]

3. Evidence of Certain Facts. — Official maps, when duly authenticated, are competent to prove boundaries of land;[3] that certain lands are within the boundaries defined on such maps;[4] the location

1. *Dakota.* — McCall *v.* United States, 1 Dak. 320, 46 N. W. 608; United States *v.* Beebe, 2 Dak. 292, 11 N. W. 505.

Mississippi. — Sessions *v.* Reynolds, 15 Miss. 130; Surget *v.* Doe, 24 Miss. 118.

Missouri. — Henry *v.* Dulle, 74 Mo. 443.

North Carolina. — Redmond *v.* Mullenax, 113 N. C. 505, 18 S. E. 708.

Texas. — Smith *v.* Power, 2 Tex. 57; Guilbeau *v.* Mays, 15 Tex. 411; Rogers *v.* Mexia (Tex. Civ. App.), 36 S. W. 825; Murchison *v.* Mexia (Tex. Civ. App.), 36 S. W. 828; Boon *v.* Hunter, 62 Tex. 582; Kuechler *v.* Wilson, 82 Tex. 638, 18 S. W. 317; Smith *v.* Hughes, 23 Tex. 248.

A map of a city made in pursuance of a state law, and recognized by the state and city (certified and indorsed by the mayor and the city surveyor), and in existence at and before the time when title is acquired to land in such city, and referred to in a deed of such land, is admissible for the grantee in such deed. Payne *v.* English, 79 Cal. 540, 21 Pac. 952.

In an action to recover land, a map of the county in which a portion of the land is located, made under authority of a law of the state, and kept by the county authorities, was held competent to show the location of the boundary line of the county. Polhill *v.* Brown, 84 Ga. 338, 10 S. E. 921.

Where it is the policy of state legislation to require the making and recording of plats for cities and towns, and conveyances of land are made with reference to such plats, they are competent evidence of boundaries, and control minutes of a survey which are apparently inconsistent with them. Cleveland *v.* Bigelow, 98 Fed. 242.

2. **Authentication.** — An official map is sufficiently authenticated by the certificate of the legal custodian thereof showing that he is such custodian. Galvin *v.* Palmer, 113 Cal. 46, 45 Pac. 172. A map from the general land office duly certified by the commissioner is admissible without further evidence of its authenticity. Smith *v.* Hughes, 23 Tex. 248.

3. Cleveland *v.* Bigelow, 98 Fed. 242; Payne *v.* English, 79 Cal. 540, 21 Pac. 952; Boon *v.* Hunter, 62 Tex. 582. A city map adopted by the mayor of the city and the council is competent evidence as to the location of land surveyed. Acme Brew. Co. *v.* Central R. Co., 115 Ga. 494, 42 S. E. 8.

4. Galvin *v.* Palmer, 113 Cal. 46, 45 Pac. 172.

of the water front of a city;[5] the accuracy or inaccuracy of other maps;[6] that a place is within the jurisdiction of a court;[7] the boundary line of a county or town;[8] boundaries as between private parties and the state or government, and the location of vacant lands;[9] the allotment of land in a reservation.[10]

4. Copies. — Copies of official maps, when duly authenticated and proved to be correct, are admissible in evidence in like manner as the originals.[11]

5. Private Surveys. — Maps of a private survey are not admissible in evidence as against parties who do not consent to such survey,

5. People *v.* Klumpke, 41 Cal. 263.

6. Munsell *v.* Baldwin, 56 Conn. 522, 16 Atl. 546.

7. McCall *v.* United States, 1 Dak. 320, 46 N. W. 608; United States *v.* Beebe, 2 Dak. 292, 11 N. W. 505.

8. A map made under authority of a law of the state, and kept by county authorities, is admissible to show the location of the boundary line of the county. Polhill *v.* Brown, 84 Ga. 338, 10 S. E. 921. A map of the towns and counties of the commonwealth, published by authority of the legislature, is admissible to prove the boundaries of a town. Com. *v.* King, 150 Mass. 221, 22 N. E. 905, 5 L. R. A. 536; Adams *v.* Stanyan, 24 N. H. 405. See article "BOUNDARIES," in Vol. II.

9. Boon *v.* Hunter, 62 Tex. 582.

10. The case of Fowler *v.* Scott, 64 Wis. 509, 25 N. W. 716, involved the question as to whether certain land in an Indian reservation had been allotted to a person by the allotment commissioners. A map which was not signed by the commissioners, nor authenticated by the certificate of the commissioner of the land office, accompanied the report of the allotment commissioners. It was produced from the proper depository, and upon inspection was found to correspond substantially with such report. Under these circumstances it was held to be competent evidence.

11. Goodwin *v.* McCabe, 75 Cal. 584, 17 Pac. 705. Copies of official maps of surveys of land deposited in the surveyor-general's office are the best evidence of the extent, character and boundaries of such surveys. Surget *v.* Little, 13 Miss. 319; Sessions *v.* Reynolds, 15 Miss. 130; Surget *v.* Doe, 5 Smed. & M. (Miss.) 118; Hollingsworth *v.* Holshausen, 17 Tex. 41; Kuechler *v.* Wilson, 82 Tex. 638, 18 S. W. 317.

A properly certified copy of the map of a county in the office of the secretary of state is admissible in evidence without proof of the correctness or existence of the original. Berry *v.* Clark, 117 Ga. 964, 44 S. E. 824.

The case of Houston *v.* Finnigan (Tex. Civ. App.), 85 S. W. 470, was a suit for the recovery of land. On the trial the city introduced in evidence a lithograph copy of a city map, bearing unmistakable signs of great age and long use. The recollection of the city engineer extended over a great many years, and he testified that it was the identical map, and the only map, which had been used during all that time; that the original was not in the engineer's office, and never had been within his knowledge, and that the engineer's office was the place where it was required to be kept. Other evidence showed that, with some immaterial inaccuracies, it was a copy of the original map made by the owners who had platted the land in controversy; that the copy offered was the one officially and generally used, and that the original was not recorded and could not be produced. *Held*, that the lithograph copy was admissible in evidence.

But in Iowa it has been held that a copy of the official map of a city, or what purports to be such, is not admissible in evidence unless it be properly authenticated and proved to be correct, although it be found in the custody of city officers and recognized by them as correct. Pfotzer *v.* Mullaney, 30 Iowa 197.

although such maps are made by government officers.[12] And if a map be made by an officer of the government, and is not of a private survey, it is not competent evidence unless such officer was charged by law with the duty of making it.[13]

III. UNOFFICIAL MAPS.

1. General Rule. — There is some conflict of authority concerning the admissibility of unofficial maps as independent evidence. The general rule is that maps which are not made in pursuance of law, or by direction of proper official authority, are not admissible in evidence.[14]

2. Recognized by Authority. — Some courts have held maps to be competent evidence, although not made in pursuance of law or by direction of official authority, if they were in fact recognized by public officials.[15]

12. Rose *v.* Davis, 11 Cal. 133.

13. Dalton *v.* Rentaria, 2 Ariz. 275, 15 Pac. 37.

A map of a city, though made by a former city surveyor, and found in the office of the register of the city, in a book labeled "Plans and Charts," but not appearing to have been made by authority of the city government, or adopted by it, is not competent evidence for the commonwealth in a prosecution for obstructing what is claimed to be a street of the city. Harris *v.* Com., 20 Gratt. (Va.) 833.

14. **General Rule.** — A map not made under the authority of the state, or of the United States, although generally received as a correct representation of what purports to be described thereon, is not admissible in evidence. Stein *v.* Ashby, 24 Ala. 521. A map purporting to have been officially made, but not approved or adopted by the proper officials, is not competent evidence. People *v.* Klumpke, 41 Cal. 263.

An unofficial map which is not ancient is not competent evidence against a party unless made by a party through whom he claims title. Ellison *v.* Branstrator, 153 Ind. 146, 54 N. E. 433. If an unofficial map is not shown to have been made prior to the conveyance under which a party claims title, it is not competent evidence for such party. Burnett *v.* Thompson, 35 N. C. 379; Marble *v.* McMinn, 57 Barb. (N. Y.) 610.

Maps which are not public maps, and which are not made in pursuance of any order in a cause, are not *per se* evidence of the facts which they represent. Burwell *v.* Sneed, 104 N. C. 118, 10 S. E. 152; Cowles *v.* Lovin, 135 N. C. 488, 47 S. E. 610. In the case of Tome Institute *v.* Davis, 87 Md. 591, 41 Atl. 166, *held,* that a printed document purporting to be the map of the town of Port Deposit, in which the land in controversy was located, made about forty years before the beginning of the action, but not shown to be correct, nor to have been made by any public authority, was not competent evidence to establish a boundary line of the land in controversy.

15. **Recognized by Authority.** A map of a city, made by an individual on his own account, and kept by the city council in its chamber, on which reserved lots are delineated as an open square or common, is admissible as against the city to show a recognition of the dedication of such square or common. Mayor and Council of Macon *v.* Franklin, 12 Ga. 239.

A map of a city, made by a city engineer and recognized and used in the city as substantially correct, is admissible under a law of the state which provides *aliunde* that published maps and charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety and inter-

3. Recognized by People Generally. — And it has even been held that a published map in common and accepted use by the people generally is competent evidence.[16]

4. Proved Correct by Witnesses. — Unofficial maps proved to be correct are admissible, in connection with the testimony of witnesses, to explain and elucidate the same.[17]

IV. ANCIENT MAPS.

1. Definition. — A map is deemed to be ancient, in the legal acceptation of the term, when it is more than thirty years old.[18]

2. Classed With Ancient Documents. — Ancient maps are admitted for the same reasons and upon the same principles that ancient deeds and other documents are receivable.[19]

3. Authentication. — An ancient map must be produced from a proper place of deposit, and purport to have been made by authority,

est. Nosler *v.* Chicago, B. & Q. R. Co., 73 Iowa 268, 34 N. W. 850.

Acme Brew. Co. *v.* Central R. Co., 115 Ga. 494, 42 S. E. 8, was an action of ejectment, and it was held that a city map adopted by the mayor and council of the city was competent evidence to locate land conveyed.

16. Recognized by People Generally. — In a case where the true location of the boundary line of land conveyed was uncertain it was held that an unofficial map proved to have been in common and accepted use in the community at the time of such conveyance was admissible in evidence. Hanlon *v.* Union Pac. R. Co., 40 Neb. 52, 58 N. W. 590.

17. Dobson *v.* Whisenhant, 101 N. C. 645, 8 S. E. 126; Smith *v.* Bunch, 31 Tex. Civ. App. 541, 73 S. W. 559; Rawlins *v.* State, 40 Fla. 155, 24 So. 65. A map was offered in evidence which was made by one person from surveys made by another person. It was objected to on the ground that it was secondary and hearsay evidence. *Held*, that it was properly admitted in evidence. Fulcher *v.* White (Tex. Civ. App.), 59 S. W. 628.

A map made by a witness explanatory of a survey to which he had testified was rightfully admitted in evidence. Pickering Light & Water Co. *v.* Savage, 137 Cal. 19, 69 Pac. 846.

In condemnation proceedings for the right of way the land owner offered in evidence a map of his lands which was made by a civil engineer and shown to be a correct map of the premises. *Held* to be admissible to enable the jury to properly understand and apply the other evidence adduced in the trial, especially as both parties used the map in the examination and cross-examination of witnesses. Chicago R. I. & P. R. Co. *v.* Buel, 56 Neb. 205, 76 N. W. 571.

If there be no evidence when a map was made, or that it was known to be in existence and referred to by the parties at the time a deed was made, or that it was known to the defendant, it cannot be introduced in evidence against him to show the location of land. Perkins *v.* Brinkley, 133 N. C. 348, 45 S. E. 652. See also Cowles *v.* Lovin, 135 N. C. 488, 47 S. E. 610.

18. Adams *v.* Stanyan, 24 N. H. 405.

19. Morris *v.* Lessee Harmer's Heirs, 32 U. S. 554; Public Schools *v.* Risley, 77 U. S. 91; Whitman *v.* Shaw, 166 Mass. 451, 44 N. E. 333; Kissell *v.* St. Louis Public Schools, 16 Mo. 553; Public Schools *v.* Erskine, 31 Mo. 110; Gibson *v.* Poor, 21 N. H. 440, 53 Am. Dec. 216. But it was held in Biddle *v.* Shippen, 1 Dall. (U. S.) 19, that a map about thirty years old was not competent evidence. See article "ANCIENT DOCUMENTS," Vol. I.

or be proved *aliunde* to be an official document in order to be admissible in evidence.[20]

4. Relating to Private Property. — Ancient maps which relate merely to the boundaries of private property are not admissible.[21]

5. Evidence of Boundary, but Not of Title. — Ancient maps found in appropriate places and purporting to have been made by authority, or proved to be official, may be used to prove boundaries and locations, but not for the purpose of showing title.[22]

V. MAPS IN CRIMINAL CASES.

1. Evidence of Jurisdiction. — Official maps may be admitted in a criminal action to show that the place where a crime was committed is within the jurisdiction of a court.[23]

2. Unofficial Maps in Connection With the Testimony of Witnesses. Unofficial maps showing the place where a crime was committed,

20. Authentication of Ancient Map. — In the case of Lawrence *v.* Tennant, 64 N. H. 532, 15 Atl. 543, the court said: "An ancient map or plan may be received in evidence to prove public boundaries if it appears that it was an authorized survey. If it purports to be an authorized survey, or if it be proved *aliunde* to be official, and is produced from an appropriate place, there may be little doubt of its admissibility. But some evidence derived either from an inspection of the document itself, or from the place of its deposit, or from some other source, must be adduced in support of its authenticity before it can be regarded as competent evidence of anything except its own existence and antiquity. . . . The primary question is, What does the document profess to be, or what is it shown to be? The answer to this question is the basis of the further inquiry — Was it found in such a place as such a document might reasonably be expected to be deposited in? And on the determination of this question the admissibility of the evidence depends." To the same effect see also Nichols *v.* Turney, 15 Conn. 101; Drury *v.* Midland R. Co., 127 Mass. 571; Donohue *v.* Whitney, 133 N. Y. 178, 30 N. E. 848.

In the case of Tome Institute *v.* Davis, 87 Md. 591, 41 Atl. 166, the map of a town, made about forty years before the action was commenced, which was not shown to be correct, nor to have been made by any public authority, was held not competent evidence to establish a boundary line of the land in controversy.

21. Maps of Private Property. A survey, though ancient, and made by direction of the owner of lands for his own convenience, is not admissible evidence for him or for those claiming under him. Jones *v.* Huggins, 12 N. C. 223, 17 Am. Dec. 567.

22. Boundary and Location, but Not Title. — See *Louisiana.* — Carrollton R. Co. *v.* Municipality No. 2, 19 La. (O. S.) 42.

Massachusetts. — Drury *v.* Midland R. Co., 127 Mass. 571.

New Hampshire. — Adams *v.* Stanyan, 24 N. H. 405.

New York. — Jackson *v.* Witter, 2 Johns. 180; Donohue *v.* Whitney, 133 N. Y. 178, 30 N. E. 848; Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633.

Pennsylvania. — Penny Pot Landing Co. *v.* Philadelphia, 16 Pa. St. 79; Huffman *v.* McCrea, 56 Pa. St. 95; Mineral R. & Min. Co. *v.* Auten, 188 Pa. St. 568, 41 Atl. 327; Smucker *v.* Pennsylvania R. Co., 188 Pa. St. 40, 41 Atl. 457.

23. McCall *v.* United States, 1 Dak. 320, 46 N. W. 608; United States *v.* Beebe, 2 Dak. 292, 11 N. W. 505.

and proved to be a correct representation thereof, may be used in a criminal case in connection with the testimony of witnesses.[24]

24. Turner *v.* United States, 66 Fed. 280; Burton *v.* State, 107 Ala. 108, 18 So. 284; People *v.* Phelan, 123 Cal. 551, 56 Pac. 424; Adams *v.* State, 28 Fla. 511, 10 So. 106; Ortiz *v.* State, 30 Fla. 256, 11 So. 611; Com. *v.* Holliston, 107 Mass. 232; State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625.

Upon the trial of a case for assault to murder, a map of a portion of the town of De Land embracing the locality where the assault occurred, made by a surveyor who testified that it was correct, was held admissible in evidence for the use of witnesses in explaining their evidence and to enable the jury to better understand the case, and the surveyor was permitted, in giving his testimony, to designate streets, houses and localities on said map. Rawlins *v.* State, 40 Fla. 155, 24 So. 65. But see Harris *v.* Com., 20 Gratt. (Va.) 833.

See article "DIAGRAMS," Vol. IV.

MARITIME.—See Admiralty.

MARKET VALUE.—See Value.

MARKS.—See Boundaries; Elections; Handwriting.

MARKS AND BRANDS.—See Animals; Larceny; Ownership.

MARRIAGE.

CROSS-REFERENCES:

Adultery;

Bigamy; Breach of Promise;

Divorce;

Husband and Wife;

Privilege; Privileged Communications.

I. PRESUMPTIONS AND BURDEN OF PROOF.

1. In General. — Where a party asserts the fact of marriage as the basis of his right of recovery the burden of proof is upon him to establish that fact by competent evidence.[1]

2. Proof of Actual Marriage. — The nature of the proceeding in which the question of marriage is involved is sometimes such as to make it incumbent upon the party asserting the marriage to establish an actual marriage as contradistinguished from one inferred from circumstances. Thus the burden is upon the state to establish actual marriage in prosecutions for bigamy or polygamy,[2] and adultery,[3] and criminal conversation.[4]

1. Where a Woman Claims To Be the Widow of a Decedent the burden of proof is upon her to establish the marriage. Davis Estate, 204 Pa St. 602, 54 Atl. 475. See also Wilson *v.* Allen, 108 Ga. 275, 33 S. E. 975. And in Baughman *v.* Baughman, 32 Kan. 538, 4 Pac. 1003, where the single issue presented was whether the defendant was legally married to one Daniel P. Baughman, and therefore as his widow legally entitled to inherit his property, it was held that the burden of proving the marriage was upon the defendant.

2. First Marriage Must Be Clearly Shown. — Johnson *v.* State, 60 Ark. 308, 30 S. W. 31; State *v.* Dooris, 40 Conn. 145; State *v.* Matlock, 70 Iowa 229, 30 N. W. 495; State *v.* White, 19 Kan. 445; State *v.* Edmiston, 160 Mo. 500, 61 S. W. 193. See also the article "Bigamy," Vol. II.

In Damon's Case, 6 Me. 148, a prosecution for bigamy, the court said: "It is incumbent on the government to prove that the defendant had been legally married previous to the marriage in 1812, whereby he became incapable in law of contracting a second time during the continuance of the first contract. The mere reputation of a marriage, or proof of cohabitation, or other circumstances from which a marriage may be inferred, and which are sufficient in almost all civil personal actions, cannot, in cases of this nature, be admissible. There must be evidence of a marriage in fact by a person legally authorized, and between parties legally competent to contract."

In Proving the Second Marriage of the defendant, in a prosecution for bigamy, it is sufficient to prove it as a fact; proof of cohabitation is not necessary. Cox *v.* State, 117 Ala. 103, 23 So. 806, 67 Am. St. Rep. 166, 41 L. R. A. 760; Com. *v.* Lucas, 158 Mass. 81, 32 N. E. 1033.

3. *Alabama.* — Buchanan *v.* State, 55 Ala. 154.

Missouri. — State *v.* St. John, 94 Mo. App. 229, 68 S. W. 374.

Montana. — Territory *v.* Whitcomb, 1 Mont. 359, 25 Am. Rep. 740.

New Hampshire. — State *v.* Winkley, 14 N. H. 480.

Texas. — Clay *v.* State, 3 Tex. App. 499; Webb *v.* State, 24 Tex. App. 164, 5 S. W. 651.

Vermont. — State *v.* Rood, 12 Vt. 396.

See also the article "Adultery."

The Reason for the Rule forbidding proof of a marriage by evidence of cohabitation, reputation and holding out, and requiring direct evidence of the fact, is that while ordinarily such evidence is sufficient because the law places that interpretation upon ambiguous acts which favors innocence, and will not assume that a cohabitation is illicit if by presuming marriage it would be lawful, yet in a prosecution for adultery this presumption conflicts with the presumption of the prisoner's innocence of the crime with which he stands charged, and therefore such evidence in such cases cannot alone establish marriage. The essentials of a valid marriage are in all cases the same, the distinction being in the mode of proving alone. Bailey *v.* State, 36 Neb. 808, 55 N. W. 241.

4. *England.* — Morris *v.* Miller, 4 Burr 2057.

Upon a Bastardy Proceeding, if the question arises concerning the existence of a marriage between the parents of the alleged bastard, proof of a marriage in fact, as contradistinguished from one inferable from circumstances, is not necessary.[5]

3. Presumptions From Cohabitation, Reputation, Etc. — A. In General. — The general rule is that in ordinary civil actions, except as previously noted, proof of an actual marriage need not be made, but it is sufficient to show the usual circumstances attending a marriage, such as cohabitation of the parties as husband and wife, their reputation as such in the vicinity of their residence, their acknowledgment as such, bearing and rearing children and treating them as legitimate, etc.[6] And there seems to be no ground for a

United States. — Hallett *v.* Collins, 10 How. 174.

Alabama. — Potier *v.* Barclay, 15 Ala. 439.

California. — Graham *v.* Bennet, 2 Cal. 503.

Illinois. — Keppler *v.* Elser, 23 Ill. App. 643.

Kentucky. — Dumaresly *v.* Fishly, 3 A. K. Marsh. 368.

Maryland. — Cheseldine *v.* Brewer, 1 H. & McH. 152.

Michigan. — Hutchins *v.* Krimmell, 31 Mich. 126, 18 Am. Rep. 164.

New Jersey. — Pearson *v.* Howey, 11 N. J. L. 12.

Oregon. — Jacobson *v.* Siddal, 12 Or. 280, 7 Pac. 108, 53 Am. Rep. 360.

See also the article "Criminal Conversation," Vol. III.

"Although the action of criminal conversation is, in its form, properly a civil action, yet it is in the nature of a criminal prosecution; and if proof of cohabitation or reputation were received as alone sufficient evidence of the marriage, it would place it in the power of the parties to collude together and pass themselves off as husband and wife occasionally, for the express purpose of profiting by such a suit." Fornshill *v.* Murray, 1 Bland Ch. (Md.) 479, 18 Am. Dec. 344.

5. State *v.* Worthingham, 23 Minn. 528.

6. *Alabama.* — Ford *v.* Ford, 4 Ala. 142; Moore *v.* Heineke, 119 Ala. 627, 24 So. 324; Tartt *v.* Negus, 127 Ala. 301, 28 So. 713; Morris *v.* Morris, 20 Ala. 168.

Arkansas. — Halbrook *v.* State, 34 Ark. 511.

Colorado. — Henry *v.* McNealey, 24 Colo. 456, 50 Pac. 37.

Connecticut. — Budington *v.* Munson, 33 Conn. 481.

Illinois. — Hiler *v.* People, 156 Ill. 511, 41 N. E. 181, 47 Am. St. Rep. 221; Conant *v.* Griffin, 48 Ill. 410; Harman *v.* Harman, 16 Ill. 85; Miller *v.* White, 80 Ill. 580; Hooper *v.* McCaffery, 83 Ill. App. 341.

Indiana. — Bourrs *v.* Van Winkle, 41 Ind. 432; Fleming *v.* Fleming, 8 Blackf. 234; Trimble *v.* Trimble, 2 Ind. 76.

Iowa. — Hager *v.* Brandt, 111 Iowa 746, 82 N. W. 1016.

Kentucky. — Taylor *v.* Shemwell, 4 B. Mon. 575; Botts *v.* Botts, 108 Ky. 414, 56 S. W. 961, 677; Stover *v.* Boswell, 3 Dana 232; Dannelli *v.* Dannelli, 4 Bush 51; Crozier *v.* Gano 1 Bibb 257; Chiles *v.* Drake, 2 Metc. 146, 74 Am. Dec. 406.

Maine. — Taylor *v.* Robinson, 29 Me. 323; Carter *v.* Parker, 28 Me. 509.

Maryland. — Barnum *v.* Barnum, 42 Md. 251; Jones *v.* Jones, 48 Md. 391, 30 Am. Rep. 466; Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752.

Michigan. — Hoffman *v.* Simpson, 110 Mich. 133, 67 N. W. 1107.

Mississippi. — Stevenson *v.* McReary, 12 Smed. & M. 9, 51 Am. Dec. 102; Henderson *v.* Cargill, 31 Miss. 367.

Missouri. — Cargile *v.* Wood, 63 Mo. 501.

Montana. — Soyer *v.* Great Falls Water Co., 15 Mont. 1, 37 Pac. 838.

New Hampshire. — Young *v.* Foster, 14 N. H. 114; Dunbarton *v.* Franklin, 19 N. H. 257; Stevens *v.* Reed, 37 N. H. 49.

North Carolina. — Jackson *v.* Rhem, 59 N. C. 141; Weaver *v.* Cryer, 12 N. C. 337.

distinction between cases where the party to the marriage is a party to the suit and wishes to prove the marriage and those where the attempt to establish the marriage is by one who is a stranger thereto.[7]

The Basis for this rule presuming marriage from cohabitation and reputation is that the law in general presumes against vice and immorality and in favor of innocence and good morals.[8] The rule is

Ohio. — Burner *v.* Briggs, 39 Ohio St. 478.

Oregon. — Murray *v.* Murray, 6 Or. 26.

Pennsylvania. — Drinkhouse's Estate, 151 Pa. St. 294, 24 Atl. 1083; Lehigh Valley R. Co. *v.* Hall, 61 Pa. St. 361; Yardley's Estate, 75 Pa. St. 207.

Tennessee. — Johnson *v.* Johnson, 1 Cold. 626.

Texas. — Tarpley *v.* Poage, 2 Tex. 139.

Washington. — Shank *v.* Nilson, 33 Wash. 612, 74 Pac. 812.

"Records of marriages are frequently destroyed, and it is often impossible to prove them by persons who were present at their solemnization; and largely, therefore, in the practice of our tribunals, marriages are proven by presumptions, which, originating in natural reason and justice, have been found to accord with the reason and justice of the law, and indispensable in judicial affairs. It therefore follows that the reputation that the parties are married, and that they live together as husband and wife, and are treated and received as husband and wife among their friends and neighbors, are facts sufficient to raise a strong presumption of the validity of the marriage between them, and, in the absence of clear testimony conducing to show that they were never legally married, must be deemed conclusive." Botts *v.* Botts, 108 Ky. 414, 56 S. W. 961, 677.

"The mere cohabitation of two persons of different sexes, or their behavior, in other respects, as husband and wife, always affords an inference, of greater or less strength, that a marriage has been solemnized between them. Their conduct being susceptible of two opposite explanations, we are bound to assume it to be moral, rather than immoral; and credit is to be given to their own assertions, whether express or implied, of a fact within their own knowledge." Port *v.* Port, 70 Ill. 484.

In Durning *v.* Hastings, 183 Pa. St. 210, 38 Atl. 627, an action to recover damages for the alienation of a wife's affections, it was held that marriage of the plaintiff and his wife must be established as a fact, but that absolute proof was not necessary; that evidence of cohabitation, reputation and general surroundings indicating the reasonable probability that the parties were married was sufficient to establish that fact.

Where it appears that the parties lived together as man and wife for several years, were known as such, acknowledged the relation by their daily actions and by express declarations to all persons with whom they came in contact; that both were competent to contract marriage; that the cohabitation was connubial from the start, and that the result of it was a child, yet living, the marriage contract will be presumed, though there is a denial of a ceremonial marriage, it appearing that both parties are financially interested in avoiding the contract. Stevens *v.* Stevens, 56 N. J. Eq. 488, 38 Atl. 460.

7. Taylor *v.* Robinson, 29 Me. 323.

8. Cargile *v.* Wood, 63 Mo. 501. See also White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; McKenna *v.* McKenna, 73 Ill. App. 64.

"The presumption of marriage is in favor of the innocence and good morals of the parties concerned. The law, looking upon men and women as moral members of society, will presume that when a man and woman are cohabiting they are husband and wife, and will not presume they are man and mistress; this is based on the first presumption of morality and innocence. If parties who may, by the evidence, be shorn of this charity of the law in the presumption of innocence and morality, are proved to have cohabited together, the pre-

the outgrowth, not only of this favoring of the right as against the wrong in the construction of conduct, but as well of the exigency of the case, in that all direct proof of what contract was entered into is wanting. It is mainly in cases involving questions of property rights or legitimacy, after the death of the parties to the marriage sought to be established, that this theory of presumption from course of conduct is found to be applied.[9]

Divorce Suits.— In divorce suits, evidence of cohabitation and reputation is usually sufficient proof of marriage,[10] except where the fact of marriage, if established, would involve the defendant in crime, in which latter case there must be stricter proof of marriage.[11] And even when the ground of the divorce asked is adultery, evidence of cohabitation and reputation is sufficient where the fact of adultery does not involve the guilty party in a crime.[12]

B. Acknowledgment of Marriage. — Marriage will not be presumed from mere acknowledgment where the acknowledgment was made for the purpose of concealing an illicit or unlawful relation.[13]

C. Character of Cohabitation. — Cohabitation alone will not warrant the presumption of marriage. The cohabitation must have

sumption arising from such cohabitation is much weaker than it would be were the parties in good repute for the virtues which bind society together. The cohabiting of a rake and a bawd will afford much less presumption of a marriage than would the cohabiting of an honorable man with a virtuous and refined woman. The one couple often defy the sentiment of civilized mankind and the scorn of society, while the other renders perpetual obedience to an enlightened conscience." Waddingham *v.* Waddingham, 21 Mo. App. 609.

9. McKenna *v.* McKenna, 73 Ill. App. 64; Proctor *v.* Bigelow, 38 Mich. 282; Botts *v.* Botts, 108 Ky. 414, 56 S. W. 961, 677. And see cases cited in preceding note.

10. White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; Harman *v.* Harman, 16 Ill. 85; Cross *v.* Cross, 55 Mich. 280, 21 N. W. 309.

In Morris *v.* Morris, 20 Ala. 168, a divorce suit where the answer admitted the marriage, it was held that evidence that the parties charged lived together as man and wife for more than forty years was sufficient proof of marriage.

In Trimble *v.* Trimble, 2 Ind. 76, a petition for divorce and alimony, it was held that evidence of cohabitation and reputation was sufficient to show plaintiff's marriage with defendant.

Upon an issue in a divorce case as to the marriage of the parties, the fact of marriage is sufficiently established, as against the husband's claim that a mere contract was entered into which was void under the law of the place, where the undisputed evidence shows that they cohabited as man and wife, and held themselves out to the public as sustaining that relation, during which time a child was born as the result of their union; and, upon the disputed question of whether a marriage ceremony preceded their cohabitation, the wife was sustained by corroborating circumstances in favor of such contention, while the husband, who contradicted her, was impeached in several particulars while giving testimony. Summerville *v.* Summerville, 31 Wash. 411, 72 Pac. 84.

11. Waddingham *v.* Waddingham, 21 Mo. App. 609; Collins *v.* Collins, 80 N. Y. 1.

12. White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799. And see articles "Adultery," "Divorce."

13. McKenna *v.* McKenna, 180 Ill. 577, 54 N. E. 641; Laurence *v.* Laurence, 164 Ill. 367, 45 N. E. 1071; Powers *v.* Charbmury, 35 La. Ann. 630.

been of such a character, and the conduct of the parties such, as to lead to the belief in the community that a marriage existed, and thereby create a reputation of their marriage.[14]

D. Reputation Must Result From Cohabitation. — Mere repute that the parties were husband and wife will not of itself warrant the presumption of marriage; there must be a reputation resulting from cohabitation.[15]

14. Dunbarton *v.* Franklin, 19 N. H. 257; Williams *v.* Herrick, 21 R. I. 401, 43 Atl. 1036; Heminway *v.* Miller, 87 Minn. 123, 91 N. W. 428; Eldred *v.* Eldred, 97 Va. 606, 34 S. E. 477.

"**The Legal Idea of Cohabitation** is that which carries with it a natural belief that it results from marriage only. To cohabit is to live or dwell together; to have the same habitation; so that where one lives and dwells, there does the other live and dwell always with him. The Scotch expression conveys the true idea, perhaps, better than our own — 'the habit and repute' of marriage. Thus when we see a man and woman constantly living together — where one is dwelling there the other constantly dwells with him — we obtain the first idea or first step in the presumption of marriage; and when we add to this that the parties so constantly living together are reputed to be man and wife, and so taken and received by all who know them both, we take the second thought or second step in the presumption of the fact of a marriage. Marriage is the cause; these follow as the effect." Yardley's Estate, 75 Pa. St. 207.

"**Cohabitation, Which Is Evidence of the Assumption of Marital Rights,** duties and obligations, must be a 'living together as husband and wife.'" Sharon *v.* Sharon, 79 Cal. 633, 22 Pac. 26, 131.

The presumption of a lawful marriage from the fact that the parties cohabited as husband and wife does not obtain where the proof indicates a mere casual commerce between the sexes without intent on the part of either to consummate a marital union. McBean *v.* McBean, 37 Or. 195, 61 Pac. 418.

An Intimacy Between a Man and His Housekeeper is not of itself evidence that they are married. And so long as their relations are such that the fact of marriage continues to be seriously questioned it cannot be considered as established by reputation. Cross *v.* Cross, 55 Mich. 280, 21 N. W. 309.

15. De Thoren *v.* Attorney-General, L. R. 1 App. Cas. 686; Hooper *v.* McCaffery, 83 Ill. App. 341; Ashford *v.* Metropolitan L. Ins. Co., 80 Mo. App. 638; Richard *v.* Brehm, 73 Pa. St. 140; Badger *v.* Badger, 88 N. Y. 546, 42 Am. Rep. 263; Cargile *v.* Wood, 63 Mo. 501.

"If it be once established that cohabitation and reputation constitute a marriage, the former must precede the latter. It is the cohabitation that raises the presumption and causes the reputation of matrimony. What would be easier than for parties to agree privately that they are husband and wife, and after a cohabitation of a week or less to separate, either from incompatibility of temper or from the less worthy consideration that they have become tired of each other, or galled by even this temporary bond? Such a transformation of a penal offense into matrimony, where the alleged marriage might be dissolved, as it probably in many cases would be, by the caprice of the parties, would often follow, if, at the inception of the contract, nothing but cohabitation were required." Dunbarton *v.* Franklin, 19 N. H. 257.

"Reputation is sometimes very important when a marriage is in doubt; but it is only one of the circumstances from which the true relations of the parties, as legal or otherwise, may be inferred; it is not in itself a fact which is at all important to the validity of the relation. When a marriage is once made, whether by formal ceremony or otherwise, it must stand, though the whole community say and believe it is illegal. But upon doubtful facts the court ought to presume a lawful marriage

E. Reputation Must Be General. — Where reputation is relied on, that reputation must, in order to raise the presumption of marriage, be founded on a general, and not a divided or single, opinion.[16] But whilst a divided reputation that parties are husband and wife is not so strong as an undivided reputation thereof, yet each is evidence proper to be weighed with the other concomitant circumstances.[17]

F. Presumption Strengthened by Lapse of Time. — The pre-

rather than a notorious act of immorality." Peet *v.* Peet, 52 Mich. 464, 18 N. W. 220.

In Davis *v.* Orme, 36 Ala. 540, a statutory action for the use of a wife to recover money lost at gambling, it was held that general reputation was not competent to show that the beneficiary of the suit was the wife of the loser.

16. Barnum *v.* Barnum, 42 Md. 251; Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752; Clayton *v.* Wardell, 4 N. Y. 230; Eldred *v.* Eldred, 97 Va. 606, 34 S. E. 477; Yardley's Estate, 75 Pa. St. 207; White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799.

"**Reputation, as a Synonym for Consensus of Public Opinion**, has a fixed meaning, but it is not a word denoting extent of territory. A man who is the center of a large acquaintanceship in the city may have his home in a village miles beyond the municipal limits. In a question affecting the fact of his marriage, the opinion of the few neighbors who make up his social circle will outweigh the negative testimony of a thousand citizens who know nothing and care nothing about the matter." Comly's Estate, 185 Pa. St. 208, 39 Atl. 890.

To establish a marriage by reputation no evidence of any but a general reputation is admissible. If a man and woman are generally reputed to be married, or if the contrary be generally asserted, a general reputation one way or the other exists. But a witness cannot be asked if there was a divided reputation in the community as to whether or not the parties were married. Jackson *v.* Jackson, 82 Md. 17, 33 Atl. 317. The court said: "A reputation, to be a provable reputation at all, must be a general reputation. It may be either one of two opposites; for instance, either good or bad. It cannot be intermediate, that is, partly one and partly the other, for that would not be general and there would be no general reputation either way. . . . When the courts employ the term 'divided reputation' it is not meant that an individual can have such a thing as two opposite general reputations at the same time. A condition of that sort is an impossibility. A reputation cannot be general if it is not general, and no reputation of a marriage but a general reputation is competent evidence to establish marriage. General reputation, whether affirmative or negative, is a fact to be proved like any other fact within the knowledge of witnesses by the witnesses who know it. If it exists at all it exists as a fact. That which goes to make it up is hearsay, but that which the hearsay does make up is a fact."

The fact that a marriage was deemed necessary by a friend who advised it is evidence that there was no general and uniform reputation in the community that the parties were married. To prove a marriage by cohabitation and reputation the reputation must be general and uniform. Williams *v.* Herrick, 21 R. I. 401, 43 Atl. 1036. *Compare* Northrop *v.* Knowles, 52 Conn. 522, 2 Atl. 395, 52 Am. Rep. 613, where it was said that where it is attempted to establish marriage by reputation, such evidence may be weakened by showing that the reputation is not general, but is divided; but that even in such case the negative evidence should be kept within narrow limits.

17. Greenawalt *v.* McEnelley, 85 Pa. St. 352; Clark *v.* Cassidy, 62 Ga. 407, where it was held error for the judge to charge the jury that if the reputation be divided it is of little or no weight. *Compare* Jackson *v.* Jackson, 82 Md. 17, 33 Atl.

sumption of marriage from cohabitation and reputation is strengthened by lapse of time, especially where the witnesses are dead and other evidence is not available.[18]

G. Conclusiveness of Presumption. — a. *In General.* — The presumption of marriage arising from cohabitation and reputation is not a conclusive one,[19] and it is error for the court to charge the jury that such proof is legal evidence of a marriage, and that they must find accordingly.[20] Thus the presumption is rebutted by proof of acts or conduct on the part of the parties tending to show that they did not believe that in fact they were married.[21]

b. *Separation and Subsequent Actual Marriage.* — The presumption of an actual marriage from the fact of continued cohabitation, repute, etc., is rebutted by the fact of a subsequent permanent separation without apparent cause, and the actual marriage soon there-

317, cited in the note immediately preceding.

18. Wilkinson *v.* Gordon, 2 Add. Ecc. (Eng.) 152; Hiler *v.* People, 156 Ill. 511, 41 N. E. 181, 47 Am. St. Rep. 221; Teter *v.* Teter, 101 Ind. 129, 51 Am. Rep. 742; Strode *v.* Magowan, 2 Bush (Ky.) 621; Johnson *v.* Johnson, 30 Mo. 72, 77 Am. Dec. 598; Hynes *v.* McDermott, 91 N. Y. 451; Johnson *v.* Johnson, 1 Cold. (Tenn.) 626.

19. *Alabama.* — Green *v.* State, 59 Ala. 68.

California. — Kilburn *v.* Kilburn, 89 Cal. 46, 26 Pac. 636, 23 Am. St. Rep. 447.

Illinois. — Port *v.* Port, 70 Ill. 484.

Indiana. — Nossaman *v.* Nossaman, 4 Ind. 648.

Nebraska. — Olson *v.* Peterson, 33 Neb. 358, 50 N. W. 155.

New Hampshire. — Dunbarton *v.* Franklin, 19 N. H. 257.

New Jersey. — Collins *v.* Voorhees, 47 N. J. Eq. 555, 22 Atl. 1054.

New York. — Clayton *v.* Wardell, 4 N. Y. 230.

Pennsylvania. — Yardley's Estate, 75 Pa. St. 207; Tholey's Appeal, 93 Pa. St. 36; Dailey *v.* Frey, 206 Pa. St. 227, 55 Atl. 962.

Rhode Island. — Peck *v.* Peck, 12 R. I. 485, 34 Am. Rep. 702.

20. State *v.* St. John, 94 Mo. App. 229, 68 S. W. 374; Stevenson *v.* McReary, 12 Smed. & M. (Miss.) 9, 51 Am. Dec. 102.

21. Dysart Peerage Case, L. R. 6 App. Cas. 489; Marks *v.* Marks, 108 Ill. App. 371; Knorst *v.* Knorst, 181 Ill. 347, 54 N. E. 951; Haley *v.* Goodheart, 58 N. J. Eq. 368, 44 Atl. 193; Com. *v.* Stump, 53 Pa. St. 132, 91 Am. Dec. 198; Appeal of Reading F. & Trust Ins. Co., 113 Pa. St. 204, 6 Atl. 60, 57 Am. Rep. 448; Williams *v.* Herrick, 21 R. I. 401, 43 Atl. 1036.

While cohabitation and reputed marriage relations between the parties at the several places of their residence will raise the presumption that a marriage contract had been entered into between them, this presumption "may be overcome by other presumptions springing from the acts of the parties themselves during the time of cohabitation, as well as from acts and declarations and conduct springing from their acts after cohabitation between them has ceased." *In re* Estate of Maher, 204 Ill. 25, 68 N. E. 159, *holding* that the facts disclosed by the record did overcome any presumption of a marriage contract honestly and fairly entered into between the parties. In this case it appeared that after a period of cohabitation the woman abandoned the man, assumed her maiden name, did not look to him for support, held no communication with him, and he subsequently married another woman. See also Maher *v.* Maher, 183 Ill. 61, 56 N. E. 124.

In Adair *v.* Mette, 156 Mo. 496, 57 S. W. 551, it was held error for the court to charge the jury that marriage may be inferred from "acknowledgment, cohabitation and reputation" regardless of a subsequent marriage contract and other evidence tending to prove that the parties were not in fact married.

after of one of the parties.[22] But this is no reason for entirely withdrawing from the consideration of the jury the evidence of cohabitation and repute.[23]

c. *Subsequent Similar Relations With Another.* — The presumption of marriage from cohabitation and reputation may be rebutted by subsequent similar relations with another person.[24]

d. *Former Marriage.* — The presumption of marriage arising from cohabitation and reputation may be overcome by proof that at the time one of the parties had a husband or wife living.[25] But in such case the law requires that the first alleged marriage must be shown as an actual fact as distinguished from a presumptive marriage.[26] It is held, however, that direct evidence of a marriage

In Grimm's Estate, 131 Pa. St. 199, 18 Atl. 1061, 6 L. R. A. 717, it was held that evidence that a man and woman cohabited together, he treating her as his wife and acknowledging her as such in the presence of others, it appearing that the marriage ceremony between them was to be performed at a future date, but was prevented by the accidental death of the man, was insufficient to establish the existence of the relation of husband and wife.

22. Moore *v.* Heineke, 119 Ala. 627, 24 So. 374; Weatherford *v.* Weatherford, 20 Ala. 548, 56 Am. Dec. 206; Chamberlain *v.* Chamberlain, 71 N. Y. 423; Jones *v.* Jones, 45 Md. 144; Smeser *v.* Bower, 1 Penn. & W. (Pa.) 450.

23. "Notwithstanding such evidence has been deprived of any aid from the presumption it is still evidence tending to show, and from which the jury may infer if it be sufficiently strong and satisfactory, either an actual ceremonial marriage or an actual consent or agreement to be man and wife, which, when followed by cohabitation, may constitute a valid common-law marriage." Moore *v.* Heineke, 119 Ala. 627, 24 So. 374.

24. Hiler *v.* People, 156 Ill. 511, 41 N. E. 181, 47 Am. St. Rep. 221.

25. Moore *v.* Moore, 102 Tenn. 148, 52 S. W. 778.

Henry *v.* McNealey, 24 Colo. 456, 50 Pac. 37, where the court said: "This presumption, it will be seen, is founded upon the maxim that fraud and coven are not generally presumed, the presumption of the law being usually in favor of honesty and morality. If, then, the law will not presume vice and immorality *a fortiori,* it is not to be presumed that one of the parties to an alleged marriage was guilty of bigamy in consummating the marriage."

26. Clayton *v.* Wardell, 4 N. Y. 230; Jones *v.* Jones, 48 Md. 391, 30 Am. Rep. 466, *affirming* 45 Md. 144, where the court said: "The reasoning upon which this decision rests is that in such a case the presumption of a marriage arising from cohabitation and repute is met and overcome by the stronger presumption that a man will not incur the guilt of felony, and the danger which attends it, by marrying another one during the life of one to whom he had previously been lawfully married." See also Waddingham *v.* Waddingham, 21 Mo. App. 609.

On an issue of marriage or no marriage, where the presumed innocence of a proved cohabitation is overcome or essentially weakened by counter-presumption of the innocence of some other act or transaction appearing in the case, there must be further evidence of the marriage; in other words, a marriage in fact must be shown or the facts are inadequate. "This is but to say that in case of irreconcilable presumptions of both marriage and no marriage one presumption will stand against the other and both will be nullified; hence proof superior to and that will overcome mere presumption must be resorted to by whoever has the affirmative of the case." Hooper *v.* McCaffery, 83 Ill. App. 341. In this case, a petition for a widow's award, the petitioner

does not exclude and render incompetent circumstantial evidence upon which to found a presumption of a former marriage between one of the parties and another person.[27]

4. Relations Illicit in Inception. — A. In General. — Where

claimed to have been married to the decedent at Gretna Green, Scotland, about 1835, and to have lived with him in relations apparently matrimonial in the old country and in this country until 1848, when the parties separated, and neither of them appeared to have had any knowledge of the existence of the other from that time on. Soon afterward she assumed apparently matrimonial relations with another man, and upon his death applied for and drew a pension as his widow for thirty years. Subsequent to ceasing the relations with the petitioner the decedent assumed apparently marital relations with another woman, of whom he spoke in his will as his second wife, with whom he lived as her husband and was reputed to be such for several years and until her death. The court held that the presumption of a marriage between the petitioner and the decedent arising from the cohabitation was met and nullified by the equally strong presumption in favor of the decedent's innocence in subsequent presumed marriages to his second and third wives, and by the fact of his actual marriage to the fourth wife.

"Where two alleged marriages compete, and one of them is proved as a fact, whether by direct or circumstantial evidence, the other cannot be left to stand upon the mere legal presumption founded on cohabitation and repute. . . . With no competing actual marriage proved, the law presumes marriage from cohabitation and repute. But this presumption the law declines to raise in opposition to a competing marriage actually proved." Jenkins *v.* Jenkins, 83 Ga. 283, 9 S. E. 541, 20 Am. St. Rep. 316; Norman *v.* Goode, 113 Ga. 121, 38 S. E. 317. As to the presumption of the existence of the former marriage in such case, see *infra*, "Conflicting Presumptions."

27. Archer *v.* Haithcock, 51 N. C. 421. See also Camden *v.* Belgrade, 75 Me. 126, 46 Am. Rep. 364, where the court said: "It is easy to conceive of cases where we might find ourselves compelled to do an irremediable wrong, if circumstantial evidence of a prior marriage can never be allowed to come in to overcome, if it can, direct proof of a subsequent marriage. Suppose a young couple, of decent character and repute, to have been married many years ago in a town where the records of marriages have since been burnt, or by a minister or magistrate who has failed, as they not infrequently do, to make due return to the records of its solemnization, and that the witnesses to the marriage are dead; but the parties have lived and cohabited as husband and wife in the immediate vicinity, and among their kindred and friends, and had children born to them, and have been recognized by their neighbors and by each other as lawfully married. Now, suppose the husband after a series of years becomes depraved and reckless, leaves his family, goes to another section of the state, and there is direct proof that there, under an assumed name, he goes through the form of marriage with a woman in low life, with whom he afterward cohabits and by whom he has children. Suppose the question arose in a suit touching dower or inheritance. Is it a conclusion of law that direct proof of the second marriage must of itself deprive his real wife of dower, and his legitimate children of the right of inheritance, and stigmatize her as a concubine and them as bastards, because circumstantial evidence of the first marriage cannot, however strong, be received to combat the presumption of innocence and the validity of the second marriage? To us it seems to be a question, not of the competency, but of the strength and sufficiency, of evidence in every case, and that the testimony should be received and passed upon by the jury, subject to the power of the court to set aside any unwarrantable conclusion which they may draw."

there was no impediment to marriage, and the relations between a man and woman living together were illicit in their inception, it will be presumed that they continued to be of that character until a changed relation is proved.[28]

B. Question of Law or of Fact. — In one case, at least, an instruction was approved in which was stated as a presumption of law this presumption of the continuance of an illicit relation.[29] But the better rule would seem to be that it is a question of fact.[30] But whatever be the character of the presumption in this respect, it is not a conclusive one, as will be shown by the succeeding sections.[31]

C. Proof of Change of Character of Relations. — While such relations may be transformed into matrimonial relations, to show that fact the evidence must establish a marriage valid in other respects.[32]

The Acts and Declarations of the Parties, reputation of marriage,

28. *California.* — White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799.

Illinois. — Cartwright *v.* McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. Rep. 105; Marks *v.* Marks, 108 Ill. App. 371; Potter *v.* Clapp, 203 Ill. 592, 68 N. E. 81; Robinson *v.* Robinson, 188 Ill. 371, 58 N. E. 906.

Iowa. — Barnes *v.* Barnes, 90 Iowa 282, 57 N. W. 851.

Maryland. — Jones *v.* Jones, 45 Md. 144.

Michigan. — Van Dusan *v.* Van Dusan, 97 Mich. 70, 56 N. W. 234.

Missouri. — Cargile *v.* Wood, 63 Mo. 501.

New York. — Gall *v.* Gall, 114 N. Y. 109, 21 N. E. 106; Bates *v.* Bates, 7 Misc. 547, 27 N. Y. Supp. 872.

South Carolina. — State *v.* Whaley, 10 S. C. 500.

Wisconsin. — Williams *v.* Williams, 46 Wis. 464; Spencer *v.* Pollock, 83 Wis. 215, 53 N. W. 490, 17 L. R. A. 848.

"The rule that a connection confessedly illicit in its origin, or shown to have been such, will be presumed to retain that character until some change is established is both logical and just. The force and effect of such a fact is always very great, and we are not disposed in the least degree to weaken or disregard it." Badger *v.* Badger, 88 N. Y. 546, 42 Am. Rep. 263.

29. Cargile *v.* Wood, 63 Mo. 501.

30. State *v.* Worthingham, 23 Minn. 528; White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799.

"Where the intercourse was illicit at first, but was not then accompanied by any of the evidences of marriage, and subsequently it assumes a matrimonial character, and is surrounded by the evidences of a valid marriage above named, a question of fact arises for the determination of the jury. They are to weigh the presumption arising from the meretricious character of the connection in its origin with the presumption arising from the subsequent acknowledgment, declarations, repute, etc., and decide whether all of the circumstances taken together are sufficient evidence of marriage." Gall *v.* Gall, 114 N. Y. 109, 21 N. E. 106.

31. White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799. And see cases in notes to succeeding sections.

32. Marks *v.* Marks, 108 Ill. App. 371; Robinson *v.* Robinson, 188 Ill. 371, 58 N. E. 906; Williams *v.* Williams, 46 Wis. 468; Dannelli *v.* Dannelli, 4 Bush (Ky.) 51; Bates *v.* Bates, 7 Misc. 547, 27 N. Y. Supp. 872; Williams *v.* Williams, 46 Wis. 464; Spencer *v.* Pollock, 83 Wis. 215, 53 N. W. 490, 17 L. R. A. 848; *In re* Terry's Estate, 58 Minn. 268, 59 N. W. 1013.

In Norcross *v.* Norcross, 155 Mass. 425, 29 N. E. 506, a divorce suit, the libelant substantially proved that without being married she and the defendant had lived together as hus-

and other circumstances usually attending marriage, are proper matters of proof for this purpose.[33]

band and wife in Massachusetts, and while doing so they twice went to New York together and continued in the same apparent relation, at one time for three days, and at another for a week. The court said: "We have not been referred to any decision in New York which holds that these facts would either constitute marriage there or afford a conclusive presumption of it; and we are slow to believe that acts which in Massachusetts were illicit will be deemed matrimonial merely by being continued without any new sanction by residents of Massachusetts while transiently across the state line."

In Harbeck *v.* Harbeck, 102 N. Y. 714, 7 N. E. 408, an action for divorce, the only question litigated was as to the marriage, no ceremonial marriage having taken place. That the union was at first unlawful was conceded; if a change occurred it was followed by no formal celebration, nor was there any evidence of a present agreement to take each other for husband and wife, and that they ever passed by contract or by mutual consent from the state of concubinage into that of marriage was made doubtful by the admission of the plaintiff proved by various witnesses. It was held that marriage was not proved.

Without proof subsequent actual marriage will not be presumed from continued cohabitation and reputation of a relation which was of unlawful origin. Marks *v.* Marks, 108 Ill. App. 371.

In Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752, an instruction asserting that if the relation between the parties was illicit in its inception it will be presumed to continue to be of the same character, and that this presumption can only be overcome and the marriage established by evidence other than that of cohabitation, was erroneous because it did not specify what other evidence was required.

In Support of the Legitimacy of a Child, the facts that the father desired to marry the mother, and that, although he might have maintained a meretricious intercourse without opposition from his family, he abandoned his home and parents to live with her, are some evidence that he did contract a marriage in fact prior to the birth of the child. Caujolle *v.* Ferrie, 23 N. Y. 90, *affirming* 26 Barb. 177.

The Mississippi Constitution adopted soon after the close of the civil war provided that those who had not been married, but were then living together and cohabiting as husband and wife, should be taken and held for all purposes in law as being married; and in Floyd *v.* Calvert, 53 Miss. 37, it was held that where a person claims the benefit of this constitutional provision he must show some formal and explicit agreement accepting the new organic law as establishing thenceforward a new relationship, or at all events that there must have been such open and visible change in the conduct and declarations of the parties that an agreement to accept the new law might fairly be inferred.

33. Robinson *v.* Ruprecht, 191 Ill. 424, 61 N. E. 631; *In re* Terry's Estate, 58 Minn. 268, 59 N. W. 1013; Badger *v.* Badger, 88 N. Y. 546, 42 Am. Rep. 263; Elzas *v.* Elzas, 171 Ill. 632, 49 N. E. 717, where it was shown that although there had been meretricious relations between the parties previously, at the time of the contract set up and testified to by the wife there was an immediate change. She immediately abandoned her dissolute life and moved with her accepted husband into a respectable place, where they lived together openly as husband and wife, he introducing and speaking of her as his wife and directing letters to her as such.

See also Jones *v.* Jones, 45 Md. 144, where the court further held that if, after the birth of the child whose legitimacy was in question, there was cohabitation of his father and mother, the latter assuming the name of the former, and the parties treated each other as husband and wife, and treated the child as their own, and they were treated as and reputed to be husband and wife by their friends

D. Time of Change in Character of Relations. — It is not essential, in order to establish the change from illicit to matrimonial relations, to show the precise time or occasion thereof. It is sufficient if the facts show that the change did actually take place.[34]

5. Presumption of Marriage After Removal of Disability. — As to whether or not, in the case of a second marriage, originally void because one or both of the parties had then living a husband or wife by a marriage which was undissolved, a subsequent marriage will be presumed to have occurred if the parties continued to cohabit together after the removal of the disability, the authorities are not uniform. There is authority to the effect that in such case a subsequent marriage will not be presumed.[35] Sometimes the presumption has been denied because reliance was placed upon proof of the solemnization of the second marriage, or its acknowledgment as a fact, at a time when a valid marriage could not be contracted.[36]

and acquaintances, these were facts from which marriage might be inferred, nothwithstanding the original illicit relations between the parties, and were properly submitted to the jury.

"It is sufficient if the acts and declarations of the parties, their reputation as married people and the circumstances surrounding them in their daily lives naturally lead to the conclusion that, although they began to live together as man and mistress, they finally agreed to live together as husband and wife." Gall *v.* Gall, 114 N. Y. 109, 21 N. E. 106.

The fact that the intercourse in its inception was illicit does not prevent the establishment of the marriage status by the subsequent conduct of the parties showing a general, undivided and uniform habit and repute that they had interchanged the requisite matrimonial consent. But there must be a change operated by a cohabitation which the law regards as lawful, and such change may be evidenced by cohabitation and reputation. White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799.

34. Badger *v.* Badger, 88 N. Y. 546, 42 Am. Rep. 263; Caujolle *v.* Ferrie, 23 N. Y. 90; White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799. *Contra,* Cargile *v.* Wood, 63 Mo. 501.

35. Hunt's Appeal, 86 Pa. St. 294.

36. In Cram *v.* Burnham, 5 Me. 213, where the validity of a second marriage was disputed on the ground that at the time the man had a first wife living, it was held that because he relied upon proof of the solemnization of the second marriage before the death of his first wife the court could not presume a marriage subsequent to her death. The court said that if reliance had been based upon cohabitation as evidence of a legal marriage it might have justified the presumption that a lawful marriage had taken place, when the man might lawfully enter into that relation, but that as he had introduced and relied upon proof of the solemnization of his marriage at a certain period, and it appeared that at that time he was the husband of another woman then living, the pretended marriage was clearly void.

In State *v.* Whaley, 10 S. C. 500, where a charge was given to the effect that if, after the death of a first wife, during whose lifetime the husband had married a second time, the husband acknowledged the fact of having been married to the second wife during the lifetime of his first wife, such an acknowledgment could be received as evidence of marriage; it was held that such an inference was erroneous, as that marriage, assuming its original illegality, could not become a source of the legal relation of marriage through any acknowledgment of the fact of its existence. The court said: "Recognition of the marriage relation by the parties is generally accepted as ground for inferring a contract of marriage;

The weight of authority, however, is to the effect that a presumption of a subsequent marriage arises in such case.[37]

but if the nature of that recognition is such that it points exclusively to an illegal transaction as the source from which that relation has sprung, it could not have the effect to change a state of illicit cohabitation into the legal state of marriage."

37. *England.* — De Thoren *v.* Attorney-General, L. R. 1 App. Cas. 686.

United States. — Adger *v.* Ackerman, 115 Fed. 124, 130.

Illinois. — Manning *v.* Spurck, 199 Ill. 447, 65 N. E. 342.

Iowa. — Blanchard *v.* Lambert, 43 Iowa 228, 22 Am. Rep. 245.

Kentucky. — Donnelly *v.* Donnelly, 8 B. Mon. 113.

New York. — Betsinger *v.* Chapman, 88 N. Y. 487; Jackson *v.* Claw, 18 Johns. 347; Rose *v.* Clark, 8 Paige 574; Starr *v.* Peck, 1 Hill 270; Clayton *v.* Wardell, 4 N. Y. 230.

Texas. — Yates *v.* Houston, 3 Tex. 433, 450.

In Robinson *v.* Ruprecht, 191 Ill. 424, 61 N. E. 631, it appeared that in 1871 the parties were united by a ceremonial marriage. Prior to that both parties had been previously married. The man's first wife was then living and undivorced, as he well knew. The woman's first husband was then in fact living, but it appeared that she had been informed, and upon reasonable grounds believed, that he was dead, and in good faith believed that she had full right to enter into the marriage relation. In 1875, the man's first wife died, of which fact he was within a few months thereafter informed. The woman's first husband had entered into another marriage in Pennsylvania and lived until 1890. The fact that he was living at the time of the marriage in question reached neither of the parties. It was held that their cohabitation was meretricious in its inception, and that the celebration of the marriage contract between them in 1871 did not change the character of that relation. As they had continued to live together as husband and wife for nearly sixteen years after the death of the man's first wife, and for about a year after the death of the woman's first husband, it was held that although there was no direct proof that they subsequently entered into a satisfactory marriage, yet their actions and conduct, their cohabitation and repute were foreign to and inconsistent with any relation other than that of husband and wife, and that there could be no doubt but that after the removal of the last impediment the cohabitation between them was matrimonial in the intent and belief of both parties, and that the presumption of marriage from cohabitation, apparently matrimonial, became applicable to their relation as husband and wife.

In Teter *v.* Teter, 101 Ind. 129, 51 Am. Rep. 742, a case involving the validity of marriage, it appeared that the husband had been previously married, but at the time of his second marriage believed in good faith that the former marriage had been dissolved, and there were reasonable grounds for this belief, a decree of divorce having in fact been noted on the records of an Ohio court in a suit brought by his former wife, which was, however, not formally entered and the suit was dismissed. A few months afterward the husband's former wife did in fact obtain a divorce in Indiana. The parties continued to live together as husband and wife until the wife's death many years later. It was held that the continuous living together as husband and wife, their acts as such, their well-founded belief in the validity of their formal marriage, the husband's recognition of that relation after the divorce obtained by his first wife left him free to enter into a contract of marriage, the second wife's firm faith from first to last that she was lawfully married, the declarations of the parties that they were married, and the acknowledgment of children born to them, create a presumption of marriage too strong to be overcome by the general statement of the husband, when on the witness stand, that there was only one marriage. The court said: "There was a time when no impedi-

Sometimes it is held that the question whether or not such subsequent marriage is to be presumed is to be determined by proof of knowledge on the part of the parties of the removal of the impediment.[38] Some of the courts seem to make a distinction between

ment to Clayton's second marriage existed, and the strong and almost conclusive presumption from the facts developed by the evidence is that there was present in the minds of the parties the mutual consent which gives validity to marriages even though there is no formal solemnization. It is not the formal ceremony that creates the marital relation. . . . The circumstances lead with almost irresistible force to the conclusion that the mutual consent to marry was given after as well as before the divorce was obtained by Clayton's first wife. If no form of words is essential to express the consent when the marriage is first contracted, we can see no reason why any should be needed to continue the relation after the removal of an impediment existing at the time of the formal celebration of the marriage. It would be more consistent with logical principles to hold that the subsequent cohabitation as husband and wife is referable to the consent expressed at the commencement of the connection between the parties, than to hold that it was an adulterous commerce, unsanctioned by marriage." See also Teter *v.* Teter, 88 Ind. 494, which was the same case on a former appeal.

In University of Michigan *v.* McGuckin, 64 Neb. 300, 89 N. W. 778, the beginning of the cohabitation between the parties was meretricious, each of them having a lawful spouse then living; but both these obstacles were soon afterward removed by decrees of divorce, and thereafter the parties not only continued for a long term of years to live together as husband and wife, and to enjoy the repute of that relation, but continuously represented themselves to the public and individuals as being such. That these facts and others shown would, if standing alone, be sufficient evidence of marriage was explicitly admitted. But in connection with them it appeared that the only promise the parties had made to marry each other was prior to the obtaining of the divorce. It was insisted that a lawful marriage could have had its inception only in a promise or agreement of marriage after the removal of the legal obstacles thereto; that the evidential facts found are of no significance, except as tending to establish the making of such a promise or agreement, or of raising a presumption that one had been made, and that whether one had been made was the only ultimate fact in controversy. It was held, however, that there was sufficient evidence that after the removal of the last impediment the parties consented to assume the status of husband and wife, although they made no explicit verbal contract or agreement so to do. That evidence was not rebutted by the mere negative fact that they omitted to express that consent by formal words. This consent may be expressed by conduct as effectively as by words, and proof of the conduct is proof of the consent.

38. Cartwright *v.* McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. Rep. 105. In this case the man had married with full knowledge that he was then the husband of a living wife, and never thereafter obtained information that this impediment to a lawful union with the second wife had been removed by a decree of divorce granted to his legal wife in Kentucky, the court holding that his cohabitation with the second woman remained always meretricious so far as he was concerned, and for that reason it was held that the presumption that a legal marriage was celebrated between the parties after the granting of the divorce in Kentucky did not arise. And as the court said in Robinson *v.* Ruprecht, 191 Ill. 424, 61 N. E. 631: "Their cohabitation being meretricious in its inception, at least so far as Lewis is concerned, was it changed by the divorce in Kentucky, and rendered thereafter matrimonial? This would seem to depend upon the intention of the parties, and the fact whether they had knowledge of the divorce remov-

cases involving property rights only,[39] and actions for divorce, holding that in the former case the presumption may arise, but refusing to sanction the application of the rule in the latter class of cases.[40] Still another line of cases holds that although the presumption of a subsequent marriage may sometimes be applied, it cannot where the parties were originally at liberty to form a legal or illegal union as they may have preferred.[41]

6. Presumptions From Proof of Marriage in Fact. — A. FACTS NECESSARY TO VALIDITY. — a. *In General.* — When a marriage in fact is proved, the general rule is that every fact necessary to its validity will be presumed.[42] Thus the capacity of the parties will be

ing the only impediment there was to their marriage. There is no proof in the record that either Lewis or Zerelday had ever been informed of the divorce, or that she ever knew that he had a former wife. Without knowledge of the removal of the impediment they could not have intended a second marriage, or have attempted to enter into another marriage. Courts cannot marry parties by mere presumption without their consent."

In Howland *v.* Burlington, 53 Me. 54, where a woman married a second husband after having been deserted by her former husband, who subsequently obtained a divorce, it was held that the court could not presume that there had been a remarriage of the second husband and wife after the divorce of the former husband in the absence of proof of knowledge of the divorce on their part, especially as the events were all of recent date. The court, after referring to the fact that it did not appear that the parties were aware of the divorce obtained by the woman's first husband, said: "If not, no reason would exist for a second performance of the marriage ceremony. The parties had been once married and a repetition could not reasonably be presumed without proof of knowledge on their part of the fact of a divorce, which alone would lead to such second marriage. Without such knowledge, second marriage would not be more likely to take place at one time than another — after than before the divorce."

39. The cases in the notes cited in the preceding part of this subdivision are cases involving property rights, but this distinction does not seem to have been made.

40. Collins *v.* Collins, 80 N. Y. 1; Rose *v.* Rose, 67 Mich. 619, 35 N. W. 802. See also Van Dusan *v.* Van Dusan, 97 Mich. 70, 56 N. W. 234; Voorhees *v.* Voorhees, 47 N. J. Eq. 555, 22 Atl. 1054, 14 L. R. A. 364, *affirming* 46 N. J. Eq. 411, 19 Atl. 172, 19 Am. St. Rep. 404; *s. c.*, 47 N. J. Eq. 315, 20 Atl. 676, 24 Am. St. Rep. 412, reporting a dissenting opinion by Garrison, J., in which he insisted that the rule announced in De Thoren *v.* Attorney-General, L. R. 1 App. Cas. 686, is the true rule in such circumstances as surrounded this case.

41. Barnes *v.* Barnes, 90 Iowa 282, 57 N. W. 851. *Compare* on this question the section discussing "Relations Illicit in Inception."

In such case if they originally elected the unlawful in preference to the lawful relationship they must be presumed to have continued therein until some change of intention and wishes is affirmatively shown. Floyd *v.* Calvert, 53 Miss. 37. See further on this question *supra*, "Relations Illicit in Inception. — Proof of Subsequent Marriage."

42. *Arkansas.* — Halbrook *v.* State, 34 Ark. 511.

Colorado. — Pittinger *v.* Pittinger, 28 Colo. 308, 64 Pac. 195.

Connecticut. — Erwin *v.* English, 61 Conn. 502, 23 Atl. 753.

Illinois. — Johnson *v.* Johnson, 114 Ill. 611, 3 N. E. 232, 55 Am. Rep. 883; Barber *v.* People, 203 Ill. 543, 68 N. E. 93; Jones *v.* Gilbert, 135 Ill. 27, 25 N. E. 566.

Kentucky. — Howton *v.* Gilpin, 24 Ky. L. Rep. 630, 69 S. W. 766.

presumed.[43] And it will be presumed that the clergyman or officer celebrating the marriage was acting within the scope of his legal power and authority.[44] It will also be presumed that the proper

Maine. — Harrison *v.* Lincoln, 48 Me. 205.

Michigan. — Hutchins *v.* Kimmell, 31 Mich. 126, 18 Am. Rep. 164.

Mississippi. — Hall *v.* Rawls, 5 Cushm. 471.

North Carolina. — State *v.* Davis, 109 N. C. 780, 14 S. E. 55.

Pennsylvania. — Thomas *v.* Thomas, 124 Pa. St. 646, 17 Atl. 182.

When the celebration of a marriage is proved, the validity of the marriage, the contract and the capacity of the parties are presumed. "Society rests upon marriage. The law favors it. And when a man and woman have contracted marriage in due form the law will require clear proof to remove the presumption that the contract is legal and valid." Franklin *v.* Lee, 30 Ind. App. 31, 62 N. E. 78.

In Queen *v.* Cresswell, L. R. 1 Q. B. Div. 446, an indictment for bigamy, it was proved that the first marriage was solemnized, not in the parish church, but in a chamber in a building a few yards from the church, while the church was under repair. It was further proved that divine service had several times been performed in the building in question. It was held that the building must be presumed to have been licensed, and therefore the first marriage was valid, and the prisoner was properly convicted of bigamy.

There is a strong legal presumption in favor of marriage, particularly after the lapse of a great length of time, and this presumption must be met by strong, distinct and satisfactory disproof. Where, therefore, two persons had shown a distinct intention to marry, and a marriage had been, in form, celebrated between them by a regularly ordained clergyman, in a private house, as if by special license, and the parties, by their acts at the time, showed that they believed such marriage to be a real and valid marriage, the rule of presumption was applied in favor of its validity, though no license could be found, nor any entry of the granting of it, or of the marriage itself, could be discovered; and though the bishop of the diocese (during whose episcopacy the matter occurred), when examined many years afterward on the subject, deposed to his belief that he had never granted any license for such marriage. Piers *v.* Piers, 2 H. L. Cas. 331.

"Where the evidence shows that the parties appeared at a church, and that the officiating minister then publicly, and in the presence of other persons in attendance, in fact performed a ceremony of marriage between such parties, and further, that the parties appeared to regard themselves as then married, it is fairly to be presumed, in the absence of anything to the contrary, that the ceremony was regular and legal, although the evidence fails to show what words were used by the parties or the minister, or the particulars of the ceremony, or what specific kind of ceremony was or would be according to the forms, usages or customs of such church." People *v.* Calder, 30 Mich. 85, a prosecution for polygamy.

43. Barber *v.* People, 203 Ill. 543, 68 N. E. 93; Cartwright *v.* McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. Rep. 105; United States *v.* De Amador, 6 N. M. 173, 27 Pac. 488.

44. State *v.* Clark, 54 N. H. 456; People *v.* Schoonmaker, 117 Mich. 190, 75 N. W. 439; State *v.* Davis, 109 N. C. 780, 14 S. E. 55; *In re* Estate of Megginson, 21 Or. 387, 28 Pac. 388, 14 L. R. A. 540; Hanon *v.* State, 63 Md. 123.

Where proof of marriage is made by the testimony of a witness present at the ceremony, it is not necessary in the first instance to show the authority or official character of the person celebrating or solemnizing the marriage; it seems to be sufficient if the ceremony was performed by a person appearing in the official character of one duly authorized, especially if it be followed by cohabitation and recognition as husband and wife. State *v.* Rood, 12 Vt. 396.

In Hayes *v.* People, 25 N. Y. 390, 82 Am. Dec. 364, a prosecution for

steps have all been taken and all preliminaries have been complied with.[45]

b. *Foreign Marriages.* — Where a marriage was contracted in another state it will be deemed valid if valid by the laws of the place where contracted; and in the absence of proof of the laws

bigamy, the authority or official character of the person performing the ceremony of the defendant's second marriage was not shown, and there was evidence arousing a suspicion that the prisoner had procured a man to falsely represent himself as a clergyman. It was held that if to constitute a valid marriage it must be solemnized by a minister or magistrate the evidence was sufficient *prima facie* to prove a marriage in fact, and that if the person officiating was not a clergyman it was for the prisoner to show that fact after a *prima facie* case was made out against him.

In Hanon *v.* State, 63 Md. 123, the defendant was charged with brutally assaulting and beating his wife, and it was held that proof of a marriage ceremony performed by a justice of the peace in Pennsylvania was sufficient to establish their marriage without further proof of the authority of that officer to perform a marriage. The court said: "As to the kind and degree of proof required to establish the marriage, looking to the nature of the inquiry, and the object to be subserved, the case is not one, we think, demanding the direct and positive evidence required in such criminal cases as bigamy and adultery, where the validity of the marriage tie and its violation are the vital and dominant facts at issue, but one in which the marriage may be *prima facie* established by presumptive evidence, such as reputation and cohabitation. To require greater strictness of proof in the absence of evidence to rebut such presumptions would often defeat and render ineffectual the shield extended by the statute."

In State *v.* Winkley, 14 N. H. 480, a marriage had been solemnized before a person who had been a preacher for many years. There was evidence that he had been ordained, but it did not appear at what time. There was also evidence that on other occasions he had performed the marriage ceremony. It was held that this was competent *prima facie* evidence that he was an ordained minister as required by law.

In Kline *v.* Allegair, 40 N. J. Eq. 183, a witness produced his certificate of ordination as a minister of a well-known religious sect, dated April, 1844, and testified that from 1844 to the present time he had officiated either as sole or associate pastor of a church of his denomination; and that he had performed the ceremony at the marriage of the respondent with her husband, now deceased, in 1854, at the house of respondent's father, in this state. It was held that this was sufficient proof that under the circumstances his qualification and the due solemnization of the marriage would be presumed.

In Pettyjohn *v.* Pettyjohn, 1 Houst. (Del.) 332, it was held a widow's interest in the one third of the residue of her husband's personal estate, who dies intestate, is a vested interest, and her right attaches immediately on his death. But in an action to recover it, it is not sufficient, to establish her marriage, to prove that they were married by a person generally reputed to be a Methodist preacher. Better and stronger evidence than general reputation is necessary. A printed copy, without authentication, of the minutes of the conference, on which his name appeared as a minister, is not admissible for this purpose; but further proof that he was received as such a minister, sent by the Methodist conference on the circuit, and that he served upon it two years, administering the sacrament and other ordinances of the church, and then went to another circuit, in the absence of rebutting evidence, was held sufficient to establish his ministerial character and office.

45. Franklin *v.* Lee, 30 Ind. App. 31, 62 N. E. 78.

of the state where contracted relating to marriage, it will be presumed that the laws are the same as those of the jurisdiction where the marriage is in question.[46] And the lawfulness of such a marriage will be presumed even though it appear that the laws of the jurisdiction where the marriage is in question require a formal ceremony, which was not required by the laws of the place where contracted.[47] So, too, where the marriage took place in a foreign country, evidence that it was solemnized in the manner usual in that country is presumptive proof that it was a valid marriage.[48]

c. *Burden of Proving Illegality.* — The result of these various presumptions is that a marriage once having been shown, a party who asserts its illegality has the burden of proving it,[49] and such

46. Bailey *v.* State, 36 Neb. 808, 55 N. W. 241; Raynham *v.* Canton, 3 Pick. (Mass.) 293; Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538; *s. c.*, 91 N. Y. 451. See also People *v.* Loomis, 106 Mich. 250, 64 N. W. 18; Haden *v.* Ivey, 51 Ala. 381.

In West Cambridge *v.* Lexington, 1 Pick. (Mass.) 506, a settlement case where the validity of the marriage of the parents of the paupers was in controversy, their marriage having been contracted and solemnized in New Hampshire, it was held that the court must presume that the marriage was valid in New Hampshire in the absence of proof that it was unlawful in that state for a divorced party, either guilty or innocent, to enter into another marriage.

In Com. *v.* Kenney, 120 Mass. 387, a prosecution for polygamy, it appeared that the defendant, who was a Protestant, had been married in Ireland to a Roman Catholic by a Roman Catholic priest, and that he had cohabited with the woman there as his wife. It was contended that by the law of Ireland, the defendant being a Protestant and the woman a Roman Catholic, the marriage there was illegal, but the court held that a marriage solemnized by a priest, and under which the parties have cohabited as husband and wife, is *prima facie* a valid marriage everywhere; that the law of Ireland being a foreign law was a matter of which the court could not take judicial notice. There was no proof of the law of Ireland introduced at the trial.

In Klenke *v.* Noonan, 26 Ky. L. Rep. 305, 81 S. W. 241, where the issue was as to whether or not the parties had contracted a common-law marriage in Ohio so as to be able to prove the fact by cohabitation and reputation, it was held that in the entire absence of proof the Kentucky court would presume that the common law on the subject of marriage prevailed in the state of Ohio, and that accordingly in that case, which was one involving a property right, evidence of cohabitation and reputation in the state of Ohio was sufficient to establish marriage.

47. Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752; Hanon *v.* State, 63 Md. 123; Redgrave *v.* Redgrave, 38 Md. 93.

48. Patterson *v.* Gaines, 6 How. (U. S.) 550. See also State *v.* Kean, 10 N. H. 347, 34 Am. Dec. 162; Lanctot *v.* State, 98 Wis. 136, 73 N. W. 575.

49. Harman *v.* Harman, 16 Ill. 85; Erwin *v.* English, 61 Conn. 502, 23 Atl. 753; Thomas *v.* Thomas, 124 Pa. St. 646, 17 Atl. 182; People *v.* Loomis, 106 Mich. 250, 64 N. W. 18; Cash *v.* Cash, 67 Ark. 278, 54 S. W. 744; Patterson *v.* Gaines, 6 How. (U. S.) 550.

"Every intendment of the law is in favor of matrimony. When a marriage has been shown in evidence whether regular or irregular, and whatever the form of the proof, the law raises a strong presumption of its legality; not only casting the burden of proof on the party objecting, but requiring him throughout, and in every particular, plainly to make the facts appear, against the constant pressure of this presumption, that it is illegal and void. So that it can-

requirement is enforced even though it involves proving a negative.[50]

B. Continuance of Existence of Relation. — a. *In General.* Except as noted in the succeeding sections, when a marriage has been proved the existence of the relation will ordinarily be presumed to continue until evidence is given of its dissolution by death or divorce.[51]

b. *Conflicting Presumptions.* — (1.) **Generally.** — While undoubtedly the rule just stated would be applicable in a case involving but a single marriage, yet on a controversy involving the validity of a marriage questioned because of a former marriage of one of the parties, it becomes a question of importance whether the presumption of the continuance of the existence of the first marriage is equal in probative force to the presumption in favor of the legality of the second marriage.[52]

not be tried like ordinary questions of fact, which are independent of this sort of presumption." Franklin *v.* Lee, 30 Ind. App. 31, 62 N. E. 78, *quoted* with approval from Boulden *v.* McIntire, 119 Ind. 574, 21 N. E. 445, 12 Am. St. Rep. 453.

In Estate of Edwards, 58 Iowa 431, 10 N. W. 793, an action by plaintiff claiming to be the widow of the defendant's intestate, where the allegation of marriage was not denied by the defendant, it was held that the burden was upon the defense to establish a divorce or the illegality of the marriage.

In Parsons *v.* Grand Lodge A. O. U. W., 108 Iowa 6, 78 N. W. 676, an action on a life insurance policy wherein the defendant pleaded that the plaintiff was not the legal wife of the assured and set up a former undissolved marriage, it was held that as the allegations of the answer pleading a former marriage were denied by operation of law, the burden was on the defendant to show that the plaintiff was not the wife of the assured.

50. Senge *v.* Senge, 106 Ill. App. 140; Schmisseur *v.* Beatrie, 147 Ill. 210, 35 N. E. 525.

51. State *v.* Eggleston (Or.), 77 Pac. 738; Clark *v.* Cassidy, 62 Ga. 407. See also Wilson *v.* Allen, 108 Ga. 275, 33 S. E. 975.

Where the defendant in an indictment for polygamy relies on a divorce as a justification of the second marriage, it is incumbent on him to prove it. Com. *v.* Boyer, 7 Allen (Mass.) 306.

52. Where a regular marriage ceremony is shown to have been solemnized, the presumption of its legality is not overcome by proof of the existence of a former marriage of the husband and the testimony of the former wife that she had taken no steps herself to procure a divorce and that no process had been served on her in any divorce proceedings instituted by her husband, where the second marriage took place in Colorado six years after the husband had left his former wife for cause in Pennsylvania, and where the evidence shows that before the second marriage of the husband the former wife had remarried or gone through the form of a marriage ceremony with another man. Pittinger *v.* Pittinger, 28 Colo. 308, 64 Pac. 195. The court said: "It is contended on behalf of appellant that the marriage of deceased to his first wife having been shown, that this is sufficient to overcome the presumption in favor of the legality of the marriage between deceased and appellee. While it is true that it is a presumption of law that a fact continuous in its nature, such as marriage, continues after its existence is once shown, yet this presumption is not sufficient in all cases to overthrow the presumption of law in favor of innocence. Klein *v.* Laudman, 29 Mo. 259. In other words — under the facts of this case the presumption of the con-

(2.) Presumption of Death of Former Spouse. — Accordingly, where the presumption of the continuance of life conflicts with the presumption of a person's innocence of the crime of bigamy, the courts have often indulged in the presumption of the death of the former spouse, even when the second marriage was contracted before the expiration of the period after which death will be presumed.[53] It is always material to consider, in such case, not only the time that

tinuance of the first marriage, based upon the naked fact that it was solemnized, is not equal in probative force to the presumption in favor of the legality of appellee's marriage."

53. *England.* — King *v.* Twyning, 2 Barn. & Ald. 386.

Arkansas. — Cash *v.* Cash, 67 Ark. 278, 54 S. W. 744; Sharp *v.* Johnson, 22 Ark. 79. In this case the plaintiff moved to instruct the jury, which was done, "that if the proof should satisfy them beyond a doubt that the patentee (under whom the plaintiff claimed title) had previously been married to the woman he cohabited with while a soldier in the U. S. army at Ft. Smith, they are bound to presume that she died before the marriage with Polly Mason, unless it be proved that she was living at the time of the marriage with Polly Mason by positive testimony." The defendant had requested a charge, which was refused, to the effect "that if they believed from the evidence that the wife of said John B. Powell was alive within five years next before the date of the alleged marriage with said Polly Mason or Roberts, the law presumes that she is still alive, unless it was shown in evidence to the contrary." It was held that the action of the court in deciding in favor of the presumption of innocence was correct.

California. — Hunter *v.* Hunter, 111 Cal. 261, 43 Pac. 756, 52 Am. St. Rep. 180, 31 L. R. A. 411.

Illinois. — Cartwright *v.* McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. Rep. 105; Schmisseur *v.* Beatrie, 147 Ill. 210, 35 N. E. 525; Johnson *v.* Johnson, 114 Ill. 611, 3 N. E. 232, 55 Am. Rep. 883; Coal Run Coal Co. *v.* Jones, 127 Ill. 379, 8 N. E. 865, 20 N. E. 89.

Indiana. — Boulden *v.* McIntire, 119 Ind. 574, 21 N. E. 445, 12 Am. St. Rep. 453; Squire *v.* State, 46 Ind. 459. Cooper *v.* Cooper, 86 Ind. 75, where the court said: "This is not a presumption that death occurred at the expiration of such time, but that it occurred at some time. At what time may be determined by other circumstances. Until the expiration of such time the law in such case as this presumes the party in life, but this presumption may be controlled by the presumption of innocence, and thus the date of death in the absence of evidence to the contrary may be fixed at a period of time less than seven years after the disappearance of the party." *Compare* Nossaman *v.* Nossaman, 4 Ind. 648; LeBrun *v.* LeBrun, 55 Md. 496; Com. *v.* Thompson, 6 Allen (Mass.) 591; Dixon *v.* People, 18 Mich. 84; Wilkie *v.* Collins, 48 Miss. 496; Gibson *v.* State, 38 Miss. 313; Spears *v.* Burton, 31 Miss. 547; Fenton *v.* Reed, 4 Johns. (N. Y.) 52; Chapman *v.* Cooper, 5 Rich. L. (S. C.) 452.

Texas. — Yates *v.* Houston, 3 Tex. 433, where the court said: "If the first consort be shown to have been alive within a short time of the second marriage, the law in favor of innocence cannot presume that the party was not alive at the actual time of the second marriage; and as an instance where the presumption of innocence cannot arise, he refers to a case where the first wife had been heard of twenty-six days before the date of the second marriage. [Shelford, p. 226, and cases cited.] This does not militate against the inference of innocence in the case under review, as four years had elapsed after all trace of the former wife had been obliterated before the parties are presented within the limits of this country as man and wife; and this is the earliest period, or rather two years later, at which there is any necessity for inquiry into the character of cohabitation between the parties, as the rights of the plaintiff

and defendant depend on the fact of the existence of the marriage at the date of the grant."

Vermont. — Greensborough *v.* Underhill, 12 Vt. 604.

"When it is shown that a marriage has been consummated in accordance with the forms of the law, it is to be presumed that no legal impediments existed to their entering into matrimonial relations, and the fact, if shown, that either or both of the parties have been previously married, and, of course, at a former time having a wife or husband living, does not destroy the *prima facie* legality of the last marriage. The natural inference in such case is that the former marriage has been legally dissolved, and the burden of showing that it has not been rests upon the party seeking to impeach the last marriage. The law does not impose upon every person contracting a second marriage the necessity of preserving the evidence that the former marriage has been dissolved either by death of their former consort or by a decree of court, in order to protect themselves against a bill for a divorce or a prosecution for bigamy, especially after the lapse of such a length of time as occurred in this case after the party was last seen or known of by any witness testifying and the time of the second marriage. The authorities appear to be that after the lapse of such time the law treats the presumption of the legality of the second marriage as overcoming that of the continuance of life, and requires that direct proof should be made that the former husband or wife was living at the date of the second marriage." Harris *v.* Harris, 8 Ill. App. 57.

Compare. — Harrison *v.* Lincoln, 48 Me. 205, where the validity of a marriage was disputed on the ground that at the time the woman was a married woman and her husband was then living, the court, in refusing sanction to the contention that when the presumption of life conflicts with that of innocence the latter will prevail, based their refusal on the ground that to do so would permit the presumption of innocence to overcome the direct prohibition of a statute declaring void all marriages contracted while either of the parties has a former wife or husband living, unless the former marriage has been dissolved by a decree of divorce; that every person violating this statute should be guilty of polygamy and punished accordingly, and that the statute did not extend to any person whose husband or wife had been continually absent for seven years without being known to such person to be living within that time. In that case the evidence clearly showed that the first husband had been seen in good health within a year of the second marriage and before it took place.

Thomas *v.* Thomas, 19 Neb. 81, 27 N. W. 84, where the annulment of a marriage was sought on the ground that the defendant had at the time of marrying the plaintiff a former husband living from whom she had not been divorced. The defendant contended that at the time of her marriage with the plaintiff her former husband was dead, and it was held that the burden was upon her to show by a preponderance of the evidence that fact. This she undertook to do by proving that he left the place of their former residence more than seven years previous to her marriage with the plaintiff, and had never returned nor been heard of by any one there or elsewhere to her knowledge. The evidence showed, however, that he did return and was seen in life within considerably less than seven years prior to her marriage with the plaintiff. It was held that the defendant failed to establish her defense that her former husband had been absent seven years so that his death might be presumed at the time of her marriage with the plaintiff.

In Thomas *v.* Thomas, 124 Pa. St. 646, 17 Atl. 182, where a woman married a second time about twelve years after her first husband had left her, during which time she had heard nothing from him and knew nothing of him, it was shown as an actual fact that he was living at the time of her second marriage. The court held that while the presumption of death arises from the absence of a person for seven years unheard of, such presumption is not conclusive, but stands as competent evidence of death only until it is

intervened between the last knowledge of the former spouse and the second marriage, but also between such last knowledge and the trial of the cause.[54] This presumption of death of a former spouse in support of the validity of a second marriage cannot be invoked in favor of the absent spouse who has married the second time.[55]

successfully rebutted by competent and satisfactory evidence to the contrary, and that accordingly in this case, whatever the time of her first husband's absence and her belief as to his death, her first husband being in fact alive, she was incapable of contracting a valid marriage.

54. Cooper *v.* Cooper, 86 Ind. 75, where a wife had been abandoned by her first husband more than six years before her second marriage and nearly twenty years before the trial of the case in which the second marriage was in question. See also Harris *v.* Harris, 8 Ill. App. 57; Spears *v.* Burton, 31 Miss. 547.

"If the full period in which death is presumed has elapsed at the time of the litigation, and there is no presumption as to when, within the seven years, the death in fact occurred, it may as well be held to have taken place before as after the second marriage, and there will, in that event, be 'no great need of help from the presumption of innocence to sustain the second marriage.'" Johnson *v.* Johnson, 114 Ill. 611, 3 N. E. 232, 55 Am. Rep. 883.

In Kelly *v.* Drew, 12 Allen (Mass.) 107, 90 Am. Dec. 138, where the competency of a woman as a witness against her alleged husband was in question, the evidence showed that more than twenty years previously she had been married to another man with whom she lived for a few months, and about four years afterward married the defendant without having heard of her first husband's death. No evidence was offered that the first husband had been heard from for twenty years or that he had not died or been divorced from her before her second marriage. It was held that under the circumstances of the case the presumption of the wife's innocence in marrying again might well overcome any presumption that a man not heard from for four years before the second marriage or for sixteen years afterward was alive and her lawful husband when she married the second time, and accordingly that since no sufficient evidence was offered that at the time of marrying the defendant she had a former husband she was rightly excused from testifying.

In Wilkie *v.* Collins, 48 Miss. 496, a husband left his home in Mississippi in October, 1859, going to Louisiana on business, where he was last heard from by letter to his wife November 30, 1859, announcing that he was then sick in bed, but would return home as soon as he was able to travel. It was shown that he was of habitual delicate health, and also that his domestic relations had always been most agreeable. It was the belief of his family that he was in fact dead, and subsequently in December, 1861, his wife married again. The absent husband was never heard of alive. It was held in that case, the trial of which took place some eleven years after the letter referred to, that the absent husband must be presumed to be dead, and that the second marriage was valid.

Where a person has left the state and has not since been heard from, the presumption of the law is that he is alive until the lapse of five years, and after that time that he is dead. But the presumption of life within the five years is not sufficient to establish the illegality of a second marriage of such person's wife within that time; for that would be to establish a crime by mere presumption of law; and especially ought the second marriage to be deemed legal, when it is attacked after the lapse of twenty years, and during that time the party has not been heard from. Spears *v.* Burton, 31 Miss. 547.

55. O'Gara *v.* Eisenlohr, 38 N. Y. 296, where the husband knew when he married the second time that he was committing the crime of bigamy.

(3.) Presumption of Divorce. — Again, where the validity of a marriage is questioned because of a former marriage of one of the parties, and it appears that at the time of the second marriage such former spouse was actually living, it will be presumed that the former marriage was dissolved by divorce, and the burden in such case of proving that such was not the fact is upon the party disputing the validity of the second marriage.[56] And it is held that this presumption is strengthened by the fact that after the separa-

It appeared that his first wife continued to live at the same place where he left her twelve years thereafter, and he had no reason to suppose or believe her to be dead, there being nothing in her health or age from which such an event would be expected by him.

56. *Connecticut.* — Erwin *v.* English, 61 Conn. 502, 23 Atl. 753.

Illinois. — Potter *v.* Clapp, 203 Ill. 592, 68 N. E. 81; Cartwright *v.* McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. Rep. 105; Schmisseur *v.* Beatrie, 147 Ill. 210, 35 N. E. 525; Senge *v.* Senge, 106 Ill. App. 140.

Indiana. — Wenning *v.* Teeple, 144 Ind. 189, 41 N. E. 600; Franklin *v.* Lee, 30 Ind. App. 31, 62 N. E. 78. *Compare* Wiseman *v.* Wiseman, 89 Ind. 479.

Kentucky. — Howton *v.* Gilpin, 24 Ky. L. Rep. 630, 69 S. W. 766; Tompkins *v.* Com., 25 Ky. L. Rep. 1254, 77 S. W. 712.

Mississippi. — Alabama & V. R. Co. *v.* Beardsley, 79 Miss. 417, 30 So. 660.

Missouri. — Waddingham *v.* Waddingham, 21 Mo. App. 609; Klein *v.* Laudman, 29 Mo. 259.

Montana. — Hadley *v.* Rash, 21 Mont. 170, 53 Pac. 312.

Texas. — Nixon *v.* Wichita L. & Cattle Co., 84 Tex. 408, 19 S. W. 560.

Compare Wilson *v.* Allen, 108 Ga. 275, 33 S. E. 975; Randlett *v.* Rice, 141 Mass. 385, 6 N. E. 238.

In Boulden *v.* McIntire, 119 Ind. 574, 21 N. E. 445, 12 Am. St. Rep. 453, the court said: "If the law will presume the termination of the former marriage relation by the death of one of the parties to it, why not indulge any other presumption which might legally terminate that relation? We think where the facts are not such as to destroy such a presumption that a dissolution of the first marriage by divorce will be presumed in favor of the validity of the second marriage."

In Scott *v.* Scott, 25 Ky. L. Rep. 1356, 77 S. W. 1122, it was shown that the man had separated from his first wife some fifteen years before his death; that he left the state avowedly to live in another state long enough to procure a divorce; that after the separation and following his return after a long absence he married the second wife, and after her death the third, with whom he lived until his death, in the same town; that he held out to the world each woman in turn as his wife, all with the knowledge and in the daily presence of the first wife, who was also a resident of the same town during that time and lived near enough to the second and third wives to meet the second before her death and to see the third often and at any time. It was also shown that the first wife permitted two of her children to live some time with their father and his third wife. It was held that the strong presumption thus created as to the validity of the last marriage shifted to the first wife, who claimed to be his widow, the burden of establishing the fact of the illegality of the last marriage, and that this presumption was not overthrown by the mere denial of the first wife, wholly unsupported, that the deceased was not divorced from her.

In Iowa a divorce will not be presumed unless there be something based on the acts and conduct of both parties inconsistent with the continuance of the marriage relation. Gilman *v.* Sheets, 78 Iowa 499, 43 N. W. 299, where it was held that no presumption could arise as against the wife from a subsequent marriage of the husband alone. And where a man lives with another woman in the town where his first wife lives,

tion following the first marriage the other party thereto contracted a second marriage.[57]

(4.) **Rebuttal of Presumption.** — The presumption of a valid marriage springing from proof of the ceremony is rebutted by proof that a former spouse is living, has been true to the marital vows, and that such first marriage has not been dissolved in the jurisdiction where such spouse lives.[58]

II. MODE OF PROOF.

1. **Direct Testimony.** — A. In General. — Upon an inquiry as to whether or not a man and woman were married, testimony of one well acquainted with the parties that they had lived together as husband and wife, and that the man had held out the woman as his wife, is not objectionable as being an expression of a conclusion either of fact or of law.[59] But a witness cannot be asked whether in his opinion the parties were married.[60]

B. Officiating Clergyman or Officer. — The clergyman or officer who officiated at a marriage ceremony is a competent witness to testify to his having performed the ceremony.[61]

and the latter does not question his conduct or the legitimacy of children born, the presumption arises that the parties to the first marriage were divorced and that the husband has remarried. Leach *v.* Hall, 95 Iowa 611, 64 N. W. 790. See also Blanchard *v.* Lambert, 43 Iowa 228, 22 Am. Rep. 245; Goodwin *v.* Goodwin, 113 Iowa 319, 55 N. W. 31; Parsons *v.* Grand Lodge A. O. U. W., 108 Iowa 6, 78 N. W. 676; Estate of Edwards, 58 Iowa 431, 10 N. W. 793; Barnes *v.* Barnes, 90 Iowa 282, 57 N. W. 851; Casley *v.* Mitchell, 121 Iowa 96, 96 N. W. 725.

In Ellis *v.* Ellis, 58 Iowa 720, 13 N. W. 65, where the wife had no knowledge that her husband, living apart from her and in a different locality, had remarried, or was cohabiting with another woman as his wife, until after his death, and there was no evidence tending to show that she did not consider the marriage as an existing fact, she having testified that she had never procured a divorce and had no knowledge that her husband had done so, it was held that no presumption should be indulged that he had procured a divorce.

57. Nixon *v.* Wichita Land & Cattle Co., 84 Tex. 408, 19 S. W. 560. *Compare* Wilson *v.* Allen, 108 Ga. 275, 33 S. E. 975.

58. Cole *v.* Cole, 153 Ill. 585, 38 N. E. 703. See also Schmisseur *v.* Beatrie, 147 Ill. 210, 35 N. E. 525.

59. Bynon *v.* State, 117 Ala. 80, 23 So. 640. Where there is no contradictory testimony a marriage is sufficiently proved by the marriage certificate and the testimony of two neighbors who had personal knowledge of the fact of the parties living together and having children born to them. Gilman *v.* Sheets, 78 Iowa 499, 43 N. W. 299.

60. Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752.

61. State *v.* Clark, 54 N. H. 456. In Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318, a prosecution for bigamy, the government, for the purpose of proving the defendant's unlawful marriage, was permitted to introduce a witness who testified that he performed the marriage ceremony, that he was a clergyman in Boston and an ordained minister and pastor of a Congregational church, and that he had been such pastor for many years. The defendant contended that the testimony of this witness was not competent to prove his ordination or his authority to bind the parties in

C. Eye-Witnesses. — The fact of marriage may be established by the testimony of persons who were present at the ceremony,[62] and where it is necessary to show a ceremonial marriage the testimony of one who was present at the ceremony comes within what is termed direct evidence, the production of which is sometimes necessary in order to establish the fact of marriage.[63] In testifying

marriage. The Massachusetts statute provides that a minister of the gospel ordained according to the usage of his denomination, who resides in the commonwealth and continues to perform the functions of his office, may solemnize marriages. It was held that the testimony was at least competent to prove that the witness was *de facto* discharging the office of an ordained minister, and under the statute regulating proof of marriages in a court the testimony was all circumstantial or presumptive evidence from which the fact of marriage might be inferred, and hence was competent.

In People *v.* Imes, 110 Mich. 250, 68 N. W. 157, a prosecution for adultery, it was held that the testimony of the clergyman and others who participated in a marriage ceremony in a foreign country between the complaining witness and the defendant, although insufficient to prove a valid marriage in the absence of proof as to the laws of such country, was admissible to show that a ceremony was in fact performed, which, if followed by cohabitation, would establish the marital relation.

62. Patterson *v.* Gaines, 6 How. (U. S.) 550; Williams *v.* Walton, 9 Houst. (Del.) 322, 32 Atl. 726; Odd Fellows Ben. Ass'n *v.* Carpenter, 17 R. I. 720, 24 Atl. 578; McQuade *v.* Hatch, 65 Vt. 482, 27 Atl. 136.

In any civil action in which the mere question of the descent of property is involved, the fact of a marriage may, in the absence of a statute positively requiring other evidence, be proved by the testimony of persons who were present and witnessed the ceremony. Baughman *v.* Baughman, 29 Kan. 283.

63. *Arkansas.* — Halbrook *v.* State, 34 Ark. 511.

Delaware. — Williams *v.* Walton, 9 Houst. 322, 32 Atl. 726.

Indiana. — Nixon *v.* Brown, 4 Blackf. 157.

Iowa. — Kilburn *v.* Mullen, 22 Iowa 498; State *v.* Williams, 20 Iowa 98.

Massachusetts. — Com. *v.* Littlejohn, 15 Mass. 163; Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318; Com. *v.* Norcross, 9 Mass. 492.

Missouri. — State *v.* Ulrich, 110 Mo. 350, 19 S. W. 656.

Nebraska. — Lord *v.* State, 17 Neb. 526, 23 N. W. 507.

New Hampshire. — State *v.* Kean, 10 N. H. 347, 34 Am. Dec. 162; State *v.* Clark, 54 N. H. 456; State *v.* Winkley, 14 N. H. 480.

New Mexico. — United States *v.* De Amador, 6 N. M. 173, 27 Pac. 488.

Oregon. — State *v.* Eggleston, 77 Pac. 738.

Rhode Island. — Odd Fellows Ben. Ass'n *v.* Carpenter, 17 R. I. 720, 24 Atl. 578.

Vermont. — McQuade *v.* Hatch, 65 Vt. 482, 27 Atl. 136; State *v.* Rood, 12 Vt. 396.

In Lyman *v.* People, 198 Ill. 544, 64 N. E. 974, *affirming* 98 Ill. App. 386, a prosecution for adultery, it was held that the testimony of one who was present at the ceremony of the defendant's first marriage sufficiently established a marriage contract *per verba de praesenti* between the parties, and that it was not necessary to prove that the clergyman officiating had been ordained, or that the laws of Vermont, where the ceremony took place, authorized a clergyman to solemnize marriages.

In State *v.* Hodgskins, 19 Me. 155, 36 Am. Dec. 742, a prosecution for adultery, it was held that marriage must be proved by some person present at the ceremony, or by the production of the record or by the confession of the person, and that testimony of a person who claimed to have been present at the marriage ceremony of the defendant, but who could not tell who performed the ceremony, whether it was by a clergy-

to the fact of a ceremonial marriage it is sufficient that the witness is able to state that the marriage was celebrated according to the usual form. He need not be able to state the words used.[64] Nor, in such case, need it be shown that the marriage was valid according to the laws of the country in which it was celebrated.[65]

D. Contracting Parties. — The fact of marriage may be proved by the testimony of the contracting parties.[66]

man, magistrate or any other person, was not sufficient.

64. Lord *v.* State, 17 Neb. 526, 23 N. W. 507. In Fleming *v.* People, 27 N. Y. 329, where the defendant's first marriage was testified to by witnesses who were present at the ceremony, it was held that the prosecution was not obliged to prove the language used by the married persons and the officiating clergyman on the occasion. "*Prima facie* the fact of the marriage celebrated according to the forms of a religious denomination embraces the requisite consent of the married persons to take each other as husband and wife; and if the party whose interest it is to dispute the marriage is satisfied with a general statement of the ceremony, and will not inquire more particularly as to what took place, he cannot be permitted to deny the apparent effect of the evidence."

65. State *v.* Kean, 10 N. H. 347, 34 Am. Dec. 162. As to the presumption of the validity of marriage in such case see *infra* this article.

66. State *v.* Schweitzer, 57 Conn. 532, 18 Atl. 787; State *v.* Wilson, 22 Iowa 364; Bailey *v.* State, 36 Neb. 808, 55 N. W. 241; Raynham *v.* Canton, 3 Pick. (Mass.) 293. Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep 468, 28 L. R. A. 318, which was a prosecution for bigamy, and it was held proper to permit the first wife to testify to the fact of her marriage with the defendant.

In Leighton *v.* Sheldon, 16 Minn. 243, an action by a married woman wherein her husband was joined with her as a formal party to prove that plaintiffs were husband and wife, she was asked if she was the wife of her coplaintiff. The question was objected to on the ground that verbal testimony was not the best evidence, as it is matter of record. The court, in holding that the objection was properly overruled, said: "Even if it had appeared, as it did not, that the marriage was celebrated under our statutes, no such exclusive effect is given to the record of it as evidence, and under section 89, c. 73, Gen. St., what the defendant styles 'verbal testimony' of certain kinds is expressly made competent evidence of marriage; and there is no doubt but that the affirmative answer given by the witness to the question asked was competent as evidence of a *fact* of which it is to be presumed she was cognizant. It stands upon the same basis as the evidence of the *fact* of partnership."

In Com. *v.* Dill, 156 Mass. 226, 30 N. E. 1016, a prosecution for lewd and lascivious cohabitation, it was held proper to permit a witness to testify that he was married to the female defendant, and where they were married, without producing record evidence of the marriage. The court said: "It is true that the record by statute is presumptive evidence of the marriage (Pub. Sts. c. 145, § 29), but the record of a marriage is not like the record of a divorce or other judgment or decree. It is a mere memorandum or declaration of the fact which effected the result, not itself the fact, nor that which has been constituted the only evidence of the fact. § 31. There is no reason why the oath of the person who did the act should be deemed inferior evidence to a written statement by him or another."

On a trial for bigamy, the testimony of the defendant himself as to the fact of his marriage is sufficient proof of that fact on which to base a conviction. State *v.* Clark, 54 N. H. 456.

In Hayes *v.* People, 25 N. Y. 390, 82 Am. Dec. 364, a prosecution for bigamy, it was held proper to permit the prosecutrix to testify as to the place and manner of her living immediately after her alleged marriage

Widow. — A widow is a competent witness to prove marriage with her deceased husband on a controversy with his heirs as to the issue of their marriage,[67] or when she asks for distribution of his estate.[68]

2. Written Contracts of Marriage. — Where it is desired to prove the fact of the marriage by a written contract, the same rules of evidence which govern the use of ordinary written contracts apply.[69]

3. Marriage Licenses. — A marriage license regularly issued,[70] authorizing a man and woman to be married, may be received in evidence on an issue as to whether or not the parties named in it are married;[71] although it has been held that there should first be proof of cohabitation.[72]

to the prisoner. The court said: "It was, although not a part of the *res gestae*, nevertheless competent, so far as it tended to show cohabitation between the prisoner and herself, and that they lived together as married people. Such intercourse and mode of life was a legitimate corroboration of the statement of the witness as to the actual marriage, and one to the benefit of which the prosecution as well as the witness was entitled."

67. Drinkhouse's Estate, 151 Pa. St. 294, 24 Atl. 1083. A widow is a competent witness to prove a marriage contract between herself and her deceased husband, where the legality of the marriage is in question. Greenawalt *v.* McEnelley, 85 Pa. St. 352.

68. In Comly's Estate, 185 Pa. St. 208, 39 Atl. 890, it was held that a woman claiming to be the widow of a decedent and asking for distribution of his estate was a competent witness to testify to the contract of marriage between herself and the decedent.

Contra. — Hopkins *v.* Bowers, 111 N. C. 175, 16 S. E. 1, *holding* that an alleged widow who is a party to an action by the heirs at law of her husband is not a competent witness to prove the fact of the marriage or that she lived with him as his wife, when the marriage is in issue. The court said: "If marriage is not a personal transaction between the contracting parties, what is it?"

69. Chouteau *v.* Chevalier, 1 Mo. 343, where a sworn copy of a contract of marriage made out by the Spanish authorities of Upper Louisiana having custody of the original, with proof of the signature, and that the person certifying was acting in the office he pretended to fill, was admitted in evidence.

A Certified Copy of a Marriage Contract, required by law to be registered, and which has been taken from the proper registry, is admissible in evidence when the loss or destruction of the original has been satisfactorily shown. Hayden *v.* Mitchell, 103 Ga. 431, 30 S. E. 287.

70. A certified copy of a marriage license is not inadmissible to prove the marriage between the parties on the ground that it was issued by the clerk of the county court, the statute authorizing only the county clerk to issue a license, where it appears that under the statute the county clerk and clerk of the county court are one and the same person. Tucker *v.* People, 122 Ill. 583, 13 N. E. 809.

71. Tucker *v.* People, 122 Ill. 583, 13 N. E. 809; Squire *v.* State, 46 Ind. 459. See also Foster *v.* State, 31 Tex. Crim. 409, 20 S. W. 823.

The original marriage license from the office of a county judge, as well as the original record thereof, is admissible in evidence as against the objection that the originals cannot properly be admitted, but only duly certified copies thereof. Ferrell *v.* State (Fla.), 34 So. 220.

72. In Kilburn *v.* Kilburn, 89 Cal. 46, 26 Pac. 636, 23 Am. St. Rep. 447, a divorce suit on the ground of adultery, where witnesses had testified that the defendant had agreed to become plaintiff's husband, but there was no proof of cohabitation between the parties, it was held proper to re-

4. **Marriage Certificates.** — A. In General. — On an issue of marriage *vel non,* whether the marriage was solemnized in a foreign state or country or in the state where the marriage is in question, an original certificate of marriage produced from the proper custody may be received in evidence.[73] But it seems the certificate should state in terms that the signer was the celebrant of the marriage.[74]

B. Authentication. — As evidence of an implied declaration or admission, or as an act of one of the parties, such a certificate is admissible without separate and distinct evidence of its genuineness, or that it was given by one acting in an official capacity.[75] But

ject a marriage license authorizing, and the certificate of a clergyman showing, the solemnization of a marriage between the defendant and the woman with whom he was charged in the complaint to have committed adultery.

73. Ganies *v.* Green Pond Iron Min. Co., 32 N. J. Eq. 86; State *v.* Isenhart, 32 Or. 170, 52 Pac. 569; Dailey *v.* Frey, 206 Pa. St. 227, 55 Atl. 962; Hutchins *v.* Kimmell, 31 Mich. 126, 18 Am. Rep. 164. See also Mangue *v.* Mangue, 1 Mass. 240; State *v.* Tillinghast, 25 R. I. 391, 56 Atl. 181. *Compare* Ellis *v.* Ellis, 11 Mass. 92; Miller *v.* Miller, 43 S. C. 306, 21 S. E. 254.

In Erwin *v.* English, 61 Conn. 502, 23 Atl. 753, where a marriage certificate was signed by a personal name with the words "M. of Gospel" appended, and offered in evidence to prove the marriage of the parties named in it, with parol evidence that it was the marriage certificate of the parties, it was held that the court was justified in receiving the certificate in evidence, notwithstanding the abbreviated title used.

In Nebraska no proof of the official character of the person performing the marriage ceremony is necessary, and his certificate or a copy of the record duly certified will be received in all courts and places as presumptive evidence of marriage. Lord *v.* State, 17 Neb. 526, 23 N. W. 507.

Under the Michigan Statute (2 How. Stat. § 6222) domestic certificates of marriage are held admissible in criminal cases; but foreign certificates are not. The latter have not the force of a church registry and are mere hearsay. People *v.* Imes, 110 Mich. 250, 68 N. W. 157.

74. In Erwin *v.* English, 57 Conn. 562, 23 Atl. 753, there was offered for the purpose of proving marriage the following certificate: "I hereby certify that Patrick Larkin and Mary O'Neill were lawfully married according to the rites of the Roman Catholic Church, on the 10th of August, 1843. Witnesses present on the occasion, Henry McArdle and Ann O'Neill. Dated at Crossneghn, 16th of Oct., 1867. Michael Lennon. P. P., Guggan, County Armagh, Ireland." It was held that the certificate itself did not state in terms that the priest who signed it performed the marriage ceremony, and that it was doubtful if that was its import, and hence was not receivable.

In Hill *v.* Hill, 32 Pa. St. 511, an action by the wife against the husband's administrator, it was held that a marriage certificate, although not admissible by itself, was properly received, coupled with proof that it was produced by the husband and read to the witness as a certificate of his marriage — not as evidence of the fact of marriage, but of the husband's acknowledgment of it.

75. "Proof of its genuineness and that it was given by one acting in an official capacity may enhance its weight, but will not affect its admissibility. It is admissible without such proof. And if it were not admissible without some evidence of its authenticity the fact that it is kept and produced by one of the parties as evidence of the marriage would be sufficient evidence of its genuineness to render it admissible." Camden *v.* Belgrade, 78 Me. 204, 3 Atl. 652.

where the certificate is offered as direct and original evidence, the authority of the officer and his signature must be shown.[76]

C. Identity of Parties. — A marriage certificate to be admissible must be accompanied by proof of identity of the parties named with those in question.[77]

5. Record of Marriage. — A. In General. — When the law requires a record of marriages to be kept, the record kept in pursuance thereof, or an attested copy, is admissible to establish the fact of marriage.[78] In the case of foreign marriages it must be

76. People *v.* Crawford, 62 Hun (N. Y.) 160, 16 N. Y. Supp. 575; State *v.* Colby, 51 Vt. 291. See also State *v.* Horn, 43 Vt. 20; Rooney *v.* Rooney, 54 N. J. Eq. 231, 34 Atl. 682.

In Com. *v.* Morris, 1 Cush. (Mass.) 391, an indictment for adultery, it was held that a paper purporting to be a certificate of a marriage ceremony in another state, by a clergyman resident in that state, but not authenticated in any manner, was not admissible under the Massachusetts statutes of 1840 and 1841 to prove the fact of marriage "as circumstantial or presumptive evidence from which the fact might be inferred, although such paper be derived from the possession of the woman." The court said that the paper "received no additional weight by coming from the custody of the woman alleged to be his wife. She could not be a witness against her husband, and her production of the paper not verified or proved did not make it evidence against him." It was urged that the paper was used only as a circumstance in connection with other proof, but the court held that if the other proof was sufficient without it the certificate was immaterial, and if not then it had weight as judicial proof when it should have none.

In Connecticut marriage certificates are treated as original documents and need no authentication as copies in order to be admissible to prove the fact of marriage between the parties. Erwin *v.* English, 61 Conn. 502, 23 Atl. 753. See also Northrop *v.* Knowles, 52 Conn. 522, 2 Atl. 395, 52 Am. Rep. 613, where the court said: "The practice is, we apprehend, founded upon a distinction between a certificate of this character and ordinary copies from the records of magistrates. In the latter case the document offered in evidence is a mere copy from a record preserved by the magistrate, which copy would, of course, require authentication in the usual form. In the former the certificate is itself of the nature of an original document. . . . There may be, back of these certificates, and usually is, a record preserved by the officials issuing the certificate; but it has been the practice to receive such certificates, without authentication beyond proof of their genuineness, as original documents."

77. People *v.* Isham, 109 Mich. 72, 67 N. W. 819.

78. Milford *v.* Worcester, 7 Mass. 48; Elzas *v.* Elzas, 171 Ill. 632, 49 N. E. 717; Groom *v.* Parables, 28 Ill. App. 152; Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318; State *v.* White, 19 Kan. 445; Homans *v.* Corning, 60 N. H. 418.

In Shorter *v.* Boswell, 2 Har. & J. (Md.) 359, the marriage was proved by the record book of a county court of Maryland containing the certificate and affidavit of a priest in 1702 that he had in 1681 in another county married certain persons named, and an affidavit of the person who was present at the ceremony and an entry from the parish register of the latter county stating that the above were therein recorded in 1702, and the whole recorded in the above record book in 1703.

In Verholf *v.* Van Houwenlengen, 21 Iowa 429, it appeared that an Iowa statute provided for issuing a license and for its return, and that the clerk of the county court should keep a register containing the names of the parties, the date of the marriage and the name of the person by whom the

further shown that the law requires such a record to be kept before a copy of it can be received.[79]

marriage was solemnized, which should be receivable in all courts and places as evidence of the marriage and date thereof, and it was held that it was not necessary, in order to make such evidence admissible, to show the official character of the person by whom the marriage was solemnized; that this was a matter to be presumed. It was also held that it was not error to permit evidence showing a mistake in the name of the wife in the license for the marriage and the return of the officer.

In Wedgwood's Case, 8 Me. 75, a prosecution for adultery, it was held that a copy of the record of a marriage between a person bearing the same name as the defendant and a woman named therein, although admissible in evidence, was not sufficient to establish the fact of the defendant's marriage without proof that he was the person named in the certificate.

In Niles *v.* Sprague, 13 Iowa 198, it appeared that the laws of Ohio required that a certificate of marriage should be returned by the officiating minister or officer to the county clerk by whom it was to be recorded, and it was held that an exemplification of the certificate was admissible, but that an exemplification of a mere note or memorandum on the records of the clerk was not.

In Viall *v.* Smith, 6 R. I. 417, it appeared that a Rhode Island statute required that all persons having authority to join persons in marriage should immediately after the solemnization thereof give a marriage certificate in the prescribed form, and that the persons married should within a month, subject to a penalty for neglect, have the certificate registered in the town clerk's office of the town where the marriage was celebrated; and it was held that the record of the fact of the marriage by the town clerk instead of the record of the certificate of the person who performed the ceremony was not the kind of marriage registry which the law required the clerk to keep, substituting as it did his own declaration for the record of an official certificate. The court said that in no other light than as a private memorandum could they regard the written declaration as to the time of the marriage of the parties in question; that "since he does not profess to record what alone by law he was authorized to record, what he has written must be regarded as his personal and not his official act, and is not admissible in evidence without accompanying proof to connect it with information furnished by the family;" and that as no such accompanying evidence was produced the record was properly excluded.

In Alabama, by express statute, registers of marriages kept in pursuance of law "may be certified by the custodian thereof, and, when so certified, are presumptive evidence of the facts therein stated, as well as of the law or rule in pursuance of which such registry was made, and of the authority to certify the same;" and in Hawes *v.* State, 88 Ala. 37, 7 So. 302, it is held that this statute applies equally to registers kept in or out of the state, when properly certified.

In Beggs *v.* State, 55 Ala. 108, it was held that a marriage license with the certificate of the solemnization of the marriage under it is a record of the probate court which the judge is required to keep by statute and is authorized to certify; and that when a certified transcript thereof is offered in evidence in any court in Alabama, it is not necessary that the judge's certificate should be under his official seal, since judicial notice of all public officers who are commissioned by the governor will be taken by the courts and their official acts recognized.

An Arkansas Statute makes the record of a marriage evidence of that fact. Halbrook *v.* State, 34 Ark. 511.

79. Stanglein *v.* State, 17 Ohio St. 453. In State *v.* Dooris, 40 Conn. 145, a prosecution for bigamy, the prosecution offered in evidence to prove the defendant's first marriage what purported to be a copy of a certain entry in the marriage register

B. Production of Record Not Invasion of Right of Cross-Examination. — The reception in evidence, on a prosecution for bigamy, of record proof of the defendant's marriage is not an invasion of his constitutional right to meet his accusers face to face.[80]

C. Production of Record Evidence of Marriage Necessary. And record evidence of a marriage, equally with the testimony of eye-witnesses, is direct evidence of that fact within the rule requiring a marriage to be proved by direct evidence as contradistinguished from presumptive evidence.[81]

D. Record Not Exclusive Mode of Proof. — A statute may require a record to be kept of marriages, and make such record evidence of the fact of marriage, but this does not mean that the record shall be the only evidence; the marriage may be proved by other competent evidence.[82]

book in the office of the superintendent registrar of births, deaths and marriages for the district of Mohill, county of Leitrim, Ireland, signed by the registrar, reciting that the defendant was on a date stated married to the alleged first wife and containing the signatures of the officiating priest, the parties and two witnesses; but it was held that the document was not admissible, since it was not shown that the law of Ireland required the registration of marriages, that the person signing as such was in fact superintendent registrar at the time the certificate was given, if there was such record, and that it did not appear that his signature was genuine if he was such officer.

In Erwin *v.* English, 61 Conn. 502, 23 Atl. 753, the following copy from a marriage register of a parish in Ireland was offered in evidence to prove the marriage of the parties named: "August, 1843. Patrick Larkin and Mary O'Neill. Witnesses, Henry McArdle, Ann O'Neill." It was held that the copy was properly rejected. The court said: "In order to the admissibility of the record it should at least appear that, under appropriate headings in the marriage register, the date of the marriage, and the names of the parties, had been entered by the officiating clergyman, together with his certificate attached to the record that he married the parties whose names are therein entered. It should further be shown that he was duly authorized to perform the marriage ceremony and was required to keep a record thereof. We are not attempting to prescribe the requisites to a valid copy of a marriage register generally, but only to meet the questions involved in this case. Nor, of course, are we intimating that a marriage may not be satisfactorily proved in the absence of any certificate or copy of record."

A Parish Register in England containing a record of marriages required by law to be kept is competent evidence of a marriage recorded therein by one in authority in the actual course of business. Casley *v.* Mitchell, 121 Iowa 96, 96 N. W. 725.

80. Tucker *v.* People, 122 Ill. 583, 13 N. E. 809. In this case the defendant contended that record evidence of marriage was not admissible, but that the law required the prosecution to produce as a witness the person who solemnized the marriage, in order that the defendant might meet him face to face and exercise the right of cross-examination; but the court, in holding otherwise, said: "The offered transcript consisted of a public record which is declared by the law to be evidence. The record imports verity, and a cross-examination is foreign to and has no application to this character of evidence."

81. State *v.* Rood, 12 Vt. 396; Damon's Case, 6 Me. 148.

82. Com. *v.* Norcross, 9 Mass. 452; Mathews *v.* Silvander, 14 S. D. 505, 85 N. W. 998; Kilburn *v.* Mullen, 22 Iowa 498; Albertson *v.* Smythe, 3 N. J. L. 473; Procter *v.*

E. Conclusiveness of Record. — Record evidence of a marriage is not conclusive of that fact, but may be impeached by oral evidence.[83]

6. **Entries in Family Bible.** — On the question of marriage, entries in the family Bible are admissible after the death of the enterer, although not accompanied with proof that they were made by a relative, provided the book is produced from the proper custody.[84]

Bigelow, 38 Mich. 282; State *v.* Wilson, 22 Iowa 364.

Harman *v.* Harman, 16 Ill. 85, where the court said: "These [the license or a certified copy of the registry] were also admissible at the common law, and no new rule is thereby introduced. It is only a substitution of the licenses and registers made and kept by the civil officers in place of those of the ecclesiastical, which do not exist here as a part of our civil polity."

In Baughman *v.* Baughman, 29 Kan. 283, the court said: "Parol testimony is admissible now as before the statute. A little reflection will satisfy one of the necessity of this. The record of the issue of a marriage license does not prove that the parties were in fact married, for after the issue of the license either party may decline to go further, and until the ceremony there is no marriage; and after the ceremony, if the official performing the ceremony fails to return his certificate thereof to the probate judge, such omission does not invalidate the marriage. It is a matter of common knowledge that through forgetfulness, or from other causes, many of these licenses are never returned to the probate judge after the ceremony. It would be strange in these cases if evidence of the marriage was not attainable. Further, as the official performing the ceremony is not required to return the license for thirty days, cannot the party prove his marriage until after such time? We think nothing in our statute changes the well-established rule of the common law that a marriage may be proved by the testimony of those attending and witnessing the ceremony."

A statute providing that a copy of the record of any marriage certified by a minister or justice of the peace authorized to solemnize marriages, a clerk of the Society of Friends or town clerk, shall be received in all courts and places as evidence of the fact of marriage does not make such record evidence of a higher degree than direct proof of the marriage by witnesses who were present at the ceremony, and such proof by witnesses is admissible on an indictment for adultery without showing that a copy of the record cannot be produced. "The object of registration is to facilitate and preserve the evidence of marriages, and not to limit or narrow the proof." State *v.* Marvin, 35 N. H. 22.

83. A certified copy of a marriage license with the certified certificate of the marriage, made by statute sufficient proof of either the first or second marriage in any prosecution thereunder for bigamy, is not conclusive proof of the marriage, but may be rebutted by proof that the originals were forgeries or acts of unauthorized persons. Rice *v.* State, 7 Humph. (Tenn.) 14.

The Massachusetts statutes (Gen. Stats., ch. 106, § 21, ch. 21, § 6) provide that the record of a marriage kept by the person before whom the marriage is solemnized, or by the clerk or registrar of any city or town, shall be received in all courts as presumptive evidence of such marriage; and in Com. *v.* Waterman, 122 Mass. 43, a prosecution of an indictment for conspiracy to cause the marriage of certain persons falsely to appear of record, it was held that the testimony of one of the parties that he was never married to the other party named, and that no marriage ceremony was ever performed between them, was not inadmissible as against the objection that the record of the marriage could not be impeached by oral evidence.

84. Weaver *v.* Leiman, 52 Md. 708. "Proof of the handwriting or

7. Admissions, Confessions, Declarations, Etc. — A. In Support of Marriage. — a. *In General.* — On an issue of marriage *vel non*, admissions or confessions of either of the parties of the fact of the marriage are always competent to be received in evidence against the person who made them.[85] And even in those cases where a marriage must be shown by direct evidence as contradistinguished from presumptive evidence, such evidence is regarded as competent.[86] The sufficiency of such evidence in the latter class of cases,

authorship of the entries is not required, when the book is shown to have been the family Bible or Testament, for then the entries, as evidence, derive their weight, not more from the fact that they were made by any particular person, than that, being in that place as a family registry, they are to be taken as assented to by those in whose custody the book has been kept." Jones *v.* Jones, 45 Md. 144.

85. Greenawalt *v.* McEnelley, 85 Pa. St. 352; Hulett *v.* Carey, 66 Minn. 327, 69 N. W. 31, 61 Am. St. Rep. 419; Clayton *v.* Wardell, 4 N. Y. 230; Womack *v.* Tankersley, 78 Va. 242. See also Hardenbrook *v.* Harrison, 11 Colo. 9, 17 Pac. 72; Strauss' Estate, 168 Pa. St. 561, 32 Atl. 98.

In Laughlin *v.* Eaton, 54 Me. 156, an action for malicious prosecution upon a charge of adultery wherein the defendant pleaded in abatement the coverture of the plaintiff, it was held competent to prove the marriage in support of the plea by evidence of statements by the plaintiff that she was married and that she and her alleged husband afterward lived and cohabited together as husband and wife and were reputed to be such.

On a trial for perjury in a prosecution for adultery, defendant's admissions of his marriage are proper evidence. "Admissions in this as in all other cases may be proven, though they do not constitute the strongest class of evidence and should always be submitted to the jury with proper warning by the court." United States *v.* De Amador, 6 N. M. 173, 27 Pac. 488.

In Massachusetts, by express statute (ch. 145, § 31) it is provided that whenever the fact of marriage is required or offered to be proved, admissions of the fact by the party to be affected are competent. See Knower *v.* Wesson, 13 Metc. (Mass.) 143; Meyers *v.* Pope, 110 Mass. 314.

86. Hayes *v.* People, 25 N. Y. 390, 82 Am. Dec. 364; Buchanan *v.* State, 55 Ala. 154.

In People *v.* Imes, 110 Mich. 250, 68 N. W. 157, a prosecution for adultery, it was held that evidence of admissions by the defendant that he had cohabited with the complaining witness as his wife sometime after a marriage ceremony performed between them in a foreign country was admissible; as were also letters written by him to the complaining witness, in which he addressed her as his wife.

On the trial of an indictment for bigamy, admissions by the accused prior to the alleged second marriage in regard to his former marriage are competent evidence to go to the jury in support of the averment of the former marriage. Stanglein *v.* State, 17 Ohio St. 453, where the former marriage was alleged to have been celebrated in Bavaria. See also Wolverton *v.* State, 16 Ohio 173 (the former marriage having been solemnized in Michigan), where the court said: "Reasoning upon principle, it would be difficult to assign a reason against the competency of evidence of confession in this case which would not be equally valid against the proof of any confession, or against receiving a plea of guilty to the indictment. It is true that confessions of marriage may be made by persons living in a state of fornication, with a view to secure the offenders from public censure, and thus make a case unlike the ordinary cases of confession against one's interest. This, in our opinion, furnishes no reason for rejecting the evidence as incompetent. It shows rather that the confession thus made should not be relied on and held by

however, is a question as to which the decisions are not uniform. It has been held that when a marriage must be so shown extra-judicial confessions are not alone sufficient.[87] Other courts hold that they are sufficient,[88] even though the marriage was contracted in a foreign jurisdiction.[89] And it has been held that a former marriage,

the jury, when unsupported, sufficient to work a conviction. In such a case, and indeed in all cases where the confession of a party is given in evidence, its force must depend upon the circumstances under which it is made; and of these circumstances the jury, under the advice of the court, are the proper judges. It is rather a question of credibility than competency of the confession, and, like all confessions, to be considered of much or little weight according to the attending circumstances; and these may be such as to render it very conclusive of the fact, or as tend very little to sustaining it."

In a prosecution for bigamy, evidence of the deliberate admissions of the defendant that a woman was his wife and that he cohabited with her and held her out to the community as his wife may go to the jury for what it is worth as tending to prove an actual marriage. Sharp *v.* Johnson, 22 Ark. 79.

87. People *v.* Isham, 109 Mich. 72, 67 N. W. 819.

88. Langtry *v.* State, 30 Ala. 536; Cayford's Case, 7 Me. 57; State *v.* Libby, 44 Me. 469.

In Ferrell *v.* State (Fla.), 34 So. 220, a prosecution for bigamy, the first marriage of the defendant was proved by the sworn testimony of the defendant in a suit for divorce brought by him against such former wife to the effect that he and the first wife were married on a date specified and lived together about seven years. The specific objection to this evidence was that his testimony was in the form of a narrative prepared by his counsel and sworn to before the master after having been read over to him, but it was held that this did not render the written narrative any the less a voluntary admission under oath by the defendant.

89. Squire *v.* State, 46 Ind. 459; Cayford's Case, 7 Me. 57. See also Williams *v.* State, 54 Ala. 131.

In Ham's Case, 11 Me. 391, a prosecution for adultery, it was held that the defendant's marriage, whether solemnized in the state of Maine or elsewhere, might be proved by his voluntary and deliberate confession. The court said: "The question which at once presents itself on this occasion is, why should not the defendant's *deliberate* and *explicit* confession of his *marriage,* in such a prosecution, be as competent evidence to prove such *marriage* as a similar confession is to prove the crime of *adultery* charged. If *either* fact exists, it must be certainly within his own knowledge; and, as a general proposition, it is certainly true that a deliberate and voluntary confession, understandingly made, is the best evidence; for he who makes it speaks from his actual knowledge of the fact; no one has any interest in its truth, or interest in disputing it. . . . Viewing the question under consideration, independently of decided cases, there would seem but one reason why the deliberate confession of his marriage, made by a defendant in a prosecution against him for bigamy or adultery, should not be received as competent and satisfactory evidence of such marriage, namely, that the person solemnizing the marriage had no legal authority to do it; and yet the want of authority might not have been known by the person officiating, or by the defendant himself, when he made the confession. . . . Why is the marriage better or more clearly proved by the testimony of a witness who saw a certain clergyman or magistrate solemnize the marriage, than by the voluntary and deliberate confession of the party charged that *such* clergyman or magistrate did solemnize the marriage? The plea of guilty is a confession of the *crime,* which includes a confession of the

set up either as ground for divorce or for the annulment of a marriage, may be established by admissions of the defendant.[90]

b. *Basis of Doctrine.* — The admissibility of evidence of admissions of marriage has been placed upon the ground that they are declarations against interest.[91] The acts, declarations and conduct of the parties while living together are held admissible as part of the *res gestae,* as showing how they regarded each other.[92]

marriage, that being essential to the existence of the crime."

90. In Lindsay *v.* Lindsay, 42 N. J. Eq. 150, 7 Atl. 666, the petitioner applied for a divorce *a vinculo,* on the ground that at the time the defendant married her he had another wife living. After such marriage he was convicted of polygamy on his own admissions, and sentenced therefor. Those admissions were that he had been married to a woman in Scotland, but that she was hopelessly insane at the time of his second marriage to a woman in New York, and that both of his wives were still living when he married the petitioner. He also made similar statements while he was in prison under the criminal sentence. It was held that his admissions were plenary evidence of his having another wife living at the time of his marriage to the petitioner; for if they were evidence of the nullity of his second marriage because his first wife was then living, and therefore such second marriage was void, there is also the presumption that his first wife is still living, and therefore the petitioner is entitled to a divorce. But if such first marriage be not established by those admissions, then his second marriage is lawful, and petitioner may, on that ground, obtain a divorce.

In Dare *v.* Dare, 52 N. J. Eq. 195, 27 Atl. 654, a suit to annul a marriage on the ground that at the time of its celebration the defendant had a wife living, it was held that an admission of such previous marriage in the answer was sufficient to establish it when corroborated by the production in evidence of a certified copy of the record thereof in the bureau of vital statistics, and of a record of a suit to annul it commenced by the defendant against the person alleged to have been the other party to the previous marriage.

91. Repeated acknowledgments by a man of his marriage with a certain woman are direct evidence of marriage, standing on a higher plane than the presumption arising from cohabitation and reputation, and being in themselves sufficient to sustain an indictment for polygamy. Comly's Estate, 185 Pa. St. 208, 39 Atl. 890, where the court said: "It is touching very nearly upon sarcasm to say that the admissions of a man that he is married are declarations against his own interest; but they are, for the reason that marriage imposes new burdens and responsibilities."

92. Moon *v.* Heineke, 119 Ala. 627, 24 So. 374; Robinson *v.* Robinson, 188 Ill. 371, 58 N. E. 906; Kenyon *v.* Ashbridge, 35 Pa. St. 157.

In Badger *v.* Badger, 88 N. Y. 546, 42 Am. Rep. 263, a petition for dower contested on the ground that the petitioner was not the lawful wife of the decedent, the plaintiff offered in evidence a letter, the body of which was in the handwriting of the decedent, but signed by the plaintiff as Mrs. Mary Baker, Baker being the assumed name under which they lived together. The letter was written to a nephew of the petitioner congratulating him upon his marriage, and contained the expression "We wish you much joy." The nephew also testified that the decedent had asked him afterward if he had received the letter. In holding the exclusion of the letter to be error the court said that it was to be regarded as the joint act of the petitioner and the decedent, and its signature was a representation that the petitioner was a married woman; the letter itself was material on that point and was admissible as part of the *res gestae.*

Where a marriage contract is claimed to be void upon the ground that the man was so afflicted with

c. *Declarations of Parties Since Deceased.* — Upon the question of marriage *vel non*, declarations of either party since deceased may be received provided they were made *ante litem motam*.[93] Nor are they inadmissible as being secondary evidence to the direct testimony of the other party who is alive and accessible as a witness and competent to testify.[94]

d. *Controversy Between Third Persons.* — On a controversy between third persons, declarations of one of the parties to the alleged marriage should not be received where he is accessible and competent as a witness.[95]

Declarations of Parties Deceased. — Evidence of statements by one since deceased that he was present at the solemnization of a marriage is not competent to establish the fact of the marriage.[96] But declarations of deceased persons who were related to the parties by blood or marriage, made *ante litem motam*, are competent.[97]

e. *Time of Declarations.* — Of course the declarations of the parties, in order to be part of the *res gestae*, must be contemporaneous with the cohabitation, and not subsequent thereto.[98]

f. *Weight of Declarations.* — The value of declarations of the parties concerning marriage will always depend upon the circum-

paralysis at the marriage ceremony that he could not comprehend what was passing at the time, it is competent for the woman seeking to sustain the contract to offer in evidence the written and oral declarations of the man made prior and repeated up to within a short time of the ceremony, showing that the relations of the parties were affectionate; that the man had stated he could not live happily without her; that he intended she should have his property, as she helped to make it; that they had corresponded several months, and that the contract of marriage between them had already been made. Baughman *v.* Baughman, 32 Kan. 538, 4 Pac. 1003.

93. Craufurd *v.* Blackburn, 17 Md. 49, 77 Am. Dec. 323; *reversed* on other points, 3 Wall. (U. S.) 175; Jackson *v.* Jackson, 89 Md. 176, 30 Atl. 752; Henderson *v.* Cargill, 31 Miss. 367; Dannelli *v.* Dannelli, 4 Bush (Ky.) 51; Picken's Estate, 163 Pa. St. 14, 29 Atl. 875, 25 L. R. A. 477.

Declarations of a Decedent Contained in Letters shown to have been written by him are competent to show his marriage. Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442.

94. Craufurd *v.* Blackburn, 17 Md. 49, 77 Am. Dec. 323, where the court said: "Such declarations are not held to be admissible or inadmissible according to the necessity of the particular case; but they are admitted as primary evidence on such subjects by the established rule of law, which, though said to have had its origin in necessity, is universal in its application. Nor do such declarations stand upon the footing of secondary evidence, to be excluded where a witness can be had who speaks upon the subject from his own knowledge." This case was reversed on other points in 3 Wall. (U. S.) 175.

95. Raynham *v.* Canton, 3 Pick. (Mass.) 293.

96. Sharp *v.* Johnson, 22 Ark. 79.

97. Henderson *v.* Cargill, 31 Miss. 367; Picken's Estate, 163 Pa. St. 14, 29 Atl. 875, 25 L. R. A. 477. This is the rule in pedigree cases, as to which see article "PEDIGREE."

98. Eldred *v.* Eldred, 97 Va. 606, 34 S. E. 477. Declarations made by one of the parties after they have permanently ceased to live together are, on a controversy in which the declarant is in no way interested, mere hearsay and not admissible under any of the exceptions to the rule excluding such evidence.

stances under which they were made;[99] and when made under circumstances of deliberation are entitled to great weight.[1]

B. In Denial of Marriage. — a. *Declarations of the Parties.* On an issue of marriage *vel non*, the declarations of one of the parties denying the marriage cannot be received in evidence against the other party, though at the time of the trial declarant is dead,[2]

Moore *v.* Heineke, 119 Ala. 627, 24 So. 374.

99. Barnum *v.* Barnum, 42 Md. 251. Declarations of parties to a meretricious cohabitation when made merely to cover up their shame or conceal their immorality are entitled to no weight whatever, when the question whether or not they have been lawfully married is to be determined. Eldred *v.* Eldred, 97 Va. 606, 34 S. E. 477.

Admissions by one of the parties that a marriage had been contracted when in fact no marriage had been contracted, while greatly weakening the force of subsequent admissions as an item of proof, will not have the effect of excluding them altogether on an issue involving the legitimacy of acknowledged offspring. Drinkhouse's Estate, 151 Pa. St. 294, 24 Atl. 1083.

Declarations, although accompanied by cohabitation, do not make a contract of marriage. "They are merely circumstances entitled to weight with all other circumstances properly bearing on the question, such weight to be admitted with due regard to the legal presumptions affecting the question." State *v.* Whaley, 10 S. C. 500.

1. Greenawalt *v.* McEnelley, 85 Pa. St. 352.

2. Hill *v.* Hill, 32 Pa. St. 511. See also Estate of James, 124 Cal. 653, 57 Pac. 578. In this case it was contended that the declarations of the decedent that he was not married were admissible under the provisions of Code Civ. Proc. § 1852, but the court said this could not be so for the reason that such declarations must come from a member of a family; and the whole case there rests upon the claim that the alleged husband was not a member of the wife's family; he was not a member of her family unless he was her husband, and that was the sole point involved. The court said: "The admissibility of pedigree evidence by declarations has for its only basis the close and intimate relations existing between the declarant and the party to whom the declarations pertain. The declarations, to be admissible, must not only be made by a deceased member of the family, but they must be made of and concerning a member of the same family. Here we have nothing of the kind. If a family relation be assumed to have existed between this man and this woman sufficient to justify the admission of his declarations after death as to the marriage relation existing between them, then the respondent's whole case falls to the ground; for there was no family relation between these two people, unless it was that of husband and wife. There is no pretense of any other."

In Hull *v.* Rawls, 5 Cushm. (Miss.) 471, the plaintiff filed her petition for dower in the personalty of her alleged deceased husband. The application was resisted on the ground that the petitioner was not the wife of the decedent, but that he had a wife living at the time he pretended to marry the petitioner, and to prove this fact offered a witness who testified that the decedent during his lifetime and in the presence of the petitioner had stated that he had another wife living at the time he married the petitioner. It was held that the statement of the decedent, while it could have been used as evidence against him in a proceeding in which he was directly interested or could be affected, could not be used to the prejudice of the petitioner. By consummating the marriage he admitted that he could then legally enter into the alliance.

In Hulett *v.* Carey, 66 Minn. 327, 69 N. W. 31, 61 Am. St. Rep. 419, the issue being whether the deceased executed the alleged written contract of marriage with the petitioner, it

if they were made out of the presence of the other party.[3] But when made in the presence of the other party they may be received.[4] But even though such declarations may be competent, they may be of little weight; as, for example, when opposed to the admissions of the declarant to the fact of the marriage.[5] And they may not be sufficient to overcome the presumption of marriage from cohabitation and repute.[6]

b. *Declarations of Third Persons.* — Declarations of relatives of an alleged wife, made out of her hearing and after the death of the alleged husband, to the fact of their engagement at the time of his death are not independent and affirmative evidence tending to show that the parties were not married.[7] But declarations of deceased members of a family that the parents never were married are admissible.[8]

was held that conveyances executed by the deceased subsequent to the marriage contract in which he was described as a single man were not admissible in evidence against the petitioner.

3. Thompson *v.* Nims, 83 Wis. 261, 53 N. W. 502, 17 L. R. A. 847.

4. In Heminway *v.* Miller, 87 Minn. 123, 91 N. W. 428, where the issue was whether or not a man and woman were married, a mortgage executed by the man in which he was described as a widower, and to which the woman had subscribed her maiden name as a witness, was held competent. The court said: "If their declarations and admissions by way of introduction among their friends are competent evidence to establish a marriage contract, then their declarations in writing during that period whereby they declare themselves to be single are also competent."

Where it is claimed that a marriage is illegal by reason of one of the spouses having at the time a former husband or wife living from whom no divorce had been granted, an admission by such spouse that the former spouse was living at a time subsequent to the second marriage is admissible. Cooper *v.* Cooper, 86 Ind. 75.

5. Greenawalt *v.* McEnelley, 85 Pa. St. 352. See also People *v.* Willard, 92 Cal. 482, 28 Pac. 585, where the defendant was charged with having received stolen goods and she claimed to be the wife of the thief and therefore not guilty of receiving stolen goods from him, and it was held that her admissions of a former marriage, her refusal to disclose the name of her former husband and her failure to show a dissolution of the marriage were sufficient to discredit her naked statement that she was a single woman at the time she claimed to have been married to the thief, and that accordingly there was evidence to sustain the implied finding of the jury against a lawful marriage between them.

6. Henderson *v.* Cargill, 31 Miss. 367.

The presumption from long-continued cohabitation, reputation and conduct is not overcome by a declaration on a single occasion not long prior to the death of the alleged wife, and the testimony of the husband that the marriage ceremony had never been performed, where it appears that the declaration denying the marriage was made by the husband in anger to a third person, and it appears that the parties had in fact agreed to a marriage which they had always recognized. Richard *v.* Brehm, 73 Pa. St. 140.

7. Estate of James, 124 Cal. 653, 57 Pac. 578.

8. Jewell *v.* Jewell, 1 How. (U. S.) 219, a pedigree case. See article "PEDIGREE."

8. Circumstantial Evidence. — A. In Support of Marriage. Circumstantial evidence,[9] such as cohabitation and other circumstances ordinarily attending marriage,[10] may be resorted to. And

9. In Camden *v.* Belgrade, 78 Me. 204, 3 Atl. 652, where the ordinary circumstantial evidence of cohabitation, reputation, etc., had been given in proof of a marriage, and it was charged that the parties were not in fact married, but that the woman had consented to leave her home and live with the man as his wife without in fact being married, it was held permissible to receive evidence showing the family the woman had belonged to and the kind of home she had left. The court said: "Such evidence if favorable would tend to strengthen the presumption of her innocence, and if unfavorable to weaken it."

Marriage, like any other fact involved in a judicial inquiry, may be proved by circumstances. Direct or positive proof of the fact is not necessary. Bynon *v.* State, 117 Ala. 80, 23 So. 640.

In Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442, an action to recover for the wrongful death of the plaintiff's intestate, the intestate whose marriage was in issue had immediately preceding his death been found traveling in company with a woman and young children toward home. He and the woman were observed to perform the office of parents; the baggage shown inferentially to belong to the intestate contained wearing apparel apparently suitable to the members of the party, and it was held that these circumstances afforded an inference that the relation of husband and wife existed.

Record evidence of marriage is not necessary, but may be proved by any competent evidence, whether direct or circumstantial. Casley *v.* Mitchell, 121 Iowa 96, 96 N. W. 725, where the plaintiff claimed as the widow of a decedent, an interest in real estate left by him, she not having been divorced from him.

In Moore *v.* Heineke, 119 Ala. 627, 24 So. 374, it was held that evidence of an inquiry by the man while the parties were living together as to whether or not the premiums on his life insurance had been paid up "so that the beneficiary, Mrs. Gleason (the man's name being Gleason), would have no trouble in getting her insurance in the event any accident should happen," was received as an admission on the part of Gleason that the beneficiary was his wife.

In Bryan *v.* Doolittle, 38 Ga. 255, it was held that a will duly probated bequeathing to the wife of the testator certain property was competent evidence for the purpose of showing that at the time of the execution of the will the testator recognized the beneficiary as his wife.

An Indorsement by the Husband on a False Certificate that it was the certificate of his marriage is an admission of marriage. Vincent's Appeal, 60 Pa. St. 228.

An Advertisement Announcing the Separation of the Parties, appearing in the principal newspaper of the place of their residence immediately after the separation, may, in connection with the acts and declarations of the parties, be received in evidence on the question of their marriage. Jewell *v.* Jewell, 1 How. (U. S.) 219.

10. *England.* — Piers *v.* Piers, 2 H. L. Cas. 331.

Alabama. — Martin *v.* Martin, 22 Ala. 86.

Arkansas. — Scoggins *v.* State, 32 Ark. 205.

Illinois. — Hiler *v.* People, 156 Ill. 511, 41 N. E. 181.

Maine. — Camden *v.* Belgrade, 78 Me. 204, 3 Atl. 652.

North Carolina. — Jones *v.* Reddick, 79 N. C. 290; Long *v.* Barnes, 87 N. C. 329; State *v.* Whitford, 86 N. C. 636.

Pennsylvania. — Chambers *v.* Dickson, 2 Serg. & R. 475.

Wisconsin. — Mius *v.* Thompson, 83 Wis. 261, 53 N. W. 502, 17 L. R. A. 847.

"While cohabitation and repute do not make marriage, and there can be no marriage without the mutual consent of the parties, yet cohabitation as man and wife, the rearing of children, the recognition of

even where a valid marriage cannot exist except when celebrated by a religious ceremony, such evidence may nevertheless be received.[11] And where the nature of the proceeding is such as to require marriage to be shown by direct evidence it is proper to permit the reception of evidence of cohabitation and reputation after the time of the alleged ceremonial marriage by way of corroboration

the relation by the parties themselves and by their friends and relatives, and their declarations and conduct holding themselves out to the world as husband and wife, are manifestations of the parties having consented to contract that relation *inter se*, and therefore circumstances from which the trier of the fact may infer that a marriage had in fact been entered into." Moore *v.* Heineke, 119 Ala. 627, 24 So. 324.

In Halbrook *v.* State, 34 Ark. 511, a prosecution for bigamy, the indictment charged in substance that on November 2, 1866, the defendant was married in Arkansas to a woman named, and that on July 26, 1875, while she was living and was still his wife, he feloniously married another woman. On the trial the defendant offered to prove a reputed marriage in Tennessee prior to 1866, and cohabitation as husband and wife there, and later in Arkansas and in Missouri, which marriage was still in force and undissolved at the time of having contracted the first marriage charged in the indictment. The action of the court in excluding his offered evidence of cohabitation was held to be error; his evidence of cohabitation should have been admitted, and it would then have been the province of the jury under proper considerations to weigh the presumptions in making up their verdict.

The Massachusetts statute of 1840, c. 84, ch. 145, § 31 (originally confined to the hearing of any application for divorce), provided that "whenever the fact of marriage is required or offered to be proved, evidence of admission of said fact by the party against whom the process is instituted, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence, from which said fact may be inferred, shall be received as competent evidence for consideration." The statute of 1841, c. 20, extended these provisions "to all cases where it shall become necessary to prove the fact of marriage in any hearing before any court in this commonwealth." Knower *v.* Wesson, 13 Metc. (Mass.) 143. These statutes are reenacted in the Gen. Stats., ch. 106, § 22. Meyers *v.* Pope, 110 Mass. 314, which was an action of tort for the seduction of the plaintiff's wife. The plaintiff, to prove his marriage, testified that some years previously he, accompanied by his alleged wife, went before a justice of the peace with intent on the part of both to contract marriage before him; that the plaintiff stated in the justice's presence and hearing that the woman was his wife, and that they had thereafter cohabited together as husband and wife; and it was held that there was sufficient evidence to establish the fact of marriage, notwithstanding the justice of the peace had testified that he did not understand that he had married the parties at that time, and that all that was said by either was that the plaintiff introduced the woman as his wife.

In Com. *v.* Hurley, 14 Gray (Mass.) 411, an indictment for a nuisance in keeping a tenement used for the illegal sale of intoxicating liquors, it was held that "evidence that a woman occupied the same bed with the defendant in this tenement, and was seen getting dinner and doing other household duties there in his absence, was competent to prove her to be his wife."

11. By the Law of Maryland a valid marriage cannot exist unless it is celebrated by a religious ceremony. It is not required that the marriage should be proved by witnesses who were present at the time, but such facts must be proved as in the contemplation of the law will justify the inference that a re-

of the existence of such marriage.[12] It is always competent to show the duration of the cohabitation.[13]

The Fact That a Woman Has Assumed a Certain Name and given her child that name is not any evidence that she is married to a man who bears that name.[14]

B. In Disproof of Matrimonial Character of Cohabitation. So, too, where it is in issue whether or not cohabitation between a man and woman was matrimonial, circumstantial evidence may be resorted to for the purpose of disproving its matrimonial character.[15] But where direct evidence of the fact of marriage is offered, evidence

ligious ceremony has been performed. Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752.

12. In State *v.* Tillinghast, 25 R. I. 391, 56 Atl. 181, the court said: "Nor do we see any good reason upon principle why such evidence should be excluded. It is the universal custom of people to live together and cohabit as husband and wife from the time of their marriage, and it is to be presumed that they will not thus consort unless they are married. In other words, such cohabitation naturally and legitimately follows marriage, and is a fact which certainly tends to prove that the parties not only regard themselves as being married but that such is the actual fact. And hence such circumstantial evidence tends to corroborate the positive evidence that there was a ceremonial marriage."

On an issue of bastardy, testimony of cohabitation between the parents as husband and wife at and prior to the birth of the alleged bastard; that they held themselves out as such in their intercourse with the world; that the woman assumed and went by the family name of defendant; that they had reared a family of children under that name, and otherwise conducted themselves as married people, is competent evidence for the consideration of the jury upon the question of marriage, and sufficient, if not overcome by a preponderance of evidence to the contrary, to support a finding in favor of a valid marriage so as to protect the children against the stain and taint of bastardy, and subject the parents to the duty of providing for their support. State *v.* Worthingham, 23 Minn. 528.

13. Hence evidence of cohabitation in a state where a common-law marriage cannot be contracted may be received to strengthen the presumption of the lawfulness of former cohabitation in a state where a common-law marriage may be contracted. Moore *v.* Heinecke, 119 Ala. 627, 24 So. 374.

In Smith *v.* Smith, 52 N. J. L. 207, 19 Atl. 255, an action for dower where the parties had gone through a marriage ceremony in Massachusetts, the validity of which was questioned, it was held that subsequent cohabitation in the state of Vermont, the place of domicile, was competent and corroborative evidence of such marriage.

14. Simon *v.* State, 31 Tex. Crim. 186, 20 S. W. 399, 37 Am. St. Rep. 802.

15. Although an agreement to keep the marriage secret does not invalidate it, yet the fact of secrecy may be evidence that no marriage ever took place. Hulett *v.* Carey, 66 Minn. 327, 69 N. W. 31, 61 Am. St. Rep. 419, so ruling on authority of Dalrymple *v.* Dalrymple, 2 Hagg. Consist. 54.

On the question of the fact of marriage *vel non*, the silence of the woman after knowledge of the man's subsequent reputed marriage with another may be shown as a fact affecting the *bona fides* and intent of her previous cohabitation with him. Smith *v.* Smith, 52 N. J. L. 207, 19 Atl. 255.

The presumption of marriage from unequivocal and frequent admissions, cohabitation and reputation, the husband's support of the wife and children, recognition of them as the offspring of the reputed relation, and expressions of attachment for his wife and children cannot be overcome by

of reputation that the parties were not married, but were living in a state of illicit intercourse, is not admissible in disproof thereof.[16]

9. Grave-Stone Inscriptions. — The inscription on a grave-stone is admissible to prove marriage.[17]

III. PROOF OF GROUNDS FOR ANNULMENT OF MARRIAGE.

1. Mental Incapacity. — A. BURDEN OF PROOF. — When mental incapacity of one of the parties is relied upon as ground for annulling a marriage, the evidence should be clear and definite.[18]

mere difference of rank between the parties, although this fact may be entitled to consideration. Vincent's Appeal, 60 Pa. St. 228.

Evidence that the man did not tell an intimate friend that he was married is not admissible. Jackson *v.* Jackson, 80 Md. 176, 30 Atl. 752.

16. Northrop *v.* Knowles, 52 Conn. 522, 2 Atl. 395, 52 Am. Rep. 613, where the court said: "The strongest objections ever made against hearsay evidence would apply to such a case as this; for, if the defendant's position is correct, a marriage solemnized according to all the forms of law might, in effect, be nullified by the mere speech of people. The reasoning in behalf of the defendant is based upon the fallacy that because general reputation of parties as husband and wife, in connection with other circumstances, is admissible to prove marriage, therefore general reputation must also be admissible to prove there was no marriage; but there is a vast difference between reputation as primary proof of an existing fact or relation, and reputation as applied to prove a mere negative. Reputation, in connection with other things, is admissible to prove marriage, because, among other reasons, it attends and indicates the reality as a shadow does a substance; but a non-existing thing casts no shadow. But it may be suggested that in this case the evidence was offered to prove, not simply a negative, but an adulterous relation. This, again, overlooks another fundamental reason why reputation and cohabitation furnish presumptive evidence of marriage; which is, that the law presumes against vice and immorality, and in favor of marriage. The contention of the defendant would revolutionize this wholesome principle, and obliterate all distinction between vice and virtue, concubinage and marriage, as furnishing the basis for presumption."

Evidence of the name by which the wife was known in the neighborhood is not evidence to disprove her marriage, where there is no attempt to prove the marriage by reputation. Hill *v.* Hill, 32 Pa. St. 511.

17. Barnum *v.* Barnum, 42 Md. 251, 296.

18. Slais *v.* Slais, 9 Mo. App. 96; Baughman *v.* Baughman, 32 Kan. 538, 4 Pac. 1003; Ward *v.* Dulaney, 1 Cushm. (Miss.) 410; Cole *v.* Cole, 5 Sneed (Tenn.) 57.

In Banker *v.* Banker, 63 N. Y. 409, a suit to annul a marriage on the ground of lunacy of the husband, the suit being instituted by the plaintiff as the heir at law and next of kin of the husband, who was deceased, it was held that a charge to the jury that plaintiff must show undoubted mental unsoundness on the part of the husband at the time of the marriage continuing beyond question down to his death without lucid intervals, was proper; that the plaintiff held the affirmative upon the issue throughout the trial, although if unsoundness were established at the time of the marriage a presumption of continuance might arise which would require evidence to overcome it.

In Kern *v.* Kern, 51 N. J. Eq. 574, 26 Atl. 837, a suit by the husband, through his guardian, to annul a marriage on the ground of mental incapacity on his part, the evidence showed that he was of weak intellect, but until thirty-five years of age was permitted to take care of himself and control his own prop-

If Insanity Prior to the Marriage Be Temporary, arising out of some exciting cause, such as a disease of the body or one of its organs, which, when removed, leaves the mind clear and lucid, the burden is upon the party impugning the marriage to show that insanity existed at the time of the marriage.[19]

B. Scope of Inquiry. — Where the issue is whether or not a party to a marriage was of sufficient mental capacity to contract a valid marriage, the inquiry is as to his mental condition at the very time of the marriage; but his condition both before and after the marriage is proper matter of evidence as bearing upon the question of his condition at the time of the marriage.[20]

The Fact That a Party Was Able To Go Through the Marriage Ceremony with propriety is *prima facie* evidence of sufficient understanding to make the contract.[21]

C. Inquisition. — An inquisition as to the mental condition of a party to a marriage which was contracted prior to the inquisition finding such party to be a lunatic, is competent evidence of that fact, but is not conclusive.[22]

2. Prior Marriage. — And in a suit to annul a marriage by reason of precontract with a living person, strict proof is required of such prior contract.[23]

erty; that he preserved his estate, had a good memory, and manifested considerable shrewdness in business; that he seemed to have a proper conception of the marriage ceremony, and to understand the responsibilities attached to the marital relation. It was held that the evidence did not justify an annulment of the marriage, though complainant was soon thereafter adjudged a lunatic and confined in an asylum.

A person competent to contract in law will be presumed to have sufficient mental capacity to contract a marriage. Powell *v.* Powell, 5 Cushm. (Miss.) 783, a proceeding to annul a marriage on the ground that the man was not at the time mentally competent to make a contract.

19. Smith *v.* Smith, 47 Miss. 211, where it was held that occasional periods of insanity before marriage and ultimate permanent insanity many years afterward, although accompanied by proof of taint of hereditary insanity, was not sufficient to warrant annulling the marriage. See also Hamaker *v.* Hamaker, 18 Ill. 137.

20. Nonnemacher *v.* Nonnemacher, 159 Pa. St. 634, 28 Atl. 439. See article "Insanity," Vol. VII.

21. Anonymous, 4 Pick. (Mass.) 32. See also Kern *v.* Kern, 51 N. J. Eq. 574, 26 Atl. 837, where the court said: "While, as Mr. Bishop suggests, this is laying down too strong a rule, there can be, I think, no doubt that it is a matter of signal importance in considering such a question as the one involved in this case that the party conducted himself in a preliminary conversation with the clergyman in such a way as to impress him with his sanity, and intelligently bore himself through the ceremony of marriage."

22. Kern *v.* Kern, 51 N. J. Eq. 574, 26 Atl. 837. See also Portsmouth *v.* Portsmouth, 1 Hagg. (Eng.) 355, where the commission had been executed in 1823 and the marriage attacked had been solemnized in 1814, and the court said: "The verdict would not of itself affect the validity of the marriage *de facto* solemnized, though solemnized within the time of the finding by the jury. The finding is a circumstance and a part of the evidence in support of the unsoundness of mind at the time of the marriage, but no more, for this court must be satisfied by evidence of its own that grounds of nullity exist."

23. Rooney *v.* Rooney, 54 N. J.

3. Force and Duress. — Where force and duress are relied upon as ground for annulling a marriage, the burden is on the party claiming relief to establish the force and duress complained of, and to make out a state of case authorizing the conclusion that he has not ratified the marriage by the exercise of any marital right since the removal of the alleged constraint.[24]

4. Fraud. — A. Burden of Proof. — Where fraud is set up as ground for annulling a marriage, it must be established by clear, distinct and satisfactory evidence.[25]

B. Mode of Proof. — As in other cases when the issue is fraud, that fact may be established either by direct or circumstantial evidence.[26]

Admissions. — A marriage will not be annulled on the ground that the consent of the complainant was obtained by fraud on the part of

Eq. 231, 34 Atl. 682. See also Chambers *v.* Chambers, 66 N. Y. St. 155, 32 N. Y. Supp. 875.

24. Bassett *v.* Bassett, 9 Bush (Ky.) 696. See article "Duress," Vol. IV.

25. Le Brun *v.* Le Brun, 55 Md. 496; McCulloch *v.* McCulloch, 69 Tex. 682, 7 S. W. 593, 5 Am. St. Rep. 96.

See also Donovan *v.* Donovan, 9 Allen (Mass.) 140, where the court said: "In determining on the validity of such contract, in order to ascertain whether it shall be adjudged void on the ground of fraud under Gen. Sts., c. 107, sec. 4, the same rules of evidence are to be applied as to other civil contracts. There must be satisfactory proof either of misrepresentation or concealment of some essential fact. This may be established either by direct or by circumstantial evidence. Nor is it necessary that it should be shown that there were any express misrepresentations or any positive and overt acts of concealment. It is sufficient to prove that the acts and conduct of one of the parties were such that a reasonably cautious and prudent person might be misled or deceived as to the existence of a particular fact which formed the basis or contributed an essential ingredient in the contract, and that these acts and conduct were adapted and designed to induce and create a false impression and belief in the mind of the other party."

"**To Annul a Marriage for a Fraudulent Representation** inducing the contract, the complainant must show that the fraud affected an essential of the marital relation." Crane *v.* Crane, 62 N. J. Eq. 21, 49 Atl. 734; Boehs *v.* Hanger (N. J. Eq.), 59 Atl. 904.

Uncorroborated Testimony of Complainant Not Sufficient. — In Crane *v.* Crane, 62 N. J. Eq. 21, 49 Atl. 734, a suit to annul a marriage on the ground that the marriage was induced through fraud, it was held that if proof essential to the adjudication rests wholly upon the testimony of the complainant, uncorroborated by others or by circumstances, the complainant's case must fail.

26. Donovan *v.* Donovan, 9 Allen (Mass.) 140. And see article "Fraud," Vol. VI.

In Parsons *v.* Parsons, 68 Vt. 95, 34 Atl. 33, a suit to annul a marriage on the ground that the consent of the petitioner was obtained by fraud, it was held that evidence that the respondent obtained a marriage certificate by fraudulent representations as to his residence; that he then told the petitioner, who was under age, that the certificate was all right; that having obtained it they were obliged to be married, and that her parents had no control over her in the matter, tended to show that the consent of the petitioner was obtained by fraud.

the defendant, upon the mere admission by the defendant of the truth of the facts charged in the bill.[27]

5. Impotency. — A. Burden of Proof. — In a suit to annul a marriage on the ground of impotency the burden is upon the complainant to establish not only the impotency alleged, but also that such impotency is incurable.[28]

Rule of Triennial Cohabitation. — An old rule of the canon law prevailed in the ecclesiastical courts of England, which was known as the rule of triennial cohabitation. By that rule the parties were required to live together for three years, and if at the end of that time the marriage remained unconsummated, impotency was to be presumed.[29] But this rule has not been so often applied since the law of evidence has been altered so as to permit the parties to take the stand as witnesses in their own cause.[30] The English courts have lately modified the rule of triennial cohabitation, and hold that the rule does not apply when the court is satisfied by other evidence — for example, testimony of the wife herself — of the husband's impotence.[31] And the rule seems never to have been

27. Montgomery *v.* Montgomery, 3 Barb. Ch. (N. Y.) 132, where the court said: "Nor can the court safely act upon such admissions. For the necessary result of receiving such evidence to annul a marriage would be to produce collusion between the parties, both of whom were willing to be released from the matrimonial tie." See also Dawson *v.* Dawson, 18 Mich. 335. This last ruling, however, was made in view of an express statute declaring that no decree annulling a marriage "shall be made solely on the declarations, confessions or admissions of the parties; but the court shall in all cases require other satisfactory evidence of the facts alleged in the bill." And see Chambers *v.* Chambers, 66 N. Y. St. 155, 32 N. Y. Supp. 875.

28. Cuno *v.* Cuno, L. R. 2 S. & Div. App. Cas. 300; Griffeth *v.* Griffeth, 162 Ill. 368, 44 N. E. 820; Lorenz *v.* Lorenz, 93 Ill. 376; Brown *v.* Brown, 1 Hagg. Ecc. 523; Welde *v.* Welde, 2 Lee Ecc. Cas. 580; Devanbagh *v.* Devanbagh, 5 Paige (N. Y.) 554, 28 Am. Dec. 443. See also J. G. *v.* H. G., 33 Md. 401; Riley *v.* Riley, 73 Hun 575, 26 N. Y. Supp. 164.

29. A. *v.* B., L. R. 1 P. & D. (Eng.) 559; G. *v.* G., L. R. 2 P. & D. (Eng.) 287; G. *v.* M., L. R. 10 App. Cas. 171; Stagg *v.* Edgecombe, 3 Sw. & Tr. (Eng.) 240; Briggs *v.* Morgan, 3 Phill. Ecc. (Eng.) 325.

30. See Griffeth *v.* Griffeth, 162 Ill. 368, 44 N. E. 820.

31. F. *v.* D., 4 Sw. & Tr. (Eng.) 86, where the judge ordinary said: "There remains the rule as to triennial cohabitation; this rule only applies when the impotence is left to be presumed from continued non-consummation; for when the impotence is clearly proved *aliunde*, the court has never resorted to it. The present case falls rather within the latter class; for, if I may rely upon the petitioner's oath, the impotence is beyond a doubt. See also Anonymous, 22 Eng. L. & Eq. 637; B. *v.* B. (Ir.), 9 Eq. 551, where the court said: "The rule which requires this as a condition precedent applies only where the alleged defect is left to be presumed from continued non-consummation, and does not apply where it is plainly proved *aliunde*."

In G. *v.* M., 10 App. Cas. 171, it is held that this rule of triennial cohabitation is not now recognized in England beyond this point, that where a husband or a wife seeks a decree of nullity *propter impotentiam*, if there is no more evidence than that they have for a period of three years lived together in the same house and with ordinary opportunities for intercourse, and it is clearly proved there has been no consummation, then if that is the whole state

applied in this country, at least so far as an examination of the reported cases will disclose.[32]

B. Mode of Proof. — In a suit for the annulment of a marriage upon the ground of impotency, testimony that during their cohabitation the husband had never offered to have sexual intercourse with his wife is not necessarily conclusive of the fact of impotency.[33] But evidence of a statement by the wife that she "could not have connection with any man" warrants the inference that she meant that she was physically incapable of such connection.[34]

C. Physical Examination. — In a suit to annul a marriage upon the ground of impotency, the court may, whenever necessary, order a physical examination of the party alleged to be impotent.[35] And there is one case in which a physical examination of both parties was ordered.[36]

of the evidence, inability on the part of the one or the other will be presumed. On the other hand, the presumption to be drawn from the fact of non-consummation after three years' cohabitation is capable of being rebutted. And, also, every case need not be fortified with the presumption; for although no presumption can be raised from the absence of consummation within a less period than three years, yet positive evidence may be given from which the same inference of inability may be drawn.

32. See Griffeth *v.* Griffeth, 162 Ill. 368, 44 N. E. 820, where the rule is discussed, but not applied.

33. Lorenz *v.* Lorenz, 93 Ill. 376, so holding under the Illinois statute relating to divorce, in force at that time, providing that, "If the bill is taken as confessed, the court shall proceed to hear the cause by examination of witnesses in open court, and in no case of default shall the court grant a divorce, unless the judge is satisfied that all proper means have been taken to notify the defendant of the pendency of the suit, *and that the cause of divorce has been fully* proven by reliable witnesses." The court said: "While this does not authorize a chancellor to capriciously and arbitrarily close his ears to evidence, and to refuse to act, where the proof is reasonably clear and convincing that he should act, still it vests him with a considerable degree of discretion in regard to the proofs; and the evidence should be full and satisfactory that he has abused such discretion to authorize a reversal of his decree on the ground that it is contrary to the evidence."

34. Merrill *v.* Merrill, 126 Mass. 228, *holding* further that if so understood such evidence would, in connection with the other evidence in the case, justify a finding of impotency as charged.

35. Devanbagh *v.* Devanbagh, 5 Paige (N. Y.) 554, 28 Am. Dec. 443. See also Le Barron *v.* Le Barron, 35 Vt. 365; Anonymous, 35 Ala. 226. *Compare* Shafto *v.* Shafto, 28 N. J. Eq. 34, where the order was refused out of consideration for the woman's age.

If the answer admits the present incapacity, but denies that it existed at the time of the marriage, and the nature of the incapacity is such as to render a surgical examination of the defendant necessary, in connection with a personal examination on oath as to the commencement and progress of the disease which has created the incapacity, the court will direct the defendant to submit to such examination, although she has been previously examined *ex parte* and without oath by her own medical attendants. Newell *v.* Newell, 9 Paige Ch. (N. Y.) 25. See article "Physical Examination."

36. Anonymous, 89 Ala. 291, 7 So. 100, 18 Am. St. Rep. 116, where it was alleged that the incapacity complained of was due to physical malformation of the husband

MARRIED WOMAN. — See Husband and Wife; Marriage; Privileged Communications.

MASTER AND SERVANT.

By Edgar Sharp.

CROSS-REFERENCES:

Embezzlement;

Larceny;

Negligence;

Parent and Child; Principal and Agent;

Work and Labor.

I. THE RELATION.

1. In General. — The relation of master and servant is usually evidenced by the right one person has to select and discharge another, and direct what work shall be done and the manner in which it shall be done.[1]

1. Singer Mfg. Co. *v.* Rahn, 132 U. S. 518; Railway Co. *v.* Hanning, 15 Wall. (U. S.) 649; Butler *v.* Townsend, 126 N. Y. 105, 26 N. E. 1017; Tennessee Coal, Iron & R. Co. *v.* Hayes, 97 Ala. 201, 12 So. 98; Dean *v.* East Tennessee V. & G. R. Co., 98 Ala. 586, 13 So. 489; Jensen *v.* Barbour, 15 Mont. 582, 39 Pac. 906.

In Faren *v.* Sellers, 39 La. Ann. 1011, 3 So. 363, the court held a provision in a contract to demolish a building, in the following terms: "The work of demolition is to be carried out according to the directions of the supervising architect, whose decision on all points I agree to accept as final," operated as such a reservation of control as to create the relation of master and servant.

In Waters *v.* Pioneer Fuel Co., 52 Minn. 474, 55 N. W. 52, evidence that one delivering coal for defendant used his own horses and running gear of his wagon, but was furnished a box by defendant, and was paid so much per ton every Saturday night, was held sufficient to establish the relation of master and servant.

In Huff *v.* Watkins, 15 S. C. 82, evidence that one employed on a farm was subject to the exclusive direction and control of the one owning the farm, although he was paid a portion of the crop as compensation,

2. Payments. — The fact that one is paid by the day, week, month or year, although a circumstance to be considered, is not conclusive of the relation of master and servant;[2] and the fact that one is paid by the job or piece, although strong evidence that the relation of master and servant does not exist,[3] is not conclusive of such fact.[4] The fact that one is paid a commission[5] or a portion of a crop,[6] in place of fixed wages, is immaterial in determining the relation of master and servant.

II. EMPLOYMENT.

1. Written Evidence. — A. When Necessary. — Written evidence of employment is essential where the employment is for a longer period than one year,[7] or where it is for a year to commence

established the relation of master and servant.

Evidence That Another Assumes Right to Control and Direct. — If a master abandons all control over the servant and all right to discharge him, and these rights are assumed by another, the servant then becomes the employe of such other. Brown *v.* Smith, 86 Ga. 274, 12 S. E. 411; Fenner *v.* Crips Bros., 109 Iowa 455, 80 N. W. 526.

Immaterial That Power to Control Not Exercised. — In Goldman *v.* Mason, 18 N. Y. St. 376, 2 N. Y. Supp. 337, it was held immaterial that the one retaining the power of control did not exercise such power.

Independent Contractors. — Evidence that one uses his own means and methods in accomplishing work, and is not subject to the immediate control and supervision of the employer, renders him an independent contractor. Kelleher *v.* Schmitt & Henry Mfg. Co., 122 Iowa 635, 98 N. W. 482; Morgan *v.* Smith, 159 Mass. 570, 35 N. E. 101; Gayle *v.* Missouri Car & Foundry Co., 177 Mo. 427, 76 S. W. 987; Jensen *v.* Barbour, 15 Mont. 582, 39 Pac. 906; Craft *v.* Albermarle Timb. Co., 132 N. C. 151, 43 S. E. 597; Norfolk & W. R. Co. *v.* Stevens, 97 Va. 631, 34 S. E. 525; Southern Cotton-Oil Co. *v.* Wallace, 23 Tex. Civ. App. 12, 54 S. W. 638.

In Moffet *v.* Koch, 106 La. 371, 31 So. 40, evidence that the party to whom the contract for the general work in the erection of a brewery was let employed and discharged his men was held insufficient to show the contractor independent, where the evidence showed that the owner exercised control and gave directions to the contractor in reference to the work, although assuming no control over the men employed by the contractor.

When Question for Jury. — When the evidence is conflicting as to whether one has the right to control and direct another it is a question of fact to be submitted to the jury under proper instructions from the court. Consolidated Fireworks Co. *v.* Koehl, 206 Ill. 283, 68 N. E. 1077, *affirming* 103 Ill. App. 152.

2. Corbin *v.* American Mills, 27 Conn. 274; Waters *v.* Pioneer Fuel Co., 52 Minn. 474, 55 N. W. 52.

3. Gayle *v.* Missouri Car & Foundry Co., 177 Mo. 427, 76 S. W. 987.

4. Corbin *v.* American Mills, 27 Conn. 274; Tennessee Coal, Iron & R. Co. *v.* Hayes, 97 Ala. 201, 12 So. 98; Morgan *v.* Smith, 159 Mass. 570, 35 N. E. 101; Fink *v.* Missouri Furnace Co., 10 Mo. App. 61; Perry *v.* Ford, 17 Mo. App. 212.

5. Riggs *v.* Standard Oil Co., 130 Fed. 199.

6. Tinsley *v.* Craige, 54 Ark. 346, 15 S. W. 897, 16 S. W. 570.

7. William Butcher Steel Wks. *v.* Atkinson, 68 Ill. 421; Tuttle *v.* Swett, 31 Me. 555; Hill *v.* Hooper, 1 Gray (Mass.) 131; Biest *v.* Versteeg Shoe Co., 97 Mo. App. 137, 70 S. W. 1081.

in the future.[8] An agreement to give steady employment,[9] or so long as faithful service is rendered,[10] need not be in writing.

B. Letters and Telegrams passing between the parties are admissible to show an employment,[11] and to satisfy the statute of frauds.[12]

2. Request. — Evidence that labor was performed with the express or implied consent of the owner is sufficient to establish an employment.[13]

3. Payment of Compensation. — The fact that one pays for services performed tends to establish an employment of the person performing such services by the person so paying.[14] It is immaterial

In Bernier *v.* Cabot Mfg. Co., 71 Me. 506, the court held an oral contract whereby the employe agreed that he would not leave the service of the employer for two years, nor in the summer time, nor without two weeks' notice, to be within the statute of frauds.

8. Horton *v.* Wollner, 71 Ala. 452; Comes *v.* Lamson, 16 Conn. 246; Palmer *v.* Marquette & Pac. R. M. Co., 32 Mich. 274; Fanger *v.* Caspary, 87 App. Div. 417, 84 N. Y. Supp. 410; Hillhouse *v.* Jennings, 60 S. C. 373, 38 S. E. 599; Moody *v.* Jones (Tex. Civ. App.), 37 S. W. 379; Scoggin *v.* Blackwell, 36 Ala. 351.

Where the evidence shows that the contract was for a year's service, to commence the Monday following the making of the contract, which was on Thursday, it is within the statute of frauds and must be evidenced by a writing. Haynes *v.* Mason, 30 Ill. App. 85.

In Sutcliffe *v.* Atlantic Mills, 13 R. I. 480, the court held a contract to serve for a year, to commence as soon as the servant could, and which actually commenced seven days after the contract was made, to be within the statute of frauds.

9. Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802.

10. Louisville & N. R. Co. *v.* Offutt, 99 Ky. 427, 36 S. W. 181.

11. Horton *v.* Wollner, 71 Ala. 452; Elbert *v.* Los Angeles Gas Co., 97 Cal. 244, 32 Pac. 9.

Letter Admissible Without Proof of Writer's Signature. — Troy Fertilizer Co. *v.* Logan, 90 Ala. 325, 8 So. 46.

12. Troy Fertilizer Co. *v.* Logan, 96 Ala. 619, 12 So. 712; Elbert *v.* Los Angeles Gas Co., 97 Cal. 244, 32 Pac. 9; Little *v.* Dougherty, 11 Colo. 103, 17 Pac. 292.

A telegram in the following words: "You may come at once. Salary of two thousand conditioned only upon satisfactory discharge of business," is not a sufficient writing to satisfy the statute of frauds. Palmer *v.* Marquette & Pac. R. M. Co., 32 Mich. 274.

13. Evidence that a minor was accustomed to go into a mine at the request of his father, an employe of the owner of the mine, to the knowledge of the latter, is sufficient to establish the relation of master and servant between such minor and the owner of the mine, and to entitle the former to the protection of the rule that the master must supply safe machinery, etc. Ringue *v.* Oregon Coal Co., 44 Or. 407, 75 Pac. 703.

14. Criswell *v.* Montana C. R. Co., 17 Mont. 189, 42 Pac. 767.

In an action to recover for services rendered, where the defense is that the services were rendered on the credit of the third person, evidence of an offer by such person to pay the plaintiff after the commencement of the trial is incompetent. Larry *v.* Sherburne, 2 Allen (Mass.) 34.

In an action for personal services, where the issue raised by defendants was that they did not employ plaintiff, proof of payment to plaintiff by persons alleged to be the agents of defendants is admissible, not to prove payment, but to show that plaintiff considered the agents, and not defendants, as his employers. Gilmore *v.* Atlantic & Pac. R. Co., 35 Barb. (N. Y.) 279.

that a minor is not on the pay-roll, or is not paid a compensation, when the father receives the wages.[15]

4. Actions Against Others. — Evidence of an action and judgment against a person other than the one claimed to be the employer, for services rendered,[16] or for an injury received while rendering such services,[17] is admissible as tending to show that the one claimed to be the employer was not so in fact.

5. Insurance Against Accidents to Employes. — Evidence that one insures his employes against accidents, and that the insurance company employed the attorneys defending the action brought by one claiming to be a servant, is admissible as tending to show that the plaintiff in such suit was in the employ of defendant.[18]

6. Acceptance of Service. — The performance and acceptance of service, with full knowledge of the facts, is sufficient evidence to establish an employment by the one so receiving the service.[19]

7. Performance of Single Act. — Performance by one of single, isolated acts at the direction of an employe is not sufficient to establish an employment, except in case of an emergency.[20]

8. Corporations Having Same Officers, Etc. — The fact that the corporation employing one has the same officers as another corporation,[21] or that the corporations bear a contractual relation toward such other,[22] is insufficient to show an employment by such other corporation.

9. Impression of Employes. — The impression of employes generally that one is employed is not admissible to show such employment,[23] but the person himself may testify that he believed he was employed, and that no one ever informed him to the contrary.[24]

15. Tennessee Coal, Iron & R. Co. *v.* Hayes, 97 Ala. 201, 12 So. 98.

16. De Forrest *v.* Butler, 62 Iowa 78, 17 N. W. 177.

17. Chicago K. & N. R. Co. *v.* Muncie, 56 Kan. 210, 42 Pac. 710.

18. Brower *v.* Timreck, 66 Kan. 770, 71 Pac. 581.

19. Tennessee Coal, Iron & R. Co. *v.* Hayes, 97 Ala. 201, 12 So. 98.

In Dalheim *v.* Lemon, 45 Fed. 225, it was held that the relation of master and servant existed where one knowingly permitted a convict to perform labor for him, even though such convict could not sue for the wages.

20. Holmes *v.* Cromwell, 51 La. Ann. 352, 25 So. 265.

A mere direction or order given to a person on a train to do a single act, as to turn a switch, no necessity or emergency being shown, does not establish an employment of such person by the railroad company. McDaniel *v.* Highland Ave. & B. R. Co., 90 Ala. 64, 8 So. 41.

21. Northern Alabama R. Co. *v.* Mansell, 138 Ala. 548, 36 So. 459.

22. Evidence that the Vicksburg, Shreveport and Southern railway company had an arrangement with the Arkansas Southern railway company, whose tracks crossed at right angles, whereby the former agreed to do the switching of cars for the latter at so much per car, and that plaintiff, an employe of the former company, was injured while switching a car on the tracks of the latter company, was held insufficient to show an employment as between the plaintiff and the Arkansas Southern railway company. Ederle *v.* Vicksburg S. & P. R. Co., 112 La. 728, 36 So. 664.

23. Texas M. R. Co. *v.* Douglas, 69 Tex. 694, 7 S. W. 77.

24. Dallas Elec. Co. *v.* Mitchel (Tex. Civ. App.), 76 S. W. 935.

10. Declarations and Conversations. — Declarations of an employe are not competent to prove an employment,[25] but conversations between the parties themselves are admissible for such purpose.[26]

11. As Respects Third Persons. — The employment as respects third persons may be established by affirmative acts and conduct, in holding out to the public that one is an employe,[27] or by evidence that one permitted another to so use his property as to convey to the public the idea that it was being used in accordance with the directions of the owner.[28] This rule has even been extended for the benefit of an employe.[29]

12. Ratification and Novation. — Part performance of an invalid contract made with a board of school directors,[30] retention in service and payment in accordance with the original hiring,[31] or a promise to pay, with knowledge that the one performing the service assumes he is working for the one promising,[32] is sufficient evidence of a ratification.

Whether a Novation Takes Place by the assignment of a business

25. Henning *v.* Western Union Tel. Co., 43 Fed. 131. See also article "PRINCIPAL AND AGENT."

26. Shaw *v.* Woodbury Glass Works, 52 N. J. L. 7, 18 Atl. 696.

In an action of *quantum meruit* for services rendered, and on an issue as to the employment of plaintiff, he may testify that in several conversations between himself and the defendant the latter stated that he would guarantee him $2000, not as showing the value of his services, but as evidence of the employment. Walker *v.* Turner, 27 Neb. 103, 42 N. W. 918.

27. Cargill *v.* Duffy, 123 Fed. 721-734; St. Louis & C. R. Co. *v.* Drennan, 26 Ill. App. 263.

28. Rome & D. R. Co. *v.* Chasteen, 88 Ala. 591, 7 So. 94; Zeigler *v.* Danbury & N. R. Co., 52 Conn. 543-555; Lovingston *v.* Bauchens, 34 Ill. App. 544; Elze *v.* Baumann, 2 Misc. 72, 21 N. Y. Supp. 782; Curley *v.* Electric Vehicle Co., 68 App. Div. 18, 74 N. Y. Supp. 35.

Where the evidence shows that a hack was owned by defendant, that he received the profits earned by it, and that the driver lived at his house and was working for him in other capacities, a verdict finding that the driver was in the employ of the defendant will not be set aside. Diehl *v.* Roberts, 134 Cal. 164, 66 Pac. 202.

In Axtell *v.* Northern Pac. R. Co. (Idaho), 74 Pac. 1075, an action by a third person against the railroad company, the only evidence of an employment by such company of the one causing the injury was the statement of the plaintiff that he knew they were employes because he had seen them working upon the railroad, and it was held insufficient to show an employment.

Evidence that the wagon which ran over plaintiff was painted in a peculiar manner, as other wagons of defendant, and marked with the name of defendant company, is *prima facie* evidence that the driver in control of the wagon was the servant of the defendant. Edgeworth *v.* Wood, 58 N. J. L. 463, 33 Atl. 940.

In Thurn *v.* Williams, 84 N. Y. Supp. 296, it was held that evidence that one was driving a horse and wagon belonging to defendant, which he had borrowed for his own use, was not sufficient to establish the relation of master and servant between the owner and the one so using his property.

29. Missouri Pac. R. Co. *v.* Sasse (Tex.), 22 S. W. 187.

30. Cook *v.* Ind. School Dist. of N. M., 40 Iowa 444.

31. Culbertson Irr. & W. P. Co. *v.* Wildman, 45 Neb. 663, 63 N. W. 947.

32. Monnahan *v.* Judd, 165 Mass. 93, 42 N. E. 555.

in which one is employed must necessarily be determined from the facts of the particular case.[33]

13. Burden of Proof. — The burden of proving an employment, whether it be in an action by one claiming to be a servant, or by a third person, is on the one alleging such fact.[34]

III. TERMS OF EMPLOYMENT.

1. Period. — A. COMMENCEMENT. — Where the contract of employment is in writing the servant cannot show that he began work at an earlier date than that fixed in the contract,[35] but where no time is fixed for the commencement parol evidence is admissible to show such fact.[36] The presumption is that the service is to begin within a reasonable time after the employment under all the facts and circumstances.[37]

B. DURATION. — a. *Presumption.* — **(1.) English Rule.** — In England a general hiring is presumed to be for a period of one year.[38] This presumption is not inflexible, but is affected by circumstances[39] and custom.[40]

(2.) American Rule. — The English rule is not recognized in this country,[41] it being almost universally held that a general hiring is presumed to be at will;[42] but facts and circumstances such as the

33. In an action for personal injuries by one who had been employed in operating a mill, where the only evidence of an employment by the defendant was the fact that the mill had been transferred to him by a receiver in trust for others, without his knowledge, it was held insufficient to show such an employment. Wright *v.* Bertiaux, 161 Ind. 124, 66 N. E. 900. See also Connor *v.* Hackley, 2 Metc. (Mass.) 613.

34. Actions for Injuries. — Henning *v.* Western Union Tel. Co., 43 Fed. 131; Ringue *v.* Oregon Coal Co., 44 Or. 407, 75 Pac. 703.

In Aga *v.* Harbach (Iowa), 102 N. W. 833, an action for injuries, it was held not necessary for the servant to prove a formal or express employment by the master, or that compensation was expected from him, to establish the relation of master and servant.

Actions for Services. — Ewing *v.* Janson, 57 Ark. 237, 21 S. W. 430; Berringer *v.* Lake Superior Iron Co., 41 Mich. 305, 2 N. W. 18.

35. Moynahan *v.* Interstate Min., Mill. & Dev. Co., 31 Wash. 417, 72 Pac. 81.

36. Case *v.* Phoenix Bridge Co., 34 N. Y. St. 581, 11 N. Y. Supp. 724; Meade *v.* Rutledge, 11 Tex. 44.

37. Howard *v.* East Tennessee V. & G. R. Co., 91 Ala. 268, 8 So. 868; Barnard *v.* Babbitt, 54 Ill. App 62; Stange *v.* Wilson, 17 Mich. 342.

38. Rex *v.* Worfield, 5 T. R. 506; Fairman *v.* Oakford, 5 H. & N. (Eng.) 635; Huttman *v.* Boulnois, 2 Car. & P. (Eng.) 510; Beeston *v.* Collyer, 4 Bing. 309, 13 E. C. L. 444; Fawcett *v.* Cash, 5 B. & A. (Eng.) 904; Foxall *v.* International Credit Co., 16 L. T. (N. S.) 637; Buckingham *v.* Surrey & H. Canal Co., 40 L. T. (N. S.) 885, 46 J. P. 774.

39. Baxter *v.* Nurse, 6 M. & G. 934, 46 E. C. L. 935; Fairman *v.* Oakford, 5 H. & N. (Eng.) 635; Rex *v.* Great Bowden, 7 B. & C. 249, 14 E. C. L. 39; Rex *v.* Stokesley, 6 T. R. 757.

40. Harnwell *v.* Parry Sound Lumb. Co., 24 Ont. App. 110.

41. Kansas Pac. R. Co. *v.* Roberson, 3 Colo. 142; Greer *v.* Arlington Mills Co., 1 Pen. (Del.) 581, 43 Atl. 609.

42. *California.* — De Briar *v.* Minturn, 1 Cal. 450.

admissions of the party or the custom and usage of a particular purpose of hiring may change this presumption.[43]

b. *Computation of Compensation as Affecting.* — A hiring at a weekly or monthly rate, and payment accordingly,[44] or payment by the month at a yearly rate,[45] is generally held to raise the presumption, in the absence of other facts or circumstances,[46] that the employment is for a like period. A hiring at a quarterly or yearly rate does not of itself establish a quarterly[47] or yearly employment,[48] but taken with other circumstances may be sufficient.[49]

Delaware. — Greer *v.* Arlington Mills Co., 1 Pen. 581, 43 Atl. 609.

Illinois. — Lynch *v.* Eimer, 24 Ill. App. 185; Orr *v.* Ward, 73 Ill. 318.

Maine. — Merrill *v.* Western Union Tel. Co., 78 Me. 97, 2 Atl. 847.

Maryland. — McCullough Iron Co. *v.* Carpenter, 67 Md. 554, 11 Atl. 176.

Missouri. — Boogher *v.* Maryland L. Ins. Co., 8 Mo. App. 533.

New York. — Hotchkiss *v.* Godkin, 63 App. Div. 468, 71 N. Y. Supp. 629.

43. Doerr *v.* Brune, 56 Ill. App. 657.

Hiring to Make a Crop. — In Hobbs *v.* Davis, 30 Ga. 423, the court held that when a servant was hired to raise a crop of corn, cotton, etc., and no time was fixed for the termination of the hiring, the presumption is that he was employed for the period of one year. "When one is hired to work in a crop being raised, the presumption is, in the absence of circumstances showing a contrary intention, that his term of service is to continue during the crop season." Magarahan *v.* Wright, 83 Ga. 773, 10 S. E. 584. See also Smith *v.* Theobald, 86 Ky. 141, 5 S. W. 394.

44. Jones *v.* Vestry of Trinity Church, 19 Fed. 59; Tennessee Coal, Iron & R. Co. *v.* Pierce, 81 Fed. 814; The Hudson, 12 Fed. Cas. No. 6831; Moss *v.* Decatur Land Imp. & Furnace Co., 93 Ala. 269, 9 So. 188; Capron *v.* Strout, 11 Nev. 304; Beach *v.* Mullin, 34 N. J. L. 343; Young *v.* Lewis, 9 Tex. 73; San Antonio & A. P. R. Co. *v.* Sale (Tex. Civ. App.), 31 S. W. 325.

In California the presumptions arising from the method adopted for estimating wages is fixed by the Civil Code, §§ 2010-2011.

Contra. — Howard *v.* East Tennessee V. & G. R. Co., 91 Ala. 268, 8 So. 868; Greer *v.* Arlington Mills Co., 1 Pen. (Del.) 581.

45. Pinckney *v.* Talmage, 32 S. C. 364, 10 S. E. 1083.

Yearly Contract Not Changed by Fact That Wages Are Paid Monthly. Rosenberger *v.* Pacific Coast R. Co., 111 Cal. 313, 43 Pac. 963; Norton *v.* Cowell, 65 Md. 359; Martin *v.* New York L. Ins. Co., 56 N. Y. St. 149, 26 N. Y. Supp. 283.

46. Jones *v.* Vestry of Trinity Church, 19 Fed. 59.

47. Tatterson *v.* Suffolk Mfg. Co., 106 Mass. 56.

48. Haney *v.* Caldwell, 35 Ark. 156; Lynch *v.* Eimer, 24 Ill. App. 185; Finger *v.* Kock & Schilling Brew. Co., 13 Mo. App. 310; Evans *v.* St. Louis I. M. & S. R. Co., 24 Mo. App. 114; Martin *v.* New York L. Ins. Co., 148 N. Y. 117, 42 N. E. 416; Prentiss *v.* Ledyard, 28 Wis. 131.

Contra. — In Kellogg *v.* Citizens' Ins. Co., 94 Wis. 554, 69 N. W. 362, it was held that where wages are paid by the week, month or year such circumstance strongly indicates the period contracted for, and in the absence of other evidence is sufficient to support a finding to such effect.

49. Lynch *v.* Eimer, 24 Ill. App. 185; Hotchkiss *v.* Godkin, 63 App. Div. 468, 71 N. Y. Supp. 629.

In Norton *v.* Cowell, 65 Md. 359, a contract of employment containing the following clause, "and if you give me satisfaction at the end of the first year I will increase your salary accordingly," was held to be sufficient evidence of an employment for a year.

Evidence that a servant employed by the month stated to his master that he desired his position to be made more certain, whereupon a specified amount per year was agreed upon, is

c. *Understanding of Parties.* — Either the master or the servant may show the mutual understanding as to the duration of the employment.[50] The master may also show that the servant understood that the hiring was terminable at the latter's will, as affording a strong presumption that the former might also terminate it at any time.[51]

d. *Statements or Declarations.* — Statements or declarations of a general agent of the master are admissible to show the length of the employment,[52] but statements by others than the employer, or one representing him, are not admissible.[53]

e. *Custom or Usage.* — Evidence of a general custom or usage to employ for a particular time is admissible to show the duration of an employment,[54] in the absence of an agreement fixing such fact.[55]

f. *Burden of Proof.* — The burden of proving that he was employed for any definite or fixed time is on the servant.[56]

2. Compensation. — A. Special Agreement. — Where the parties have mutually agreed upon a compensation the sum agreed upon is the best evidence of the value of the services,[57] and when the agreement is in writing it cannot be varied.[58]

a. *Evidence To Show Special Agreement.* — When the employment is not in writing, conversations between the parties leading

sufficient to show a yearly hiring. Bascom *v.* Shillito, 37 Ohio St. 431.

50. Greer *v.* Arlington Mills Co., 1 Pen. (Del.) 581.

51. Tuesdale *v.* Young, 24 Fed. Cas. No. 14,204.

52. Western Union Beef Co. *v.* Kirchevalle (Tex. Civ. App.), 26 S. W. 147.

53. Parks *v.* Atlanta, 76 Ga. 828.

54. Tuesdale *v.* Young, 24 Fed. Cas. No. 14,204; Kansas Pac. R. Co. *v.* Roberson, 3 Colo. 142; Chamberlain *v.* Detroit Stove Wks., 103 Mich. 124, 61 N. W. 532.

55. In an action *indebitatus assumpsit,* evidence of a custom of dry goods jobbers, such as defendant, to employ their clerks for the season, in the absence of any special agreement, and that the seasons were from January 1st to July 1st, and from July 1st to January 1st, is admissible as showing that plaintiff was employed for one of those seasons. Given *v.* Charron, 15 Md. 502.

Where plaintiff in an action to recover for services rendered testified that defendant employed him for a year, but defendant testified that he employed him for an indefinite time, at a specified salary per month, evidence of defendant's custom to employ his clerks by the month is incompetent, as the contract was an express one. Hartsell *v.* Masterson, 132 Ala. 275, 31 So. 616.

In Parks *v.* Atlanta, 76 Ga. 828, an action by a discharged employe, evidence of a custom of the defendant city to employ men in a department as long as they performed their duties was held inadmissible.

Testimony of Other Employes as to Duration of Their Employment. On an issue as to whether one was employed by the week or by the year, testimony of other employes that they were hired by the year is inadmissible and irrelevant. Lichtenheim *v.* Fisher, 6 App. Div. 385, 39 N. Y. Supp. 553.

56. Greer *v.* Arlington Mills Co., 1 Pen. (Del.) 581; Mandel *v.* Hocquard, 99 Ill. App. 75; Leveridge *v.* Lipscomb, 36 Mo. App. 630.

57. Woodrow *v.* Hawving, 105 Ala. 240, 16 So. 720; Moulin *v.* Columbet, 22 Cal. 509; Wallace *v.* Floyd, 29 Pa. St. 184.

58. Baltimore & O. R. Co. *v.* Polly, 14 Gratt. (Va.) 447; New-

up to the employment,[59] letters written, and book entries,[60] are admissible to show the agreed rate of compensation. So, also, evidence of the reasonable value of the service,[61] or of the amount the servant was receiving immediately prior to the employment,[62] is admissible as tending to show the rate.

b. *Evidence Under Special Agreement.* — **(1.) Custom.** — Evidence of a custom or usage to pay the servant a certain sum, in the particular locality where employed,[63] or commissions on renewal of annual premiums,[64] or compensation while on vacations,[65] is not admissible where the parties have agreed on the compensation.

(2.) Reasonable Value. — Evidence of the reasonable value of services,[66] or what the servant offered to work for another for,[67] or what his services were worth to the former employer,[68] is not admissible under a special agreement. Where the agreement is that the reasonable value of the services shall be paid, evidence of such value is then admissible.[69]

(3.) Incompetency and Misconduct. — Evidence of a servant's incom-

hall *v.* Appleton, 124 N. Y. 668, 26 N. E. 1107.

59. Bee *v.* San Francisco & H. B. R. Co., 46 Cal. 248; Millar *v.* Cuddy, 43 Mich. 273, 5 N. W. 316.

In Marsh *v.* Tunis, 39 Mich. 100, it was held that evidence of a promise to increase a servant's salary was not sufficient to show an agreement to so increase.

60. Chapin *v.* Cambria Iron Co., 145 Pa. St. 478, 22 Atl. 1041.

But parties cannot use letters written by themselves or their agents, after the employment has commenced, to vary or dispute the terms of employment. Chapin *v.* Cambria Iron Co., 145 Pa. St. 478, 22 Atl. 1041.

It is not the custom between employers and employes to give and take receipts for wages, and therefore the books and accounts, where there is no reason to suppose they are improperly kept, and especially when acquiesced in by the parties for a considerable length of time, are usually the best evidence of the terms of the contract. Webb *v.* Lees, 149 Pa. St. 13, 24 Atl. 169, *affirmed* 153 Pa. St. 436, 25 Atl. 1081.

61. Knallakan *v.* Beck, 47 Hun (N. Y.) 117.

62. In an action to recover for services, on an issue as to the agreed compensation, evidence that the servant was receiving $80 from another employment at the time of the contract is admissible as tending to support plaintiff's claim that the agreed salary was not $40 per month. Rocco *v.* Parczyk, 9 Lea (Tenn.) 328.

63. Smith *v.* Sheridan, 57 Hun 585, 10 N. Y. Supp. 365.

64. Partridge *v.* Insurance Co., 15 Wall. (U. S.) 473.

65. Wilson *v.* Smith, 111 Ala. 170, 20 So. 134.

66. Marsh *v.* Tunis, 39 Mich. 100; Robinson *v.* Hunt, 88 Hun 285, 34 N. Y. Supp. 794.

Evidence of the reasonable value of services is admissible when the contract of employment is in writing, but no consideration is mentioned. Toomy *v.* Dunphy, 86 Cal. 639, 25 Pac. 130.

67. Roles *v.* Mintzer, 27 Minn. 31, 6 N. W. 378.

68. Ganther *v.* Jenks, 76 Mich. 510, 43 N. W. 600.

69. Syson *v.* Hieronymus, 127 Ala. 482, 28 So. 967.

In an action on a contract to pay plaintiff the same wages as other men in the employment of the defendant company, in the absence of evidence that the company had other men in its employ the plaintiff may show the reasonable value of his services. Kent Furniture Mfg. Co. *v.* Ransom, 46 Mich. 416, 9 S. W. 454.

petency[70] misconduct,[71] unfaithfulness[72] or failure to perform the service as agreed[73] is admissible in behalf of the master to reduce the stipulated compensation. Evidence of the quality of service performed by the servant on a particular occasion,[74] or of the embarrassed condition of the master's business,[75] or that the servant did less than others in the same department,[76] is not admissible to show the servant's incompetency. On the other hand, the servant cannot testify that he has performed all his duties under the contract,[77] although his testimony that he is competent, corroborated by other circumstances, may be sufficient to establish such fact.[78] Nor can the servant show that the master ought to have been satisfied with his service where the contract provides that the services shall be good and satisfactory.[79]

B. REASONABLE VALUE. — a. *In General.* — In the absence of any agreement fixing the compensation for services rendered, the presumption is that they are to be paid for at their reasonable worth.[80] This presumption may be overcome by any facts or circumstances showing that compensation was not intended or expected.[81]

b. *Evidence To Show Reasonable Value.* — **(1.) Special Contract.** Where the entire performance of a special contract has been prevented by one of the parties the contract is admissible as an admission of the standard of value.[82] Special contracts have also

70. Lalor *v.* McDonald, 44 Mo. App. 439.

71. In an action for wages, the defendant having set up as a counterclaim misconduct of the servant generally, evidence that plaintiff had told other employes of defendant that they were not to be paid is not admissible without showing that the employes were so influenced by the statement that they quit defendant's employ, or that the defendant was injured. Eckelund *v.* Talbot, 80 Iowa 569, 46 N. W. 661.

72. Ewing *v.* Janson, 57 Ark. 237, 21 S. W. 430; Morris *v.* Redfield, 23 Vt. 295.

73. Goldstein *v.* White, 43 N. Y. St. 121, 16 N. Y. Supp. 860.

74. Waugh *v.* Shunk, 20 Pa. St. 130.

75. Paulsen *v.* Schultz, 85 Cal. 538, 24 Pac. 1070.

76. Greene *v.* Washburn, 7 Allen (Mass.) 390.

77. Fisher *v.* Monroe, 42 N. Y. St. 118, 17 N. Y. Supp. 837.

78. In an action to recover agreed salary, plaintiff's testimony that he was competent to perform the service is corroborated by the fact that several months after he commenced his employment defendant paid a $400 expense account of plaintiff's without complaint. La Coursier *v.* Russell, 82 Wis. 265, 52 N. W. 176.

79. Bush *v.* Koll, 2 Colo. App. 48, 29 Pac. 919.

80. Toomy *v.* Dunphy, 86 Cal. 639, 25 Pac. 130; Hudson *v.* Hudson, 90 Ga. 581, 16 S. E. 349; Doggett *v.* Ream, 5 Ill. App. 174; Scully *v.* Scully, 28 Iowa 548; Miller *v.* Cuddy, 43 Mich. 273; Owen *v.* O'Reilly, 20 Mo. 603.

Where the evidence shows that while plaintiff's intestate was in the employ of another railroad company, yet his services were of a beneficial nature to defendant, such evidence tends to support a cause of action in favor of the plaintiff, and is properly submitted to the jury. O'Sullivan *v.* Chicago M. & St. P. R. Co., 23 Ill. App. 646.

81. Doggett *v.* Ream, 5 Ill. App. 174; Smith *v.* Milligan, 43 Pa. St. 107.

82. Reynolds *v.* Jourdan, 6 Cal.

been admitted to show the reasonable value of the services, in an action on *quantum meruit.*[83]

(2.) Nature of Service. — Evidence of the quantity, quality and nature of the service,[84] and the length of time required to perform it,[85] is admissible to show the reasonable value.

(3.) Comparison With Compensation or Capacity of Other Servants. Evidence as to what other servants in similar positions were paid,[86] and their capacity[87] as compared with plaintiff, is admissible to show the reasonable value of plaintiff's services.

(4.) Conduct of Third Parties. — Evidence as to what such services were worth in that community,[88] or their value as fixed by a schedule of wages by those following that particular vocation,[89] or what some other person considered the services worth to him,[90] or had paid[91] or charged[92] for similar service, is not admissible to show the reasonable value of the services. A custom to make smaller charges in consideration of obtaining all of a party's business is not admissible to show the reasonable value unless it is a general custom.[93]

109; Britt *v.* Hays, 21 Ga. 157; Woodrow *v.* Hawving, 105 Ala. 240, 16 So. 720.

83. Chicago Exhaust and Blow Pipe Co. *v.* Johnson, 44 Ill. App. 224; Sands *v.* Potter, 59 Ill. App. 206; Crump *v.* Rebstock, 20 Mo. App. 37. *Contra.* — Farrell *v.* Knapp, 1 Cranch C. C. 131, 8 Fed. Cas. No. 4684.

84. Baltimore & O. R. Co. *v.* Polly, 14 Gratt. (Va.) 447.

Where the complaint for work and labor is in accordance with the common accounts, and the bill of particulars is "debtor to fourteen years, seven months service, work and labor," no demand having been made to have the complaint or bill of particulars made more certain, evidence that the service was performed as foreman and general manager is admissible. Adams *v.* Adams, 23 Ind. 50.

In Stanley *v.* Barringer, 74 Iowa 34, 36 N. W. 877, an action to recover for services rendered as a farm hand, it was held that evidence as to the size of the farm and the number of cattle, cows and horses thereon, was not admissible to show the amount of work done by plaintiff.

In an action for services rendered as nurse it is competent to ask a witness whether plaintiff's appearance did not show her constitution to be broken down by her duties. Thompson *v.* Stevens, 71 Pa. St. 161.

85. Ostrom *v.* Smith (Tex. Civ. App.), 25 S. W. 1130.

86. Shade *v.* Sisson Mill & Lumb. Co., 115 Cal. 357, 47 Pac. 135; Jenks *v.* Knott's Mex. S. M. Co., 58 Iowa 549, 12 N. W. 588. *Contra.* — Gill *v.* Staylor, 97 Md. 665, 55 Atl. 398.

87. Murray *v.* Ware, 1 Bibb (Ky.) 325; Shepard *v.* Ashley, 10 Allen (Mass.) 542; Mayor *v.* Spies, 66 Barb. (N. Y.) 576.

88. Andrews *v.* Johnston, 7 Colo. App. 551, 44 Pac. 73.

89. In an action to recover the reasonable value of services as a nurse, the scale of wages as fixed by nurses of a training school is not admissible. De Witt *v.* De Witt, 46 Hun (N. Y.) 258.

90. Connelly *v.* Cover, 102 Ill. App. 426; Williams *v.* Williams, 82 Mich. 449, 46 N. W. 734.

91. Given *v.* Charron, 15 Md. 502. *Contra.* — In McPeters *v.* Ray, 85 N. C. 462, the court held that a witness might testify as to the value of services, basing his judgment on what he had paid the servant for such services.

92. French *v.* Frazier, 7 J. J. Marsh. (Ky.) 325.

93. Syson *v.* Hieronymus, 127 Ala. 482, 28 So. 967.

C. Services by Members of Same Family. — a. *Generally.* Services rendered to and by persons living together as members of the same family are presumed to be gratuitous.[94] This presumption is generally applied irrespective of the relation between[95] or age of[96] the parties, but in some jurisdictions it is limited to cases in which the relation of parent and child exists.[97]

b. *Proof Required To Overcome Presumption.* — To rebut the presumption arising as between members of the same family there must be clear proof of an express contract, or such circumstances as imply a contract, to pay for the services.[98] In some jurisdictions

94. *Illinois.* — Dunlap *v.* Allen, 90 Ill. 108.

Indiana. — Smith *v.* Denman, 48 Ind. 65, 71; Stout *v.* Perry, 70 Ind. 501.

Iowa. — Cowan *v.* Musgrave, 73 Iowa 384, 35 N. W. 496; Tank *v.* Rohweder, 98 Iowa 154, 67 N. W. 106.

Maryland. — Bantz *v.* Bantz, 52 Md. 686.

Michigan. — Harris *v.* Smith, 79 Mich. 54, 44 N. W. 169.

Missouri. — Callahan *v.* Riggins, 43 Mo. App. 130; Erhart *v.* Dietrich, 118 Mo. 418, 24 S. W. 188.

New Hampshire. — Munger *v.* Munger, 33 N. H. 581; Seavey *v.* Seavey, 37 N. H. 125.

New Jersey. — Updike *v.* Titus, 13 N. J. Eq. 151.

New York. — Wilcox *v.* Wilcox, 48 Barb. 327.

95. Near Relatives. — Hays *v.* McConnell, 42 Ind. 285; Sloan *v.* Dale, 90 Mo. App. 87; Updike *v.* Titus, 13 N. J. Eq. 151; Andrus *v.* Foster, 17 Vt. 556.

Orphan or Infant Stranger. Reeves *v.* Moore, 4 Ind. App. 492, 31 N. E. 44; Smith *v.* Johnson, 45 Iowa 308; Pellage *v.* Pellage, 32 Wis. 136; Tyler *v.* Burrington, 39 Wis. 376.

Parent and Child. — *California.* Murdock *v.* Murdock, 7 Cal. 511; Swartz *v.* Hazlett, 8 Cal. 118.

Georgia. — Hudson *v.* Hudson, 90 Ga. 581, 16 S. E. 349.

Iowa. — Donovan *v.* Driscoll, 116 Iowa 339, 90 N. W. 60.

Missouri. — Woods *v.* Land, 30 Mo. App. 176; Penter *v.* Roberts, 51 Mo. App. 222; Louder *v.* Hart, 52 Mo. App. 377; Finnell *v.* Gooch, 59 Mo. App. 209.

New Jersey. — Updike *v.* Titus, 13 N. J. Eq. 151.

New York. — Conger *v.* Van Aernum, 43 Barb. 602.

Oregon. — Barrett *v.* Barrett, 5 Or. 411.

Vermont. — Andrus *v.* Foster, 17 Vt. 556.

Son-in Law. — In Wright *v.* Donnell, 34 Tex. 291, it was held that this presumption did not apply to services rendered by a son-in-law.

Stepson. — Guenther *v.* Birkicht, 22 Mo. 439; Hart *v.* Hart, 41 Mo. 441.

96. Mills *v.* Joiner, 20 Fla. 479; Miller *v.* Miller, 16 Ill. 295; Adams *v.* Adams, 23 Ind. 50; Hays *v.* McConnell, 42 Ind. 285; Allen *v.* Allen, 60 Mich. 635, 27 N. W. 702; Williams *v.* Barnes, 14 N. C. 348; *Ex parte* Aycock, 34 S. C. 255, 13 S. E. 450; Putnam *v.* Town, 34 Vt. 429.

97. Smith *v.* Milligan, 43 Pa. St. 107; Schoch *v.* Garrett, 69 Pa. St. 144; Horton's Appeal, 94 Pa. St. 62; Moyer's Appeal, 112 Pa. St. 290, 3 Atl. 811; Curry *v.* Curry, 114 Pa. St. 367, 7 Atl. 61; Griffith's Estate, 147 Pa. St. 274, 23 Atl. 556; Murphy *v.* Corrigan, 161 Pa. St. 59, 28 Atl. 947; Gerz *v.* Demarra, 162 Pa. St. 530, 29 Atl. 761.

98. *California.* — Murdock *v.* Murdock, 7 Cal. 511; Friermuth *v.* Friermuth, 46 Cal. 42.

Florida. — Mills *v.* Joiner, 20 Fla. 479.

Georgia. — Hudson *v.* Hudson, 90 Ga. 581, 16 S. E. 349; O'Kelly *v.* Faulkner, 92 Ga. 521, 17 S. E. 847.

Illinois. — Miller *v.* Miller, 16 Ill. 295; Collar *v.* Patterson, 137 Ill. 403, 27 N. E. 604.

Indiana. — Jessup *v.* Jessup, 17 Ind. App. 177, 46 N. E. 550; Oxford *v.* McFarland, 3 Ind. 156.

Iowa. — Cowan *v.* Musgrave, 73 Iowa 384, 35 N. W. 496.

circumstances are not enough; proof of an express contract is required.[99]

c. *Sufficiency of Evidence.* — **(1.) Circumstances Under Which Service Commenced or Continued.** — Proof that the service originally commenced under a contract of employment, but continued after the expiration thereof,[1] or was rendered only after urgent request,[2] is sufficient to rebut this presumption. Evidence as to the treatment received[3] or character of labor performed[4] may also be sufficient.

(2.) Expectations. — That the one rendering the service expected to be paid is not of itself sufficient evidence of an agreement to

Kansas. — Ayres *v.* Hull, 5 Kan. 419; Wyley *v.* Bull, 41 Kan. 206, 20 Pac. 855.

Maryland. — Bixler *v.* Sellman, 77 Md. 494, 27 Atl. 137.

Massachusetts. — Guild *v.* Guild, 15 Pick. 129.

Michigan. — Allen *v.* Allen, 60 Mich. 635, 27 N. W. 702.

Missouri. — Guenther *v.* Birkicht, 22 Mo. 439; Koch *v.* Hebel, 32 Mo. App. 103.

Nebraska. — Bell *v.* Rice, 50 Neb. 547, 70 N. W. 25.

New Jersey. — Prickett *v.* Prickett, 20 N. J. Eq. 478.

New York. — Sullivan *v.* Sullivan, 6 Hun 658; Williams *v.* Hutchinson, 5 Barb. 122.

Pennsylvania. — Neel *v.* Neel, 59 Pa. St. 347.

Vermont. — Putnam *v.* Town, 34 Vt. 429.

99. Wilkes *v.* Cornelius, 21 Or. 348, 28 Pac. 135; Hall *v.* Finch, 29 Wis. 278; Pellage *v.* Pellage, 32 Wis. 136; Tyler *v.* Burrington, 39 Wis. 376; Wells *v.* Perkins, 43 Wis. 160; Ellis *v.* Cary, 74 Wis. 176, 42 N. W. 252.

1. Where a parent agreed to pay for eight months' service of daughter at $12 per month, and she continued to labor for several years after such agreement, such fact is sufficient to entitle plaintiff to recover the reasonable value of such services subsequent to the agreement. Conger *v.* Van Aernum, 43 Barb. (N. Y.) 602, The presumption is that once a hiring, always a hiring. Olson *v.* Solveson, 71 Wis. 663, 38 N. W. 329.

2. In Robnett *v.* Robnett, 43 Ill. App. 191, evidence that a daughter was teaching school away from home when requested to return, and that she complied with such request and thereafter performed a considerable portion of the work on her parent's place, was held sufficient to warrant a finding that there was an implied agreement to pay for her services.

In an action by a son to recover from the estate of his deceased father, evidence that he had been paid $1000 for his service from 1855 to 1863, when he quit; that he returned shortly after at his father's request, and worked in a similar capacity till 1888, and that his father paid other sons and promised that plaintiff should be compensated, was held sufficient to warrant a finding that there was an implied understanding that the services were to be paid for. Hardy *v.* Hardy, 79 Md. 9, 28 Atl. 887.

3. Where plaintiff, eleven years of age, without guardian, parents or home, went to reside with defendant in 1881, remaining there and rendering service until 1889, it was held, in an action for services rendered, that evidence of the kind and quality of clothing and amount of money furnished plaintiff was admissible to show the relation of the parties, and that testimony of the plaintiff to the effect that defendant promised him a horse and wagon and $200 if he would stay with him until a certain time was admissible to show the expectations of the plaintiff. Resso *v.* Lehan, 96 Iowa 45, 64 N. W. 689.

4. Rogers *v.* Millard, 44 Iowa 466; Scully *v.* Scully, 28 Iowa 548.

In Adams *v.* Adams, 23 Ind. 50, evidence that a son and his wife lived in a cabin on his father's ranch, and for a period of eleven years managed the ranch, hiring, paying and discharging employes, was held sufficient to sustain a verdict allowing compensation for such services.

pay,[5] but is a proper fact to be considered with other circumstances.[6] If the one receiving the service knew of such expectation an agreement to pay may then be implied.[7]

(3.) Settlements and Accounts. — Failure to demand a settlement for[8] or to keep account of[9] the services affords a strong presumption that no compensation was expected, and especially where there have been settlements without any claim for compensation.[10]

(4.) Declarations. — General or loose declarations of gratitude,[11] opinion as to the value of the services[12] or intention to compensate therefor[13] are insufficient of themselves to establish either an express or implied contract, even though in writing.[14] However, if the declarations are coupled with other circumstances they may be sufficient.[15] If the declarations take the form of a promise, they are, of course, sufficient to support an action.[16]

5. Hilbish *v.* Hilbish, 71 Ind. 27; Bixler *v.* Sellman, 77 Md. 494, 27 Atl. 137; Shirley *v.* Vail, 38 How. Pr. (N. Y.) 406.

In Perry *v.* Perry, 2 Duv. (Ky.) 312, evidence that a mother expressed her intention of giving her property to her son, and that he expected such a gift, was held sufficient to rebut any presumption that the former was to compensate the latter for services rendered.

6. Hilbish *v.* Hilbish, 71 Ind. 27; Bixler *v.* Sellman, 77 Md. 494, 27 Atl. 137; Tyler *v.* Burrington, 39 Wis. 376.

7. If the one receiving the service knows that the one rendering the same expects to be paid, and permits him to continue without informing him to the contrary, the presumption that he was not to be paid is overcome. Hilbish *v.* Hilbish, 71 Ind. 27.

8. Collar *v.* Patterson, 137 Ill. 403, 27 N. E. 604; Donovan *v.* Driscoll, 116 Iowa 339, 90 N. W. 60.

9. Entries of account made by the one claiming compensation in the books of the defendant, while acting as his bookkeeper, are not sufficient to establish an agreement to pay for services. Tilghman *v.* Lewis, 8 La. 105.

10. Chamberlain *v.* Davis, 33 N. H. 121; Linton *v.* Linton (Tenn.), 55 S. W. 1065.

11. Reynolds *v.* Reynolds, 92 Ky. 556, 18 S. W. 517; Louder *v.* Hart, 52 Mo. App. 377; Murphy *v.* Corrigan, 161 Pa. St. 59, 28 Atl. 947.

12. Donovan *v.* Driscoll, 116 Iowa 339, 90 N. W. 60.

An entry in a book of the parent's opinion that a daughter was not entitled to any compensation for her services, as she had already been compensated, is not admissible after the death of the parent in an action by the daughter to recover for such services. Putnam *v.* Town, 34 Vt. 429.

13. *Georgia.* — O'Kelly *v.* Faulkner, 92 Ga. 521, 17 S. E. 847.

Iowa. — Donovan *v.* Driscoll, 116 Iowa 339, 90 N. W. 60.

Kentucky. — Reynolds *v.* Reynolds, 92 Ky. 556, 18 S. W. 517.

Missouri. — Hart *v.* Hart, 41 Mo. 441; Woods *v.* Land, 30 Mo. App. 176.

Pennsylvania. — Leidig *v.* Coover, 47 Pa. St. 534; Murphy *v.* Corrigan, 161 Pa. St. 59, 28 Atl. 947.

South Carolina. — *Ex parte* Aycock, 34 S. C. 255, 13 S. E. 450.

14. A letter written to the one rendering the service, in which the writer states that he has become greatly attached to the former, is insufficient to overcome the usual presumption. Boyter *v.* Atkinson, 96 Ill. App. 580.

In Donovan *v.* Driscoll, 116 Iowa 339, 90 N. W. 60, it was held that a letter written at the request of a sister of plaintiff seeking to recover for services rendered his father's estate, was not admissible.

15. Hart *v.* Hart, 41 Mo. 441; Perkins *v.* Hasbrouck, 155 Pa. St. 494, 26 Atl. 695; Gerz *v.* Demarra, 162 Pa. St. 530, 29 Atl. 761.

16. Harris *v.* Smith, 79 Mich. 54,

D. Services Covered by Employment. — All services of a similar nature rendered by the servant during the employment are presumed to be covered by the employment, and the servant cannot recover for extra work in the absence of proof of an express contract to pay therefor.[17] A custom may be sufficient to overcome this presumption.[18]

E. Burden of Proof. — a. *Agreement To Pay and Amount of Compensation.* — The servant must prove that the master agreed to pay him a specific compensation,[19] or that compensation was to continue while on vacations.[20] The burden of proving a family relationship is on the one asserting such fact,[21] but when proved the burden of showing that he was to be paid is then on the one seeking

44 N. W. 169; Thornton *v.* Grange, 66 Barb. (N. Y.) 507; Titman *v.* Titman, 64 Pa. St. 480.

Promissory Note. — An express promise in the form of a promissory note is sufficient to support an action for services rendered by a member of a family. Price *v.* Jones, 105 Ind. 543, 5 N. E. 683.

17. *California.* — Bee *v.* San Francisco & H. B. R. Co., 46 Cal. 248; Cany *v.* Halleck, 9 Cal. 198.

Kansas. — Houghton *v.* Kittleman, 7 Kan. App. 207, 52 Pac. 898; Guthrie *v.* Merrill, 4 Kan. 188 (an action to recover extra compensation for work done on Sunday).

Louisiana. — Succession *v.* Turnell, 34 La. Ann. 888.

Missouri. — Leach *v.* Hannibal & St. J. R. Co., 86 Mo. 27 (action to recover for notarial service); New York L. Ins. Co. *v.* Goodrich, 74 Mo. App. 355.

New York. — Moffat *v.* Brooklyn, 1 N. Y. Supp. 781; Perry *v.* Woodbury, 44 N. Y. St. 287, 17 N. Y. Supp. 530.

Where a person is employed by the month or year to attend to a particular branch of business, he may recover extra compensation for work done outside such branch without proof of an express contract. Cincinnati I. & C. R. Co. *v.* Clarkson, 7 Ind. 595.

Effect of Settlements. — Settlements made with the servant, in which no claim was made for extra compensation, are strong evidence that no charge was intended. Levy *v.* McCan, 44 La. Ann. 528, 10 So. 794; Bartlett *v.* Street R. Co., 82 Mich. 658, 46 N. W. 1034; Leach *v.* Hannibal & St. J. R. Co., 86 Mo. 27.

Effect of Eight-Hour Laws. — It is generally held that the eight-hour laws do not change this presumption. Luske *v.* Hotchkiss, 37 Conn. 219; Helphenstine *v.* Hartig, 5 Ind. App. 172, 31 N. E. 845.

18. A custom to pay for extra work sufficiently notorious to warrant the presumption that the parties made their contract with reference to it will permit a recovery. Schurr *v.* Savigny, 85 Mich. 144, 48 N. W. 547.

19. Hudson *v.* Hudson, 90 Ga. 581, 16 S. E. 349; Howard *v.* Gobel, 62 Ill. App. 497; Boogher *v.* Maryland L. Ins. Co., 8 Mo. App. 533.

In Lyman *v.* Schwartz, 13 Colo. App. 318, 57 Pac. 735, an action by a miner to recover compensation at the agreed rate of $2 per day, it was held that the burden of showing that he had worked a portion of the time under a new contract was on the defendant.

In an action to recover $110 proven to have come into the hands of the defendant while an employe of plaintiff, where the defense was that the amount was no more than sufficient to cover wages due the defendant at $75 a month, the burden of proving an employment at $75 a month is on the defendant. Smith *v.* Kegley, 77 Iowa 475, 42 N. W. 376.

20. Wilson *v.* Smith, 111 Ala. 170, 20 So. 134.

21. Shubart's Estate, 154 Pa. St. 230, 26 Atl. 202.

to recover.[22] In the absence of such relation the burden of showing that the services were to be gratuitous is on the master.[23]

b. *Payment.* — The burden of proving payment is on the master.[24] Entries in the master's books showing payments are competent.[25]

c. *Continuation of Service.* — **(1.) General Presumption.** — Continuing to render service after the expiration of a hiring for a definite time and compensation raises the presumption of a new hiring upon like terms,[26] and the conditions of the original employment are admissible to show such terms,[27] even though it did not comply with the statute of frauds.[28] In some jurisdictions this presumption is limited to cases in which the original hiring was for at least one year.[29]

22. Resso *v.* Lehan, 96 Iowa 45, 64 N. W. 689; Erhart *v.* Dietrich, 118 Mo. 418, 24 S. W. 188; Ridgway *v.* English, 22 N. J. L. 409. See also *supra,* "Services by Members of Same Family."

23. Linn *v.* Linderoth, 40 Ill. App. 320. See also *supra,* "Reasonable Value."

24. Stuart *v.* Lord, 138 Cal. 672, 72 Pac. 142.

25. Ganther *v.* Jenks, 76 Mich. 510, 43 N. W. 600.

Must Be on Account of the Services. — Either the entry or other evidence must show that it is in account with the person rendering, and on account of the services. Gill *v.* Staylor, 97 Md. 665, 49 Atl. 650.

26. *Arkansas.* — Ewing *v.* Janson, 57 Ark. 237, 21 S. W. 430.

California. — Nicholson *v.* Patchin, 5 Cal. 474; Hermann *v.* Littlefield, 109 Cal. 430, 42 Pac. 443; Gabriel *v.* Bank of Suisun, 145 Cal. 266, 78 Pac. 736.

Colorado. — State Board of Agriculture *v.* Meyers (Colo. App.), 77 Pac. 372.

Illinois. — Grover & Baker Sew. Mach. Co. *v.* Bulkley, 48 Ill. 189; Ingalls *v.* Allen, 132 Ill. 170, 23 N. E. 1026; Crane Bros. Mfg. Co. *v.* Adams, 142 Ill. 125, 30 N. E. 1030; Moline Plow Co. *v.* Booth, 17 Ill. App. 574; Mears *v.* O'Donoghue, 58 Ill. App. 345.

Louisiana. — Lalande . *v.* Aldrich, 41 La. Ann. 307, 6 So. 28.

Maryland. — McCullough Iron Co. *v.* Carpenter, 67 Md. 554, 11 Atl. 176; Listers' Agr. Chem. Wks. *v.* Pender, 74 Md. 15, 21 Atl. 686.

Michigan. — Thompson *v.* Detroit & L. S. Copper Co., 80 Mich. 422, 45 N. W. 189.

Nebraska. — Leidigh *v.* Keever, 97 N. W. 801.

Nevada. — Capron *v.* Strout, 11 Nev. 304.

New Hampshire. — New Hampshire Iron Factory Co. *v.* Richardson, 5 N. H. 294.

Ohio. — Kelly *v.* Carthage Wheel Co., 62 Ohio St. 598, 57 N. E. 984.

Pennsylvania. — Wallace *v.* Floyd, 29 Pa. St. 184.

Precludes Recovery on Quantum Meruit. — The servant cannot recover the reasonable value of the services rendered after the expiration of the original contract, but is bound by its terms. Sullivan *v.* New Orleans Stave & Heading Co., 44 La. Ann. 787, 11 So. 89; Ranck *v.* Albright, 36 Pa. St. 367.

27. *California.* — Hermann *v.* Littlefield, 109 Cal. 430, 42 Pac. 443.

Illinois. — Lynch *v.* Eimer, 24 Ill. App. 185; Mears *v.* O'Donoghue, 58 Ill. App. 345.

Iowa. — Laubach *v.* Cedar Rapids Supply Co., 122 Iowa 643, 98 N. W. 511.

Massachusetts. — Tatterson *v.* Suffolk Mfg. Co., 106 Mass. 56.

Michigan. — Wright *v.* Elk Rapids Iron Co., 129 Mich. 543, 89 N. W. 335; Tallon *v.* Grand Portage M. Co., 55 Mich. 147, 20 N. W. 878.

28. Hodge *v.* Newton, 14 Daly (N. Y.) 372; Galvin *v.* Prentice, 45 N. Y. 162.

29. Caldwell *v.* Caldwell Co., 88 N. Y. Supp. 970. See also Adams *v.* Fitzpatrick, 125 N. Y. 124, 26 N. E. 143; Berg *v.* Carroll, 29 N. Y. St. 675, 9 N. Y. Supp. 509; Bacon *v.*

(2.) Evidence to Overcome Presumption. — The fact that the service rendered after the termination of the contract was not of the same nature,[30] or was to a different person,[31] is sufficient to rebut this presumption. A change in the terms of the employment is also sufficient.[32]

IV. TERMINATION OF RELATION.

1. Discharge by Master. — A. EVIDENCE OF. — No particular evidence of a discharge is required, but any evidence of an intention

New Home Sew. Mach. Co., 59 Hun 624, 13 N. Y. Supp. 359; Vail *v.* Jersey Little Falls Mfg. Co., 32 Barb. (N. Y.) 564; Kellogg *v.* Citizens Ins. Co., 94 Wis. 554, 69 N. W. 362.

In Smith *v.* Velie, 60 N. Y. 106, the court held that the general presumption did not apply where the service originally commenced without any agreement as to time. See also Lally *v.* Crookston Lumb. Co., 85 Minn. 257, 88 N. W. 846.

30. Ewing *v.* Janson, 57 Ark. 237, 21 S. W. 430.

Evidence that the original employment was in a hotel in Colorado, and that the continuation, after a lapse of two months, was in the capacity of a servant in a farm house in California, was held sufficient to rebut the usual presumption. Reed *v.* Swift, 45 Cal. 255.

Evidence Held Insufficient. — Evidence that the services were of a slightly different character, or were performed at a different place, is not sufficient to overcome the presumption arising from a continuation in employment. Ingalls *v.* Allen, 132 Ill. 170, 23 N. E. 1026.

In O'Connor *v.* Briggs, 182 Mass. 387, 65 N. E. 386, evidence that after the expiration of the employment the servant collected some bills, and attempted to collect others, on account of goods sold by him during his employment, but did not resume his former work, was held insufficient to show a renewal of the former contract.

In Leidigh *v.* Keever (Neb.), 97 N. W. 801, evidence that the original employment was in the ice business, and that the continuation was on a farm, with the understanding that the servant should assist in the ice business whenever he could, was held insufficient to overcome this presumption.

31. Evidence that the original employment was by an individual, and that the continuation was under a copartnership of the original employer and others, is sufficient to rebut this presumption. Mason *v.* Secor, 76 Hun 178, 27 N. Y. Supp. 570.

Where one hired an assistant at $3.50 a day, and afterward, as the agent of his wife, continued to pay him the same rate until the wife assumed personal control, evidence as to the terms of the original hiring was held admissible in an action by the employe against the wife to recover wages then due under the employment by the husband as agent. McQuown *v.* Cavanaugh, 14 Colo. 188, 23 Pac. 341.

32. McCullough Iron Co. *v.* Carpenter, 67 Md. 554, 11 Atl. 176.

Immaterial That New Contract Void Under Statute of Frauds. — In Horton *v.* Wollner, 71 Ala. 452, the court held that this presumption was overcome by the making of a new contract even though it was void under the statute of frauds. See also Crommelin *v.* Thiess, 31 Ala. 412.

Parol Evidence of New Terms. In Hale *v.* Sheehan, 41 Neb. 102, 59 N. W. 554, parol evidence of new terms agreed upon after the expiration of the original employment is admissible to rebut the presumption arising from a continuation in service.

Notice of Change. — Evidence that the servant continued in the service after notice of a change in the terms is sufficient to show a new agreement. Crane Bros. Mfg. Co. *v.* Adams, 142 Ill. 125, 30 N. E. 1030; Spicer *v.* Earl, 41 Mich. 191, 1 N. W. 923.

and desire to dispense with the services of the servant, conveyed to him, whether verbally[33] or in writing,[34] is sufficient.

B. Actions for Wrongful Discharge. — a. *Justification.* (1.) **In General.** — Evidence of any acts of the servant injurious to the master's business is admissible in justifying the discharge.[35] Evidence of actual loss is unnecessary, but it is sufficient if damage has resulted, or is likely to.[36]

33. McNamara *v.* New York, 152 N. Y. 228, 46 N. E. 507.

In an action to recover damages for the breach of a contract to employ plaintiff as a school teacher for a definite time, the plaintiff in relation to his discharge testified "that on Friday . . . as they were about leaving the school room, the defendant informed him of some complaints made by patrons of the school, and said to him, 'We had better discontinue our relationship.' I asked her when, and she said 'Immediately,' and with that I left. After I had gone down stairs I returned and asked her if we could have a meeting the next day. She said 'No,' she was too busy, and she could not then arrange any time for a personal meeting." He also testified that he presented himself at the school room the following Monday, but found that his classes were taken by other teachers, and after waiting for an hour returned home. The defendant offered no evidence in her behalf. The court held that the statements of defendant were sufficient evidence that plaintiff's services were no longer desired and that his employment was suspended. Bennett *v.* Morton, 46 Minn. 113, 48 N. W. 678.

In Paine *v.* Hill, 7 Wash. 437, 35 Pac. 136, evidence that the president of a corporation said to plaintiff, "It is very disagreeable to have you here, and you are not fit for the grocery business, I can see that, and I think you had better go," corroborated by the testimony of the vice-president that the president, when speaking of plaintiff, said, "You never mind; you leave that between Mr. Paine and I. I will get rid of him," was held sufficient to show a discharge.

34. Request To Resign. — In Cumberland & P. R. Co. *v.* Slack, 45 Md. 161, a letter written by the president of the company to the plaintiff, employed as a superintendent, requesting him to turn over the papers in his office to the second vice-president, and asking his resignation, was held sufficient evidence of a discharge.

In Jones *v.* Graham & Morton Transp. Co., 51 Mich. 539, 16 N. W. 893, a letter from the defendant's manager to the plaintiff, containing the following clause, "I am very sorry to have to ask you to resign your position," was held to operate as a peremptory discharge.

Suspension. — In McNamara *v.* New York, 152 N. Y. 228, 46 N. E. 507, a notice from the aqueduct commissioners to plaintiff, employed as an inspector of masonry, in the following form: "Owing to lack of work, as reported by Division Engineer Gowen, you are hereby suspended from November 16th without pay, until such time as your services may be required," was held sufficient evidence of a discharge.

Evidence Held Insufficient. — In an action by a lumber inspector to recover damages for being wrongfully prevented from performing his contract, a letter in a series of letters between the parties in attempting to compromise their differences containing the following clause: "I think you had better call your man [who had measured some of the lumber] home, and quit," was held insufficient to show a discharge. Pinet *v.* Montague, 103 Mich. 516, 61 N. W. 876.

35. Newman *v.* Reagan, 65 Ga. 512; Vinson *v.* Kelly, 99 Ga. 270, 25 S. E. 630; Adams Exp. Co. *v.* Trego, 35 Md. 47.

36. Deane *v.* Cutler, 48 N. Y. St. 404, 20 N. Y. Supp. 617.

Evidence that the services would not be profitable to the master is entirely immaterial. Weber Gas & Gasoline Engine Co. *v.* Bradford (Tex. Civ. App.), 79 S. W. 46.

(2.) Neglect of Duty. — It is not necessary for the master to prove habitual neglect,[37] but neglect of any character injurious to the master is sufficient.[38] Evidence of absence from business may be sufficient.[39] Testimony of a coemploye that the servant was inattentive and made mistakes is not sufficient to establish neglect.[40] Evidence that the servant did not keep other employes under him constantly employed,[41] or that the master's business was not as good as it would have been had he attended to business,[42] is admissible, but evidence as to what other employes accomplished is not admissible.[43]

(3.) Incompetency. — Direct Evidence. — Evidence as to the fitness or capacity of the servant to perform a particular service is admissible on an issue as to the competency of the servant,[44] but opinions are not admissible.[45]

37. Peltz *v.* Printz, 186 Pa. St. 347, 40 Atl. 486.

38. Miller *v.* Gidiere, 36 La. Ann. 201; Cramer *v.* Mack, 8 Mo. App. 531; Peltz *v.* Printz, 186 Pa. St. 347, 40 Atl. 486.

In Armour-Cudahy Pack. Co. *v.* Hart, 36 Neb. 166, 54 N. W. 262, evidence that the manager of a packing house drank to excess, and while intoxicated permitted the temperature to become so high as to spoil the meat, was held a sufficient showing of neglect to justify his discharge.

39. Evidence that an overseer was absent by reason of a protracted illness is sufficient to justify his discharge where his duties were such as to require his continual presence. Miller *v.* Gidiere, 38 La. Ann. 201.

Where a servant absented himself for a day, evidence that he was paid by the day is admissible as having some bearing on the question of whether one day's absence was sufficient to justify his discharge. Shaver *v.* Ingham, 58 Mich. 649, 26 N. W. 162.

40. Testimony of a coemploye in a general way that the servant was inattentive to business, made some mistakes and was unpleasant to other employes is not sufficient to justify the servant's discharge. Hand *v.* Clearfield Coal Co., 143 Pa. St. 408, 22 Atl. 709.

41. Where the servant agrees to keep other employes of defendant industriously employed, evidence that he permitted the men to be idle at times is admissible in behalf of the master in an action for wrongful discharge. Stoddard *v.* Hill, 33 Vt. 459.

42. Stoddard *v.* Treadwell, 26 Cal. 294.

43. In Hamill *v.* Foute, 51 Md. 419, an action for the breach of a contract of employment under which the servant agreed to serve the master faithfully and honestly to the best of his knowledge and ability, evidence that another employe subsequently engaged in the same capacity succeeded in making larger sales does not show that plaintiff did not serve defendant faithfully and honestly to the best of his knowledge and ability.

44. Jones *v.* Graham & Morton Transp. Co., 51 Mich. 539, 16 N. W. 893.

In Squire *v.* Wright, 1 Mo. App. 172, an action brought by one employed at so much per day as foreman of a sash, door and blind factory to recover damages for being discharged before the expiration of his employment, it was held proper to ask him on cross-examination if he was competent to perform the work.

On an issue as to the competency of a servant he may call as witnesses persons having knowledge of his qualifications in the particular employment. Hare *v.* Mahoney, 60 Hun 576, 14 N. Y. Supp. 81.

45. The opinion of a witness as to whether a superintendent was a good man to manage hands is not admissible, but the facts should be stated and the jury permitted to draw its own conclusion. Troy

Circumstantial Evidence. — Evidence that the servant failed to give satisfaction in similar service for another,[46] or that the business of the master resulted in a loss,[47] or that the servant did not do as much as some other employe,[48] is not admissible to show incompetency of the servant. Retention in service is *prima facie* evidence of competency.[49]

Fertilizer Co. *v.* Logan, 90 Ala. 325, 8 So. 46.

46. Rich *v.* Fendler, 55 Mo. App. 236, was an action to recover damages for being discharged before the expiration of the period of employment. The defendant justified the discharge on the ground of incompetency, and offered to prove that plaintiff did not possess the necessary skill to discharge the duties, by showing his general reputation as a workman, and that he had undertaken similar work for other parties and had failed to give satisfaction, but the lower court excluded the testimony. In affirming the ruling the court said: "We are of the opinion that the court did right in excluding the evidence which the defendant offered. The plaintiff worked for the defendant for more than a month, and we think that his competency or incompetency could be best determined by the manner in which he actually discharged the duties assigned to him."

But see Continental Match Co. *v.* Swett, 61 N. J. L. 457, 38 Atl. 969, an action by an artisan to recover damages for the breach of a contract of employment, where on an issue as to the competency of the plaintiff, evidence that he satisfactorily performed similar work in the same capacity in another factory was held admissible in his behalf.

In School Dist. of Omaha *v.* McDonald (Neb.), 94 N. W. 829, an action to recover damages for the breach of a contract to employ plaintiff as an architect for a period of one year, the court held that the incompetency of the plaintiff could not be shown by a cross-examination tending to show how long it took him to perform another and independent contract.

47. Dunton *v.* Derby Desk Co., 186 Mass. 35, 71 N. E. 91, was an action to recover a balance due on an alleged contract to employ plaintiff for the term of one year from July 1st, 1900, at the rate of $3500 a year, and the defense set up was neglect and incompetency of the plaintiff. *Held,* evidence that there was a loss of about $20,000 in defendant's business from the 1st of July, 1900, to the 1st of January, 1901, and that the loss was due to the failure of the factory of which plaintiff was superintendent to properly furnish goods for the business, was inadmissible, the court saying: "If the plaintiff had neglected or willfully failed to perform his duties this was susceptible of direct proof, and the loss or profit of a manufacturing company is dependent upon so many conditions that there is no necessary connection between them and the conduct of the superintendent."

Output of Mill Admissible. — In Peck *v.* Dexter, S. P. & P. Co., 164 N. Y. 127, 58 N. E. 6, an action to recover damages for wrongful discharge before the expiration of the period of employment as the foreman of a pulp mill, the defense set up was the incompetency of the plaintiff. *Held,* evidence that the average daily output of the mill was nine tons during the time plaintiff was employed, and that after his discharge it was twenty-seven tons, was admissible as tending to show that plaintiff was incompetent, and that evidence of the amount of dividends and profits of defendant during plaintiff's employment and for the years subsequent to the date of the discharge was incompetent to overcome the evidence as to the output.

48. Evidence that the management of a servant was inferior to that of a former employe is not admissible to show incompetency. Troy Fertilizer Co. *v.* Logan, 90 Ala. 325, 8 So. 46.

49. In Roberts *v.* Brownrigg, 9 Ala. 106, an action by an overseer to recover the balance of his year's wages after his discharge, it was held

(4.) Discourtesy or Disrespect. — The master may show that the servant so conducted or demeaned himself toward customers as to injure his business.[50] Evidence of slight discourtesies, hasty words or occasional exhibitions of temper is not sufficient for such purpose.[51]

(5.) Drunkenness. — The master may show that the servant used intoxicating liquors to such an extent as to render him incapable of performing his duties.[52] Evidence of intoxication after the discharge is not admissible without showing resulting incapacity.[53]

(6.) Immoral Conduct. — Evidence of immoral conduct is admissible in justification of a discharge.[54] It has been held, however, that immoral conduct in itself as a matter of law does not justify a discharge; the immoral conduct must be of such a nature as to interfere

that the fact that he was in defendant's employ for six months was *prima facie* evidence of his competency.

50. Evidence that a bookkeeper was rude and discourteous to the employer's customers, and that his conduct in that respect injured the business, is admissible in behalf of the master in justification of the servant's discharge before the expiration of the period of hiring. McMurray *v.* Boyd, 58 Ark. 504, 25 S. W. 505.

Where the justification set up for discharging a servant was that he insulted customers, the evidence showing that he insulted certain customers, evidence that he conducted himself properly toward other customers is immaterial. Suttie *v.* Aloe, 39 Mo. App. 38.

51. Leatherberry *v.* Odell, 7 Fed. 641.

52. Ulrich *v.* Hower, 156 Pa. St. 414, 27 Atl. 243.

In Collins *v.* Glass, 46 Mo. App. 297, an action for wrongful discharge, the defense set up was incompetency by reason of drunkenness, and the master introduced evidence tending to show that the servant was drunk every night and nearly every day. *Held*, that the servant could show by witnesses that he was sober when they saw him, as it negatived this.

Incapacity From Drunkenness Not Always Necessary. — In Bass Furnace Co. *v.* Glasscock, 82 Ala. 452, 2 So. 315, the court held that the nature of the duties and the time of the drunkenness might be of such a nature as to injure the master's business or be offensive to him, and yet not fully incapacitate the servant.

An indictment for drunkenness is not admissible as evidence to show drunkenness. Clark *v.* Ryan, 95 Ala. 406, 11 So. 22.

53. Hinchcliffe *v.* Koontz, 121 Ind. 422, 23 N. E. 271, was an action to recover damages for the breach of a contract to employ plaintiff as foreman of defendants' brick yard for a period of one year. In justifying the discharge the defendants offered to prove that the plaintiff was frequently seen on the streets in an intoxicated condition after he was discharged, and in excluding the evidence the court said: "This evidence was properly excluded. It is quite true that an employe wrongfully discharged must not voluntarily render himself incapable of performing other service substantially similar to that which he had engaged to perform, but the appellants [defendants] made no offer to show such a degree of intoxication as in any wise affected his capacity for service."

54. Dwyer *v.* Cane, 6 La. Ann. 707.

In an action to recover damages for being discharged before the expiration of the period of hiring, where the defense set up was that the servant conducted himself indecently toward a maid servant, shirked his duty as between himself and another male servant, and objected to the quality and quantity of food furnished, evidence of indecent proposals and remarks to the maid servant, and that she informed the master that she would leave unless the plaintiff did, was held admissible. Weaver *v.* Halsey, 1 Ill. App. 558.

with the proper performance of the servant's duties or injure the business of the employer.[55]

(7.) Violation of Instructions. — Evidence of the violation of positive directions is admissible in behalf of the master,[56] but evidence as to the number of sales made by the servant is inadmissible.[57]

(8.) Misrepresentations at Time of Employment. — Evidence that the servant made false representations at the time of his employment is admissible in behalf of the master to justify a discharge.[58]

(9.) Burden of Proof. — The master has the burden of showing a sufficient cause for discharging the servant, the latter being under no obligation to show that he was without fault.[59]

(10.) Question for Jury. — Whether the master had sufficient cause for discharging a servant is generally held to be a question for the jury.[60]

55. Child *v.* Boyd, 175 Mass. 493, 56 N. E. 608; Preyer *v.* Bidwell, 32 N. Y. St. 680, 11 N. Y. Supp. 71.

56. Park Bros. & Co. *v.* Bushnell, 60 Fed. 583, 9 C. C. A. 138; Schaub *v.* Arc Welding Co., 123 Mich. 487, 82 N. W. 235; Cramer *v.* Mack, 8 Mo. App. 531.

57. In an action of assumpsit for the wrongful discharge of plaintiff, employed as traveling salesman for a period of one year, where the defendant justified the discharge on the ground that the plaintiff violated instructions, evidence that the sales of plaintiff did not come up to the expectations of defendant is not admissible. Milligan *v.* Sligh Furniture Co., 111 Mich. 629, 70 N. W. 133.

58. In Kidd *v.* American Pill & Medicine Co., 91 Iowa 261, 59 N. W. 41, the plaintiff sold to defendant the right to manufacture and sell certain medicines in consideration of his employment as general manager of defendant corporation for one year. Before the expiration of the year defendant discharged plaintiff, and in an action to recover damages for such discharge defendant justified the discharge on the ground of false representations made at the time of employment. Evidence that the plaintiff represented the medicines to be good, proper and legitimate, and that three years prior to his employment he knew that the medicines were used for the purpose of causing abortion, is admissible to show the falsity of his representations at the time of his employment, and to justify the defendant in discharging plaintiff. See also Child *v.* Detroit Mfg. Co., 72 Mich. 623, 40 N. W. 916.

59. *Alabama.* — Roberts *v.* Brownrigg, 9 Ala. 106.

Georgia. — Echols *v.* Fleming, 58 Ga. 156.

Illinois. — Morris *v.* Taliaferro, 75 Ill. App. 182; *s. c.*, 44 Ill. App. 359; Western Mfrs. Mut. Ins. Co. *v.* Boughton, 136 Ill. 317, 26 N. E. 591.

Michigan. — Milligan *v.* Sligh Furniture Co., 111 Mich. 629, 70 N. W. 133.

Missouri. — Koenigkraemer *v.* Missouri Glass Co., 24 Mo. App. 124; Miller *v.* Woolman-Todd Boot & Shoe Co., 26 Mo. App. 57; Squire *v.* Wright, 1 Mo. App. 172.

New York. — Zeiss *v.* American Wringer Co., 62 App. Div. 463, 70 N. Y. Supp. 1110; Stern *v.* Congregation Schaare Rachmin, 2 Daly 415.

North Carolina. — Deitrick *v.* Cashie & C. R. & Lumb. Co., 127 N. C. 25, 37 S. E. 64.

Oregon. — Barlow *v.* Taylor Placer Min. & Mill. Co., 29 Or. 132, 44 Pac. 492.

West Virginia. — Rhoades *v.* Chesapeake & O. R. Co., 49 W. Va. 494, 39 S. E. 209.

60. Echols *v.* Fleming, 58 Ga. 156; Waxelbaum *v.* Limberger, 78 Ga. 43, 3 S. E. 257; Peniston *v.* John Y. Huber Co., 196 Pa. St. 580, 46 Atl. 934; Fairbanks *v.* Nelson, 56 Vt. 657; Deane *v.* Cutler, 48 N. Y. St. 404, 20 N. Y. Supp. 617. But see Lippus *v.* Columbus Watch Co., 54 Hun 637, 7 N. Y. Supp. 478.

b. *Motive of Discharge.* — Evidence as to the motive of the master in discharging the servant is entirely immaterial.[61]

c. *Cause of Discharge.* — The master may introduce evidence of any sufficient cause for discharge other than that assigned[62] or known to him at the time of the discharge.[63] Where the violation of duty continues from time to time till the discharge, the whole course of the servant's conduct is admissible.[64]

d. *Waiver of Right To Discharge.* — Retention in service after knowledge of sufficient cause and the lapse of reasonable time to discharge is *prima facie* a condonation of such misconduct.[65] What is

61. Pape *v.* Lathrop, 18 Ind. App. 633, 46 N. E. 154; Greene *v.* Washburn, 7 Allen (Mass.) 390; Jackson *v.* New York Post Graduate School & Hospital, 6 Misc. 101, 26 N. Y. Supp. 27; Crescent Horseshoe & Iron Co. *v.* Eynon, 95 Va. 151, 27 S. E. 935.

62. Orr *v.* Ward, 73 Ill. 318; Odeneal *v.* Henry, 70 Miss. 172-181, 12 So. 154; Arkush *v.* Hanan, 60 Hun 518, 15 N. Y. Supp. 219.

In Sams Automatic Car Coupler Co. *v.* League, 25 Colo. 129, 54 Pac. 642, it was held that the master could not introduce evidence of causes other than those set up in the answer.

In Hughes *v.* Gross, 166 Mass. 61, 43 N. E. 1031, plaintiff was employed for one year from April 25, 1892, as assistant manager of the cloak department in defendant's store in Boston, at $25 a week. The contract, after providing for a week's notice of cancellation by the plaintiff, and an optional right to continue it for a second year by giving notice to that effect on or before April 25, 1893, continued, "provided also that the services of said second party [plaintiff] have been reasonably satisfactory to said first party [defendant] until Jan. 1, 1893; also provided that said first party gives written notice to said second party of any cause of dissatisfaction on or before January 1, 1893." On December 28, 1892, defendants wrote plaintiff that the contract would not be continued beyond the one year, following this with a letter of date December 31, 1892, in which five distinct reasons of dissatisfaction were set forth. These letters were followed by one absolutely refusing to employ plaintiff for a second year. In an action for failure to employ plaintiff for another year it was held that evidence of other causes of dissatisfaction than those stated in defendants' letter of date December 31, 1892, was not admissible.

63. Odeneal *v.* Henry, 70 Miss. 172-181, 12 So. 154; Crescent Horseshoe & Iron Co. *v.* Eynon, 95 Va. 151, 27 S. E. 935.

64. In Little *v.* Dougherty, 11 Colo. 103, 17 Pac. 292, plaintiff was employed to serve in a jewelry business for a period of two years at $1400 a year. He was transferred to the position of traveling salesman, in which capacity he continued for about a month, when he was discharged. *Held,* evidence of misconduct a month prior to the discharge and before the change in service admissible. See also Troy Fertilizer Co. *v.* Logan, 90 Ala. 325, 8 So. 46.

65. *United States.* — Leatherberry *v.* Odell, 7 Fed. 641; Jones *v.* Vestry of Trinity Church, 19 Fed. 59.

Alabama. — Martin *v.* Everett, 11 Ala. 375; Jonas *v.* Field, 83 Ala. 445, 3 So. 893; Troy Fertilizer Co. *v.* Logan, 90 Ala. 325, 8 So. 46.

Arkansas. — McMurray *v.* Boyd, 58 Ark. 504, 25 S. W. 505.

New York. — Gray *v.* Shepard, 147 N. Y. 177, 41 N. E. 500.

Wisconsin. — Tickler *v.* Andrae Mfg. Co., 95 Wis. 352, 70 N. W. 292.

In Daniell *v.* Boston & M. R. Co., 184 Mass. 337, 68 N. E. 337, a retention in service after knowledge of a breach of the contract of employment, although certain discipline or demerit marks were put down against the servant, was held *prima facie* evidence of a waiver of such breaches, but that in case of subse-

a reasonable time in which to discharge is usually a question for the jury under all the facts and circumstances.[66] The master, to rebut this presumption, may introduce evidence of any reasonable excuse for not discharging.[67] Payment of wages as stipulated is *prima facie* evidence of a waiver of the right to discharge for incompetency prior to such payment.[68] Deduction from wages by reason of absences[69] or expressions of confidence by the master, though admissible, are not sufficient to constitute a waiver.[70]

e. *Waiver of Right To Sue.* — The mere acceptance of other employment is not of itself sufficient evidence of a waiver of the right to recover for a wrongful discharge.[71] One hired for a year waives his right to sue for the whole year's salary, until after the expiration of the year, by returning to work after his discharge.[72] So, also, a voluntary resignation after the discharge has been held a waiver.[73]

quent misconduct evidence of such prior breaches was admissible.

66. Troy Fertilizer Co. *v.* Logan, 90 Ala. 325, 8 So. 46; Jonas *v.* Field, 83 Ala. 445, 3 So. 893; Newman *v.* Reagan, 63 Ga. 755; Atlantic Compress Co. *v.* Young, 118 Ga. 868, 45 S. E. 677; Jordan *v.* Weber Moulding Co., 77 Mo. App. 572.

Where the servant was employed on trial for sixty days, with the understanding that if his services were satisfactory he should be employed for a year, it was held that notice of dissatisfaction might be given a reasonable time after the sixty days elapsed. Baldwin Fertilizer Co. *v.* Cope, 110 Ga. 325, 35 S. E. 316.

67. Jones *v.* Vestry of Trinity Church, 19 Fed. 59.

The master may show that by reason of sickness and inability to supervise the work he did not have knowledge of the servant's misconduct. Williams *v.* Jeter, 64 Ga. 737.

Forbearance or Kindness. — In Dunkell *v.* Simons, 27 N. Y. St. 811, 7 N. Y. Supp. 655, it was held that the master might show that he was prompted by feelings of kindness or forbearance in retaining the servant. See also Leatherberry *v.* O'Dell, 7 Fed. 641.

Busy Season. — The master may show that he did not discharge the servant because it was the busy season, and he could not obtain another employe to take his place. McMurray *v.* Boyd, 58 Ark. 504, 25 S. W. 505.

68. In an action for wrongful discharge, where the justification set up was incompetency, evidence that the master paid the servant at the stipulated wages in proportion to the time he had worked is *prima facie* evidence that he had waived the right to discharge by reason of the incompetency. Tickler *v.* Andrae Mfg. Co., 95 Wis. 352, 70 N. W. 292.

69. In Mandel *v.* Hocquard, 99 Ill. App. 75, an action was brought to recover for the breach of a contract to employ plaintiff as a designer of hats. The defense was that she absented herself from business contrary to express rules. *Held,* evidence that a deduction was made from her wages by reason of such absences was not sufficient to deprive defendant of the right to discharge her.

70. Expressions of confidence in the servant based on his own reports, though admissible, are no estoppel against showing his default. Alberts *v.* Stearns, 50 Mich. 349, 15 N. W. 505.

71. Hamill *v.* Foute, 51 Md. 419; Van Schaick *v.* Wannemacher (Pa.), 5 Atl. 31; Allen *v.* Maronne, 93 Tenn. 161, 23 S. W. 113.

72. Chevalier *v.* Borie, 3 La. 299.

73. Wharton *v.* Christie, 53 N. J. L. 607, 23 Atl. 258.

Letters May Indicate Acceptance. In Roberts *v.* Crowley, 81 Ga. 429, 7 S. E. 740, the plaintiff had been employed as superintendent of a furniture factory for a period of one year from January 1, 1887. He was discharged in March and sued to recover damages for the breach of the

f. *Offer or Willingness To Perform.* — In most jurisdictions it is held unnecessary for the servant to allege or prove an offer or willingness to perform the service after the discharge,[74] but the contrary is held in some states.[75]

g. *Damages.* — (1.) **Evidence in Mitigation.** — The master may show, in mitigation of the *prima facie* measure of damages, the amount the servant realized, or with the exercise of reasonable diligence could have realized, from similar employment.[76] The burden

contract. Two letters written by defendant after the discharge were introduced in evidence, one stating that his discharge was final and so accepted by him, the other being a letter of recommendation. *Held*, the letter of recommendation was *prima facie* recognition of the right to discharge, and especially as he did not introduce any evidence to show that he denied the statement in the first letter, that he had accepted the discharge.

In Bell *v.* Gund, 110 Wis. 271, 85 N. W. 1031, plaintiff had been employed as the general manager of a sawmill for a period of three years from November 20, 1894. In an action for a breach of the contract the defendant offered in evidence three letters written by plaintiff in July, 1896, in which he stated he was going into the farming business, and sought advice from defendant. In holding these letters admissible the court said: "They certainly tended to show that he not only made no objection to such discharge, but that it was with his entire approval. . . . They all indicate that plaintiff had fully settled upon the plan to go to farming when such need (the sawmill had been sold) was at an end. There is no hint or suggestion in any one of them that he had any right to demand employment by defendant for any certain time, or that the approaching final termination of his employment was viewed as a pending violation of his right."

74. *Illinois.* — Stumer *v.* Wilson, 82 Ill. App. 384.

Indiana. — Hinchcliffe *v.* Koontz, 121 Ind. 422, 23 N. E. 271.

Maryland. — Bull *v.* Schuberth, 2 Md. 38.

Michigan. — Jones *v.* Graham & Morton Transp. Co., 51 Mich. 539, 16 N. W. 893.

Minnesota. — McMullan *v.* Dickinson Co., 63 Minn. 405, 65 N. W. 661, 663.

New York. — Bacon *v.* New Home Sew. Mach. Co., 37 N. Y. St. 56, 13 N. Y. Supp. 359, *affirmed* 129 N. Y. 658, 30 N. E. 65; Howard *v.* Daly, 61 N. Y. 362. But see Wiseman *v.* Panama R. Co., 1 Hilt 300.

Pennsylvania. — Van Schaick *v.* Wannemacher, 5 Atl. 31; Chamberlain *v.* Morgan, 68 Pa. St. 168; King *v.* Steiren, 44 Pa. St. 99.

75. Sayre *v.* Durwood, 35 Ala. 247; Hale *v.* Sheehan, 36 Neb. 439, 54 N. W. 682.

76. *Alabama.* — Strauss *v.* Meertief, 64 Ala. 299; Wilkinson *v.* Black, 80 Ala. 329.

Arkansas. — Walworth *v.* Pool, 9 Ark. 394.

Colorado. — Saxonia M. & R. Co. *v.* Cook, 7 Colo. 569, 4 Pac. 1111.

Georgia. — Waxelbaum *v.* Limberger, 78 Ga. 43, 3 S. E. 257; Roberts *v.* Crowley, 81 Ga. 429, 7 S. E. 740.

Illinois. — Moline Plow Co. *v.* Booth, 17 Ill. App. 574; Brown *v.* Board of Education, 29 Ill. App. 572.

Indiana. — Gazette Print. Co. *v.* Morss, 60 Ind. 153; Hinchcliffe *v.* Koontz, 121 Ind. 422, 23 N. E. 271.

Maryland. — Cumberland & P. R. Co. *v.* Slack, 45 Md. 161.

Michigan. — Owen *v.* Union Match Co., 48 Mich. 348, 12 N. W. 175; Alberts *v.* Stearns, 50 Mich. 349, 15 N. W. 505.

Minnesota. — Williams *v.* Anderson, 9 Minn. 50.

Mississippi. — Armfield *v.* Nash, 31 Miss. 361.

Missouri. — Stevens *v.* Crane, 37 Mo. App. 487.

New Jersey. — Moore *v.* Central Foundry Co., 68 N. J. L. 14, 52 Atl. 292.

New York. — Costigan *v.* Mo-

of proving such fact is on the master.[77] Whether a servant has exercised reasonable diligence is usually a question for the jury.[78] Evidence that a servant could have obtained employment of a different nature,[79] or that he performed labor on his own account, unless such work was incompatible with his duties under the employ-

hawk & H. R. Co., 2 Denio 609; Bigelow *v.* American Forcite Powder Mfg. Co., 39 Hun 599.

North Carolina. — Hendrickson *v.* Anderson, 50 N. C. 246.

Pennsylvania. — King *v.* Steven, 44 Pa. St. 99.

South Carolina. — Latimer *v.* York Cotton Mills, 66 S. C. 135, 44 S. E. 559.

Tennessee. — Congregation *v.* Peres, 2 Coldw. 620.

Texas. — Allgeyer *v.* Rutherford (Tex. Civ. App.), 45 S. W. 628; Weber Gas & Gasoline Engine Co. *v.* Bradford (Tex. Civ. App.), 79 S. W. 46.

West Virginia. — Rhoades *v.* Chesapeake & O. R. Co., 39 S. E. 209.

Wisconsin. — Babcock *v.* Appleton Mfg. Co., 93 Wis. 124, 67 N. W. 33; Winkler *v.* Racine Wagon & Carriage Co., 99 Wis. 184, 74 N. W. 793.

77. *United States.* — Leatherberry *v.* Odell, 7 Fed. 641.

Alabama. — Holloway *v.* Talbot, 70 Ala. 389.

Arkansas. — Van Winkle *v.* Satterfield, 58 Ark. 617, 25 S. W. 1113; Ewing *v.* Janson, 57 Ark. 237, 21 S. W. 430.

California. — Rosenberger *v.* Pacific Coast R. Co., 111 Cal. 313, 43 Pac. 963.

Georgia. — Kyle *v.* Pou, 96 Ga. 166, 23 S. E. 114.

Illinois. — Fuller *v.* Little, 61 Ill. 21; World's Columbian Exp. *v.* Richards, 57 Ill. App. 601; Kelley *v.* Louisville & N. R. Co., 49 Ill. App. 304.

Indiana. — Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802.

Michigan. — Pinet *v.* Montague, 103 Mich. 516, 61 N. W. 876; Farrell *v.* School Dist., 98 Mich. 43, 56 N. W. 1053; Allen *v.* Whitlark, 99 Mich. 492, 58 N. W. 470.

Minnesota. — Horn *v.* Western Land Ass'n, 22 Minn. 233.

Mississippi. — Hunt *v.* Crane, 33 Miss. 669; Odeneal *v.* Henry, 70 Miss. 172, 12 So. 154.

Missouri. — Squire *v.* Wright, 1 Mo. App. 172; Lewis *v.* Atlas Mut. L. Ins. Co., 61 Mo. 534; Koenigkraemer *v.* Missouri Glass Co., 24 Mo. App. 124; Lally *v.* Cantwell, 40 Mo. App. 44.

Nebraska. — Wirth *v.* Calhoun, 64 Neb. 316, 89 N. W. 785.

New York. — Everson *v.* Powers, 89 N. Y. 527; Howson *v.* Mestayer, 14 Daly 83; Thompson *v.* Wood, 1 Hilt. 93; Griffin *v.* Brooklyn Ball Club, 68 App. Div. 566, 73 N. Y. Supp. 864; Howard *v.* Daly, 61 N. Y. 362; Merrill *v.* Blanchard, 158 N. Y. 682, 52 N. E. 1125.

Pennsylvania. — Emery *v.* Steckel, 126 Pa. St. 171, 17 Atl. 601.

Wisconsin. — Norris *v.* Cargill, 57 Wis. 251, 15 N. W. 148; Barker *v.* Knickerbocker L. Ins. Co., 24 Wis. 630.

See also cases cited in note 1.

Contra. — Hill *v.* Hager, 7 Ky. L. Rep. 518; John C. Lewis Co. *v.* Scott, 95 Ky. 484, 26 S. W. 192; Duffy *v.* Brennan, 10 Ky. L. Rep. 637.

78. Leatherberry *v.* Odell, 7 Fed. 641; Park *v.* Bushnell, 60 Fed. 583, 9 C. C. A. 138; Connor *v.* Hurley, 112 Mich. 622, 71 N. W. 158; Cutter *v.* Gillette, 163 Mass. 95, 39 N. E. 1010; Emery *v.* Steckel, 126 Pa. St. 175, 17 Atl. 601.

In an action for wrongfully discharging plaintiff as the superintendent of salt works, evidence that one of the stockholders of defendant company was connected with a great number of salt works in the United States was held admissible as tending to show that the influence of such stockholder was such as to prevent plaintiff from obtaining a similar position. Lone Star Salt Co. *v.* Wilderspire (Tex. Civ. App.), 81 S. W. 327.

79. Elbert *v.* Los Angeles Gas Co., 97 Cal. 244, 32 Pac. 9.

ment,[80] or of profits made from investments of the servant,[81] is not admissible in mitigation of the *prima facie* measure of damages.

(2.) Not Direct Result of Breach of Contract. — Evidence of the expenses the servant incurred for his own purposes or the convenience of his family in seeking other employment,[82] or of damage not the direct result of the breach of the contract of employment, is not admissible.[83]

2. Abandonment by Servant. — The burden of proving a justifiable excuse for abandoning an employment is on the servant.[84] To entitle the master to retain any portion of the servant's wages he must prove the agreement[85] and the contingency[86] permitting him to do so. It requires but slight evidence to permit an apportionment.[87]

80. Gates *v.* School Dist., 57 Ark. 370, 21 S. W. 1060; Van Winkle *v.* Satterfield, 58 Ark. 617, 25 S. W. 1113; Stevens *v.* Crane, 37 Mo. App. 487; Harrington *v.* Gies, 45 Mich. 374, 8 N. W. 87.

81. Kyle *v.* Pou, 96 Ga. 166, 23 S. E. 114.

82. The servant is not entitled to deduct the amount of such expenses from the credit due the master on account of wages received in other employment. Tickler *v.* Andrae Mfg. Co., 95 Wis. 352, 70 N. W. 292.

83. Damage to Character. — Evidence of special damage to the character of the servant is not admissible unless specially pleaded. Lee *v.* Hill, 84 Va. 919, 6 S. E. 473.

Profits of Business. — Where the contract of employment provided that the servant should receive a portion of the profit of the business as compensation, he cannot, in an action for wrongful discharge, show what business would have been done the six months succeeding his discharge had the master furnished all the material and help he wanted, where there was no obligation upon the part of the master to do so. Kelly *v.* Carthage Wheel Co., 62 Ohio St. 598, 57 N. E. 984.

Consideration of Employment. In Crescent Horseshoe & Iron Co. *v.* Eynon, 95 Va. 151, 27 S. E. 935, the plaintiff in consideration of being employed for a certain time assigned to the defendant certain patents, and in an action for being wrongfully discharged before such period had expired it was held that evidence as to the value of such patents was not admissible, as he was not entitled to recover anything except the actual damage which resulted by reason of his not being permitted to continue in the employment.

84. Griffin *v.* Kehrer, 24 Ill. App. 243; Erving *v.* Ingram, 24 N. J. L. 520.

How Proved. — Such facts should be established by evidence of specific acts of the master toward the servant, and not by the testimony of witnesses that the servant left on account of abusive language and bad conduct. Cody *v.* Raynaud, 1 Colo. 272.

85. In an action to recover a balance of $39 due for services, evidence of a custom among rolling mills to have printed rules and regulations requiring employes to give notice of their intention to quit or forfeit wages then due, is inadmissible without showing that the plaintiff had knowledge of such a custom. Collins *v.* New England Iron Co., 115 Mass. 23. See also Dean *v.* Wilder, 65 N. H. 90, 18 Atl. 87.

In Bradley *v.* Salmon Falls Mfg. Co., 30 N. H. 487, evidence that the servant had a copy of the rules requiring two weeks' notice of an intention to quit was held not conclusive that he knew of such rule.

86. Storer Mfg. Co. *v.* Latz, 42 Ill. App. 230.

87. Hogan *v.* Titlow, 14 Cal. 255.

In Trawick *v.* Trussell (Ga.), 50 S. E. 86, evidence that the servant was ill and quit the employment at the request of the master was held

V. ASSUMPTION OF RISKS.

1. In General. — A servant is presumed to know and assume the obvious risks ordinarily and usually incidental to the employment which he undertakes.[88] What risks are obvious is generally a question

sufficient to warrant an apportionment.

88. *England.* — Priestly *v.* Fowler, 3 M. & W. 1, 1 Jur. 987.

Canada. — Poll *v.* Hewitt, 23 Ont. 619; Rudd *v.* Bell, 13 Ont. 47; Truman *v.* Rudolph, 22 Ont. App. 250.

United States. — Northern Pacific R. Co. *v.* Babcock, 154 U. S. 190; Tuttle *v.* Detroit G. H. & M. R. Co., 122 U. S. 189; Choctaw O. & G. R. Co. *v.* McDade, 191 U. S. 64; Randall *v.* Baltimore & O. R. Co., 109 U. S. 478; Chicago Terminal T. R. Co. *v.* Stone, 118 Fed. 19, 55 C. C. A. 187.

Alabama. — Louisville & N. R. Co. *v.* Boland, 96 Ala. 626, 11 So. 667; Osborne *v.* Alabama S. & W. Co., 135 Ala. 571, 33 So. 687.

Arizona. — Lopez *v.* Central Arizona Min. Co., 1 Ariz. 464, 2 Pac. 748.

Arkansas. — St. Louis, I. M. & S. R. Co. *v.* Touhey, 67 Ark. 209, 54 S. W. 577; Fordyce *v.* Edwards, 65 Ark. 98, 44 S. W. 1034; Railway Co. *v.* Triplett, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266, 11 L. R. A. 773; St. Louis I. M. & S. R. Co. *v.* Davis, 54 Ark. 389, 15 S. W. 895; St. Louis I. M. & S. R. Co. *v.* Higgins, 53 Ark. 458, 14 S. W. 653.

California. — Gisson *v.* Schwabacher, 99 Cal. 419, 34 Pac. 104; Martin *v.* California Cent. R. Co., 94 Cal. 326, 29 Pac. 645; Sanborn *v.* Madera Flume & Trad. Co., 70 Cal. 261, 11 Pac. 710; Sowden *v.* Idaho Quartz Min. Co., 55 Cal. 443; McGlynn *v.* Brodie, 31 Cal. 376.

Colorado. — Victor Coal Co. *v.* Muir, 20 Colo. 320, 38 Pac. 378; Burlington & C. R. Co. *v.* Liehe, 17 Colo. 280, 29 Pac. 175.

Connecticut. — Burke *v.* Norwich & W. R. Co., 34 Conn. 474.

Delaware. — Maul *v.* Queen Anne's R. Co., 1 Pen. 561, 42 Atl. 990.

Florida. — Green *v.* Sansom, 41 Fla. 94, 25 So. 332.

Georgia. — Palmer Brick Co. *v.* Chenall, 119 Ga. 837, 47 S. E. 329; Worlds *v.* Georgia R. Co., 99 Ga. 283, 25 S. E. 646; Hazlehurst *v.* Brunswick Lumb. Co., 94 Ga. 535, 19 S. E. 756; Dartmouth Spinning Co. *v.* Achord, 84 Ga. 14, 10 S. E. 449; Schnibbe *v.* Central R. & Bkg. Co., 85 Ga. 592, 11 S. E. 876.

Idaho. — Minty *v.* Union Pac. R. Co., 2 Idaho 437, 21 Pac. 660.

Illinois. — Wrisley Co. *v.* Burke, 203 Ill. 250, 67 N. E. 818, *affirming* 106 Ill. App. 30; Pittsburg Bridge Co. *v.* Walker, 170 Ill. 550, 48 N. E. 915; Indianapolis B. & W. R. Co. *v.* Flanigan, 77 Ill. 365; Chicago & E. I. R. Co. *v.* Geary, 110 Ill. 383; St. Louis & E. I. R. Co. *v.* Britz, 72 Ill. 256.

Indiana. — Republican Iron & Steel Co. *v.* Ohler, 161 Ind. 393, 68 N. E. 901; Pennsylvania Co. *v.* Ebaugh, 152 Ind. 531, 53 N. E. 763; Diamond Plate Glass Co. *v.* De Hority, 143 Ind. 381, 40 N. E. 681; Evansville & T. H. R. Co. *v.* Duel, 134 Ind. 156, 33 N. E. 355; Lake Erie & W. R. Co. *v.* Mugg, 132 Ind. 168, 31 N. E. 564.

Iowa. — Ford *v.* Chicago R. I. & P. R. Co., 106 Iowa 85, 75 N. W. 650; Cowles *v.* Chicago R. I. & P. R. Co., 102 Iowa 507, 71 N. W. 580; Branstrator *v.* Keokuk & W. R. Co., 108 Iowa 377, 79 N. W. 130; Morris *v.* Excelsior Coal Co., 95 Iowa 639, 64 N. W. 627; Newman *v.* Chicago M. & St. P. R. Co., 80 Iowa 672, 45 N. W. 1054.

Kansas. — Morbach *v.* Home Min. Co., 53 Kan. 731, 37 Pac. 122; Union Pac. R. Co. *v.* Monden, 50 Kan. 539, 31 Pac. 1002; St. Louis Ft. S. & W. R. Co. *v.* Irvin, 37 Kan. 701, 16 Pac. 146; Greef *v.* Brown, 7 Kan. App. 394, 51 Pac. 926.

Kentucky. — Mellot *v.* Louisville & N. R. Co., 101 Ky. 212, 40 S. W. 696; Needham *v.* Louisville & N. R. Co., 85 Ky. 423, 3 S. W. 797, 11 S. W. 306; Simmons *v.* Louisville & N. R. Co., 13 Ky. L. Rep. 941, 18 S. W. 1024; Sullivan *v.* Louisville Bridge Co., 9 Bush 81; Derby *v.* Kentucky

Cent. R. Co., 9 Ky. L. Rep. 153, 4 S. W. 303.

Louisiana. — Myhan *v.* Louisiana Elec. L. & P. Co., 41 La. Ann. 964, 6 So. 799.

Maine. — Jones *v.* Manufacturing & Inv. Co., 92 Me. 565, 43 Atl. 512; Judkins *v.* Maine Cent. R. Co., 80 Me. 417, 14 Atl. 735; Coolbroth *v.* Maine Cent. R. Co., 77 Me. 165.

Maryland. — Wood *v.* Heiges, 83 Md. 257, 34 Atl. 872; Yates *v.* McCullough Iron Co., 69 Md. 370, 16 Atl. 280; Cumberland & P. R. Co. *v.* State, 44 Md. 283, 45 Md. 229.

Massachusetts. — McIsaac *v.* Northhampton Elec. L. Co., 172 Mass. 89, 51 N. E. 524; Donahue *v.* Washburn & Moen Mfg. Co., 169 Mass. 574, 48 N. E. 842; Barnard *v.* Schrafft, 168 Mass. 211, 46 N. E. 621; Dolan *v.* Atwater, 167 Mass. 274, 45 N. E. 742; Lehman *v.* VanNostrand, 165 Mass. 233, 42 N. E. 1125.

Michigan. — Juchatz *v.* Michigan Alkali Co., 120 Mich. 654, 75 N. W. 907; Peppett *v.* Michigan Cent. R. Co., 119 Mich. 640, 78 N. W. 900; Mackey *v.* Newberry Furnace Co., 119 Mich. 552, 78 N. W. 783; La Pierre *v.* Chicago & G. T. R. Co., 99 Mich. 212, 58 N. W. 60; Johnson *v.* Hovey, 98 Mich. 343, 57 N. W. 172.

Minnesota. — Manley *v.* Minneapolis Paint Co., 76 Minn. 169, 78 N. W. 1050; Rutherford *v.* Chicago, M. & St. P. R. Co., 57 Minn. 237, 59 N. W. 302; Hefferen *v.* Northern Pac. R. Co., 45 Minn. 471, 48 N. W. 1, 526; Doyle *v.* St. Paul M. & M. R. Co., 42 Minn. 79, 43 N. W. 787; Anderson *v.* Minnesota & N. W. R. Co., 39 Minn. 523, 41 N. W. 104.

Mississippi. — Hatter *v.* Illinois Cent. R. Co., 69 Miss. 642, 13 So. 827.

Missouri. — Settle *v.* St. Louis & S. F. R. Co., 127 Mo. 336, 30 S. W. 125; Fugler *v.* Bothe, 117 Mo. 475, 22 S. W. 1113; Hamilton *v.* Rich Hill Coal Min. Co., 108 Mo. 364, 18 S. W. 977; Gutridge *v.* Missouri Pac. R. Co., 105 Mo. 520, 16 S. W. 943; Huhn *v.* Missouri Pac. R. Co., 92 Mo. 440, 4 S. W. 937.

Montana. — McAndrews *v.* Montana U. R. Co., 15 Mont. 290, 39 Pac. 85.

Nebraska. — Chicago, B. & Q. R. Co. *v.* Curtis, 51 Neb. 442, 71 N. W. 42; Kearney Elec. Co. *v.* Laughlin, 45 Neb. 390, 63 N. W. 941; Malm *v.* Thelin, 47 Neb. 686, 66 N. W. 650.

New Hampshire. — Casey *v.* Grand Trunk R. Co., 68 N. H. 162, 44 Atl. 92; Foss *v.* Baker, 62 N. H. 247.

New Jersey. — Dillenberger *v.* Weingartner, 64 N. J. L. 292, 45 Atl. 638; Chandler *v.* Atlantic Coast Elec. R. Co., 61 N. J. L. 380, 39 Atl. 674; Dunn *v.* McNamee, 59 N. J. L. 498, 37 Atl. 61; Foley *v.* Jersey City Elec. L. Co., 54 N. J. L. 411, 24 Atl. 487; Smith *v.* Irwin, 51 N. J. L. 507, 18 Atl. 852.

New Mexico. — Cerrillos Coal R. Co. *v.* Deserant, 9 N. M. 49, 49 Pac. 807.

New York. — Huda *v.* American Glucose Co., 154 N. Y. 474, 48 N. E. 897; Ogley *v.* Miles, 139 N. Y. 458, 34 N. E. 1059; Arnold *v.* Delaware & H. Canal Co., 125 N. Y. 15, 25 N. E. 1064; Cullen *v.* Norton, 126 N. Y. 1, 26 N. E. 905; Buckley *v.* Gutta Percha & Rubber Mfg. Co., 113 N. Y. 540, 21 N. E. 717.

North Dakota. — Bennett *v.* Northern Pac. R. Co., 2 N. D. 112, 49 N. W. 408.

Ohio. — Railway Co. *v.* Leech, 41 Ohio St. 388; Stewart *v.* Toledo Bridge Co., 15 Ohio Cir. Ct. 601.

Oklahoma. — Chaddick *v.* Lindsay, 5 Okla. 616, 49 Pac. 940.

Oregon. — Johnston *v.* Oregon S. L. & U. N. R. Co., 23 Or. 94, 31 Pac. 283; Carlson *v.* Oregon S. L. & U. N. R. Co., 21 Or. 450, 28 Pac. 497; Stone *v.* Oregon City Mfg. Co., 4 Or. 52.

Pennsylvania. — Dooner *v.* Delaware & H. Canal Co., 171 Pa. St. 581, 33 Atl. 415; Rooney *v.* Carson, 161 Pa. St. 26, 28 Atl. 996; Reusch *v.* Groetzinger, 192 Pa. St. 74, 43 Atl. 398; Hart *v.* H. C. Frick Cake Co., 131 Pa. St. 125, 18 Atl. 1011; Philadelphia & R. R. Co. *v.* Hughes, 119 Pa. St. 301, 13 Atl. 286.

Rhode Island. — Gaffney *v.* J. O. Inman Mfg. Co., 18 R. I. 781, 31 Atl. 6.

South Carolina. — Adkins *v.* Atlanta & C. A. R. Air Line R. Co., 27 S. C. 71, 2 S. E. 849.

South Dakota. — Carlson *v.* Sioux Falls Water Co., 8 S. D. 47, 65 N. W. 419.

Tennessee. — Louisville & N. R. Co. *v.* Gower, 85 Tenn. 465, 3 S. W. 824.

Texas. — Green *v.* Cross, 79 Tex.

tion for the jury to determine from the circumstances of each case.[89]

2. Evidence to Rebut Presumption. — A. Inexperience or Effect of Work. — Evidence of the servant's inexperience is admissible to show that he did not appreciate the usual and ordinary risks,[90] but evidence of the ill effect of the work upon the servant, and also upon a former employe, is not competent unless it resulted in the injury.[91] On the other hand, the master may show the servant's former experience on an issue as to the appreciation of the risks.[92]

B. Minority. — Evidence of the servant's infancy is admissible to show lack of sufficient intelligence to comprehend the usual risks

130, 15 S. W. 220; Taylor B. & H. R. Co. *v.* Taylor, 79 Tex. 104, 14 S. W. 918; Texas & N. O. R. Co. *v.* Dillard, 70 Tex. 62, 8 S. W. 113; International & G. N. R. Co. *v.* McCarthy, 64 Tex. 632; International & G. N. R. Co. *v.* Doyle, 49 Tex. 190.

Utah. — Bennett *v.* Tintic Iron Co., 9 Utah 291, 34 Pac. 61.

Vermont. — Williamson *v.* Sheldon Marble Co., 66 Vt. 427, 29 Atl. 669.

Virginia. — Robinson *v.* Dininny, 96 Va. 41, 30 S. E. 442; Norfolk & W. R. Co. *v.* McDonald, 88 Va. 352, 13 S. E. 706; Darracott *v.* Chesapeake & O. R. Co., 83 Va. 288, 2 S. E. 511.

Washington. — Pugh *v.* Oregon Imp. Co., 14 Wash. 331, 44 Pac. 547, 689; Anderson *v.* Guineau, 9 Wash. 304, 37 Pac. 449; Richardson *v.* Carbon Hill Coal Co., 6 Wash. 52, 32 Pac. 1012; Week *v.* Fremont Mill Co., 3 Wash. 629, 29 Pac. 215.

West Virginia. — Seldomridge *v.* Chesapeake & O. R. Co. 46 W. Va. 569, 33 S. E. 293.

Wisconsin. — Sladky *v.* Marinette Lumb. Co., 107 Wis. 250, 83 N. W. 514; Schiefelbein *v.* Badger Paper Co., 101 Wis. 402, 77 N. W. 742; Osborne *v.* Lehigh Valley Coal Co., 97 Wis. 27, 71 N. W. 814; Nash *v.* Chicago, M. & St. P. R. Co., 95 Wis. 327, 70 N. W. 293; Thompson *v.* Edward P. Allis Co., 89 Wis. 523, 62 N. W. 527.

89. *United States.* — Texas & Pac. R. Co. *v.* Minnick, 61 Fed. 635; Oregon S. L. & U. N. R. Co. *v.* Tracy, 66 Fed. 931; Choctaw O. & G. R. Co. *v.* McDade, 112 Fed. 888; Wright *v.* Stanley, 119 Fed. 330.

Arkansas. — St. Louis, I. M. & S. R. Co. *v.* Richter, 48 Ark. 349, 3 S. W. 56; Davis *v.* Railway, 53 Ark. 117, 13 S. W. 801.

California. — Ingerman *v.* Moore, 90 Cal. 410, 27 Pac. 306; Hanley *v.* California Bridge & Const. Co., 127 Cal. 232, 59 Pac. 577.

Illinois. — Chicago, B. & Q. R. Co. *v.* Camper, 199 Ill. 569, 65 N. E. 448; Wrisley *v.* Burke, 203 Ill. 250, 67 N. E. 818, *affirming* 106 Ill. App. 30; Chicago & A. R. Co. *v.* Bell, 111 Ill. App. 280.

Indiana. — Ft. Wayne *v.* Christie, 156 Ind. 172, 59 N. E. 385; Rogers *v.* Leyden, 127 Ind. 50, 26 N. E. 210.

Maine. — Dempsey *v.* Sawyer, 95 Me. 295, 49 Atl. 1035.

Massachusetts. — Fitzgerald *v.* Connecticut River Paper Co., 155 Mass. 155, 29 N. E. 464; Gurney *v.* Le Baron, 182 Mass. 368, 65 N. E. 789.

New York. — Schwander *v.* Birge, 33 Hun 186; Pullutro *v.* Delaware L. & W. R. Co., 27 N. Y. St. 63, 7 N. Y. Supp. 510; Cielfield *v.* Browning, 9 Misc. 98, 29 N. Y. Supp. 710.

90. Huizega *v.* Cutler & S. Lumb. Co., 51 Mich. 272, 16 N. W. 643.

91. Steiler *v.* Hart, 65 Mich. 644, 32 N. W. 875.

92. In Smith *v.* Beaudry, 175 Mass. 286, 56 N. E. 596, plaintiff was employed in 1895 to grind on a certain stone, but after the lapse of several months was discharged. Four months later he was re-employed to help the finishers, where he remained for three months, when he was put to grinding on the same stone which he had formerly used. In an action to recover damages for an injury received while using this stone it was held that the master might show his former experience in using the stone. See also Toomey *v.* Donovan, 158 Mass. 232, 33 N. E. 396.

of an employment.[93] Such evidence is not conclusive, but is a fact for the consideration of the jury.[94] In some cases an infant is presumed to have sufficient capacity.[95] Testimony of a former school teacher as to the intelligence of the minor has been held admissible,[96] but evidence as to the capacity of some other servant[97] or minor[98] at a certain age is not admissible to show the intelligence or capacity of the plaintiff. The burden of proving incapacity by reason of minority is on the servant.[99]

3. Continuance in Service After Knowledge of Dangers. — A. In General. — A servant is presumed to have assumed those risks or dangers of which he acquires knowledge during his employment.[1] Proof of knowledge of defects or conditions is usually sufficient evidence of a comprehension of the resulting risks,[2] but where the

93. Herdman-Harrison M. Co. *v.* Spehr, 46 Ill. App. 24; Ziegler *v.* C. Gotzian & Co., 86 Minn. 290, 90 N. W. 387.

94. Wynne *v.* Conklin, 86 Ga. 40, 12 S. E. 183; Herdman-Harrison M. Co. *v.* Spehr, 46 Ill. App. 24; Ziegler *v.* C. Gotzian & Co., 86 Minn. 290, 90 N. W. 387; Luebke *v.* Berlin Mach. Wks., 88 Wis. 442, 60 N. W. 711.

95. In Sanborn *v.* Atchison T. & S. F. R. Co., 35 Kan. 292, 10 Pac. 860, the court held that a young man, seventeen years of age, was presumed to have sufficient capacity to be sensible of danger and to avoid it. See also Sims *v.* East & West R. Co., 84 Ga. 152, 10 S. E. 543.

96. In Connors *v.* Grilley, 155 Mass. 575, 30 N. E. 218, it was openly intimated, on cross-examination, that the plaintiff was feigning dullness. *Held*, that testimony of a former school teacher that she (plaintiff) was an unusually dull girl was admissible in the discretion of the trial judge.

97. Alabama Steel & Wire Co. *v.* Wrenn, 136 Ala. 475, 34 So. 970.

98. Leistritz *v.* American Zylonite Co., 154 Mass. 382, 28 N. E. 294.

99. The burden is upon an infant over the age of fourteen to show that he was incapable of forming a judgment of the dangers of an employment. Greenway *v.* Conroy, 160 Pa. St. 185, 28 Atl. 692.

1. *Colorado.* — Denver Tram. Co. *v.* Nesbit, 22 Colo. 408, 45 Pac. 405.

Georgia. — Western & A. R. Co. *v.* Moran, 116 Ga. 441, 42 S. E. 737.

Illinois. — Camp Point Mfg. Co. *v.* Ballou, 71 Ill. 417; Chicago & A. R. Co. *v.* House, 172 Ill. 601, 50 N. E. 151.

Kansas. — Weld *v.* Missouri Pac. R. Co., 39 Kan. 63, 17 Pac. 306.

Kentucky. — Lawrence *v.* Hagemeyer, 93 Ky. 591, 20 S. W. 704.

Maine. — Dempsey *v.* Sawyer, 95 Me. 295, 49 Atl. 1035; Mundle *v.* Hill Mfg. Co., 86 Me. 400, 30 Atl. 16.

Nebraska. — Chicago B. & Q. R. Co. *v.* McGinnis, 49 Neb. 649, 68 N. W. 1057.

New Hampshire. — Olney *v.* Boston & M. R. R., 71 N. H. 427, 52 Atl. 1097.

North Carolina. — Hudson *v.* Charleston C. & C. R. Co., 104 N. C. 491, 10 S. E. 669.

Oklahoma. — Neeley *v.* Southwestern C. S. O. Co., 13 Okla. 356, 75 Pac. 537.

West Virginia. — Oliver *v.* Ohio River R. Co., 42 W. Va. 703, 26 S. E. 444.

Must Have Been Cause of Injury. The defect which the servant knew of or ought to have known of must have caused the injury. Hulehan *v.* Green Bay W. & S. T. P. R. Co., 68 Wis. 520, 32 N. W. 529.

Evidence that the servant knew a coupling apparatus was out of order raises no presumption that he assumed the risk of injury by reason of the sudden increase in the speed of an engine. Strong *v.* Iowa Cent. R. Co., 94 Iowa 380, 62 N. W. 799.

2. *United States.* — St. Louis Cordage Co. *v.* Miller, 126 Fed. 495; Glenmont Lumb. Co. *v.* Roy, 126 Fed. 524.

Maryland. — Yates *v.* McCullough Iron Co., 69 Md. 370, 16 Atl. 280.

dangers would not be apparent to a person of ordinary intelligence, proof of knowledge of the risk is necessary.[3] The burden of proving knowledge of the servant is on the master.[4]

B. Evidence of Knowledge or Ignorance. — Evidence that the danger was obvious and patent, although not one of the usual or incidental risks;[5] or of the length of time[6] the servant had been

Massachusetts. — Anderson *v.* Clark, 155 Mass. 368, 29 N. E. 589.

Michigan. — Breig *v.* Chicago & W. M. R. Co., 98 Mich. 222, 57 N. W. 118; Davey *v.* Hall, 122 Mich. 206, 80 N. W. 1082; Ragon *v.* Toledo, A. A. & N. M. R. Co., 97 Mich. 265, 56 N. W. 612.

Minnesota. — Scharenbroich *v.* St. Cloud Fiber-Ware Co., 59 Minn. 116, 60 N. W. 1093.

Missouri. — Corey *v.* Hannibal & St. J. R. Co., 86 Mo. 635.

New York. — Appel *v.* Buffalo N. Y. & P. R. Co., 111 N. Y. 550, 19 N. E. 93.

Pennsylvania. — New York, L. E. & W. R. Co. *v.* Lyons, 119 Pa. St. 324, 13 Atl. 205.

Washington. — Bier *v.* Hosford, 35 Wash. 544, 77 Pac. 867.

3. *United States.* — Union Pac. R. Co. *v.* Jarvi, 53 Fed. 65; Blumenthal *v.* Craig, 81 Fed. 320.

Arkansas. — Davis *v.* Railway, 53 Ark. 117, 13 S. W. 801.

California. — Magee *v.* North Pacific C. R. Co., 78 Cal. 430, 21 Pac. 114.

Georgia. — Pitts *v.* Florida Cent. & P. R. Co., 98 Ga. 655, 27 S. E. 189.

Iowa. — Stomne *v.* Hanford Produce Co., 108 Iowa 137, 78 N. W. 841; Heath *v.* Whitebreast Coal & Min. Co., 65 Iowa 737, 23 N. W. 148; Worden *v.* Humeston & S. R. Co., 72 Iowa 201, 33 N. W. 629.

Louisiana. — Faren *v.* Sellars, 39 La. Ann. 1011, 3 So. 363.

Maryland. — Yates *v.* McCullough Iron Co., 69 Md. 370, 16 Atl. 280.

Minnesota. — Russell *v.* Minneapolis & St. L. R. Co., 32 Minn. 230, 20 N. W. 147; Bender *v.* Great Northern R. Co., 89 Minn. 163, 94 N. W. 546.

Missouri. — Goins *v.* Chicago R. I. & P. R. Co., 37 Mo. App. 221.

New Hampshire. — Demars *v.* Glen Mfg. Co., 67 N. H. 404, 40 Atl. 902.

Oregon. — Johnston *v.* Oregon S. L. & U. N. R. Co., 23 Or. 94, 31 Pac. 283.

Texas. — Gulf C. & S. F. R. Co. *v.* Harriett, 80 Tex. 73, 15 S. W. 556.

4. E. E. Jackson Lumb. Co. *v.* Cunningham (Ala.), 37 So. 445; Alexander *v.* Central Lumb. & Mill Co., 104 Cal. 532, 38 Pac. 410; Coates *v.* Burlington C. R. & M. R. Co., 62 Iowa 486, 17 N. W. 760; Shebeck *v.* National Cracker Co., 120 Iowa 414, 94 N. W. 930; Dowd *v.* New York O. & W. R. Co., 170 N. Y. 459, 63 N. E. 541; Norfolk & W. R. Co. *v.* Ward, 90 Va. 687, 19 S. E. 849; Nadau *v.* White River Lumb. Co., 76 Wis. 120, 43 N. W. 1135.

5. This principle is practically the same as the general presumption that the servant assumes all obvious and patent risks by engaging in the employment, the only difference being that under this rule he is presumed to know of obvious dangers arising during his employment which are not ordinarily incident to the employment. Armour *v.* Golkowska, 202 Ill. 144, 66 N. E. 1037; Collier *v.* Coggins, 103 Ala. 281, 15 So. 578; Wilson *v.* Chess, 25 Ky. L. Rep. 1065, 78 S. W. 453.

Whether a Servant Knew or Ought To Have Known Usually a Question for the Jury. — Choctaw O. & G. R. Co. *v.* McDade, 191 U. S. 64; Alexander *v.* Central Lumb. & Mill Co., 104 Cal. 532, 38 Pac. 410; Gisson *v.* Schwabacher, 99 Cal. 419, 34 Pac. 104; Pioneer Fireproof Const. Co. *v.* Howell, 90 Ill. App. 122, *affirmed* 189 Ill. 123, 59 N. E. 535; Madden *v.* Minneapolis & St. L. R. Co., 32 Minn. 303, 20 N. W. 317.

6. Evidence that a switchman had been employed in defendant's yard three or four months, and had thrown switches immediately before the accident, is admissible, but not conclusive evidence that he knew of the

working; or of an admission by the servant that he took chances,[7] is admissible to show the servant's knowledge of defects. On the other hand, the servant may testify that he did not know of the defective condition.[8]

C. Evidence To Overcome Presumption From Continuance. a. *Acting in Accordance With Directions of a Superior.* — In most jurisdictions evidence that the servant acted in accordance with the directions of a superior, even though in fear of losing his position, is held insufficient to rebut the presumption arising from knowledge of danger,[9] although in some cases this rule has been applied only where the danger was such that no reasonably prudent person would have undertaken the work.[10]

b. *Notice of, and Promise by, Master To Remedy Defect.* — The servant's reason for not informing the master of a defect has been held admissible.[11] Evidence that the master was notified of a defect and promised to repair it is admissible,[12] and usually sufficient,[13]

proximity of the switch-stand to the track. McCabe *v.* Montana C. R. Co. (Mont.), 76 Pac. 701.

7. In Consumers Cotton-Oil Co. *v.* Jonte (Tex. Civ. App.), 80 S. W. 847, an action to recover damages for an injury suffered while using a certain passage way, it was held that a statement of the plaintiff to the effect that he took chances in going along the passage way was admissible to show his knowledge of the danger.

8. Louisville, N. A. & C. R. Co. *v.* Frawley, 110 Ind. 18, 9 N. E. 594; Davidson *v.* Cornell, 31 N. Y. St. 982, 10 N. Y. Supp. 521.

In Lawrence *v.* Hagemeyer, 93 Ky. 591, 20 S. W. 704, it was held that the servant might testify that the defective condition was not apparent after he made a protest.

9. *United States.* — Reed *v.* Stockmeyer, 74 Fed. 186.

Connecticut. — Dickenson *v.* Vernon, 60 Atl. 270.

Georgia. — Worlds *v.* Georgia R. Co., 99 Ga. 283, 25 S. E. 646.

Kansas. — Southern Kan. R. Co. *v.* Moore, 49 Kan. 616, 31 Pac. 138.

Massachusetts. — Lamson *v.* American Axe & Tool Co., 177 Mass. 144, 58 N. E. 585.

Missouri. — Harff *v.* Green, 168 Mo. 308, 67 S. W. 576.

New York. — Sweeney *v.* Berlin & J. Envelope Co., 101 N. Y. 520, 5 N. E. 358.

Oregon. — Brown *v.* Oregon Lumb. Co., 24 Or. 315, 33 Pac. 557.

Texas. — Bonn *v.* Galveston H. S. & A. R. Co. (Tex. Civ. App.), 82 S. W. 808.

10. Illinois Steel Co. *v.* Ryska, 200 Ill. 280, 65 N. E. 734; Barnett *v.* Schlapka, 208 Ill. 426, 70 N. E. 343; East Tennessee V. & G. R. Co. *v.* Duffield, 12 Lea (Tenn.) 63.

11. In Macy *v.* St. Paul & D. R. Co., 35 Minn. 200, 28 N. W. 249, the court held that the servant might testify that the reason he did not notify the master of a defect was that he was afraid of losing his position, as having some tendency to explain the servant's conduct.

12. Atchison T. & S. F R. Co. *v.* Sledge, 68 Kan. 321, 74 Pac. 1111; Counsell *v.* Hall, 145 Mass. 468, 14 N. E. 530; Springs *v.* Southern R. Co., 130 N. C. 186, 41 S. E. 100; Texas & N. O. R. Co. *v.* Bingle, 9 Tex. Civ. App. 322, 29 S. W. 674.

Must Be Pleaded. — Evidence of a promise to repair is not admissible unless pleaded. Malm *v.* Thelin, 47 Neb. 686, 66 N. W. 650.

13. Illinois Steel Co. *v.* Mann, 170 Ill. 200, 48 N. E. 417; Illinois Cent. R. Co. *v.* North, 97 Ill. App. 124; Shickle, Harrison & Howard Iron Co. *v.* Glon, 106 Ill. App. 645; Nelson *v.* St. Paul Plow Wks., 57 Minn. 43, 58 N. W. 868.

In Baumwald *v.* Trenkman, 88 N. Y. Supp. 182, evidence that a master promised to repair a defective wagon was held insufficient to show a non-

to show non-assumption of risks, of which the servant has knowledge, for a reasonable time thereafter, unless the dangers were so apparent that no reasonably prudent person would have undertaken the work;[14] and evidence that other servants made attempts to perform the service under similar circumstances is *prima facie* evidence that it was not so apparently perilous as to make it one which no reasonable man would attempt.[15] A reasonable time is such time as would allow the master ample opportunity to remedy the defect, and is generally a question for the jury.[16] The servant must show that he relied upon a promise made to him,[17] and evidence of an assurance to another employe is not competent to show a promise to plaintiff.[18] The notice or promise need not take any particular form.[19] Notice of defects has also been held sufficient to show non-assumption of risks, even in the absence of a promise to repair.[20] The burden of proving that the master promised to remedy the defect is on the servant.[21]

VI. FELLOW-SERVANTS AND VICE-PRINCIPALS.

1. Province of Court and Jury. — It is the province of the court to determine what facts are necessary to constitute the relation of

assumption of the risks in thereafter using the same.

14. Anderson *v.* Fielding, 92 Minn. 42, 99 N. W. 357; Texas & N. O. R. Co. *v.* Bingle, 9 Tex. Civ. App. 322, 29 S. W. 674.

15. Chicago R. I. & P. R. Co. *v.* Kinnare, 91 Ill. App. 508.

16. Joliet A. & N. R. Co. *v.* Velie (Ill.), 26 N. E. 1086; Illinois Cent. R. Co. *v.* North, 97 Ill. App. 124; Dowd *v.* Erie R. Co., 70 N. J. L. 451, 57 Atl. 248; Taylor *v.* Nevada C. & O. R. Co. (Nev.), 69 Pac. 858.

In Belair *v.* Chicago & N. W. R. Co., 43 Iowa 662, evidence that a railroad employe continued to use a defective coupling from October to January was held insufficient to show that he used the appliance for an unreasonable length of time, where it was shown that he was absent for ten days of such time, and that the use of this coupling was not of frequent occurrence.

In Mann *v.* Lake Shore & M. S. R. Co., 124 Mich. 641, 83 N. W. 596, the court held a reasonable time to be such time as under the circumstances would preclude all reasonable hope that the defect would be remedied.

17. Crooker *v.* Pacific Lounge & Mattress Co., 29 Wash. 30, 69 Pac. 359.

In Curtis *v.* McNair, 173 Mo. 270, 73 S. W. 167, the fact that the servant returned to work after an assurance by the master that a blast would not be blown hard until a screen was put in was held evidence that the servant relied on the promise.

18. Ford *v.* Chicago R. I & P. R. Co., 91 Iowa 179, 59 N. W. 5.

19. Poirier *v.* Carroll, 35 La. Ann. 699.

In Pieart *v.* Chicago R. I & P. R. Co., 82 Iowa 148, 47 N. W. 1017, the court said: "No particular form of words is required to constitute a complaint or assurance. If by any acts or expressions the deceased gave the proper agent of defendant to know that he was unwilling to continue in the employment without running boards on the engine, that was a sufficient complaint; and if by any acts or expressions the agent gave the deceased reason to believe that running boards would be furnished, that was a sufficient assurance or promise."

20. Magee *v.* North Pacific C. R. Co., 78 Cal. 430, 21 Pac. 114; Northern Pac. R. Co. *v.* Babcock, 154 U. S. 190; Chicago Drop Forge & Foundry Co. *v.* Van Dam, 149 Ill. 337, 36 N. E. 1024.

21. Parody *v.* Chicago M. & St.

fellow servants, and of the jury to determine whether those facts exist, in case of a dispute,[22] and in the absence of any dispute it is solely a question for the court.[23]

2. Burden of Proof. — In some jurisdictions all servants of the same master engaged in a common service are held *prima facie* to be fellow servants,[24] while other courts, though not adopting such rule in words, hold that the burden of showing the non-existence of the relation of fellow servants to be on the servant.[25]

3. Common Service Doctrine. — A. GENERALLY. — In most jurisdictions proof that the servants were employed and paid by the same master, and engaged in a common service for the accomplishment of the same end, is sufficient to establish the relation of fellow servants.[26] In Georgia the fact of payment is held to be immaterial,

P. R. Co., 15 Fed. 205; Ford *v.* Chicago R. I. & P. R. Co., 106 Iowa 85, 75 N. W. 650.

22. Alaska Treadwell Gold Min. Co. *v.* Whelan, 64 Fed. 462; Lake Erie & W. R. Co. *v.* Middleton, 142 Ill. 550, 32 N. E. 453; Mexican N. R. Co. *v.* Finch, 8 Tex. Civ App. 409, 27 S. W. 1028.

23. Spring Valley Coal Co. *v.* Patting, 210 Ill. 342, 71 N. E. 371; Neal *v.* Northern Pac. R. Co., 57 Minn. 365, 59 N. W. 312; McGowan *v.* St. Louis & I. M. R. Co., 61 Mo. 528.

24. Minneapolis *v.* Lundin, 58 Fed. 525; Balch *v.* Haas, 73 Fed. 974; Baltimore & O. R. R. *v.* Baugh, 149 U. S. 368; Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346; Swadley *v.* Missouri Pac. R. Co., 118 Mo. 268, 24 S. W. 140.

In McGowan *v.* St. Louis & I. M. R. Co., 61 Mo. 528, it was held that all employes on a train of cars were *prima facie* fellow servants. See also Grattis *v.* Kansas City P. & G. R. Co., 153 Mo. 380, 55 S. W. 108.

25. Chicago City R. Co. *v.* Leach, 208 Ill. 198, 70 N. E. 222; Shaw *v.* Bambrick-Bates Const. Co., 102 Mo. App. 666, 77 S. W. 96; McGowan *v.* St. Louis & I. M. R. Co., 61 Mo. 528; Blessing *v.* St. Louis K. C. & N. R. Co., 77 Mo. 410; Gilmore *v.* Oxford Iron & Nail Co., 55 N. J. L. 39, 25 Atl. 707; Patton *v.* Western N. C. R. Co., 96 N. C. 455, 1 S. E. 863.

26. *England.* — Morgan *v.* Vale of Neath R. Co., 5 B. & S. 736, 10 Jur. N. S. 1074; Waller *v.* South-Eastern R. Co., 32 L. J. Ex. (N. S.) 205, 9 Jur. (N. S.) 501; M'Eniry *v.* Waterford & K. R. Co., 8 I. C. L. 312.

United States. — Randall *v.* Baltimore & O. R. Co., 109 U. S. 478; Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349; Naylor *v.* New York C. & H. R. R. Co., 33 Fed. 801.

Arkansas. — Railway Co. *v.* Triplett, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266, 11 L. R. A. 773; St. Louis S. W. R. Co. *v.* Henson, 61 Ark. 302, 32 S. W. 1079.

Florida. — Parrish *v.* Pensacola & A. R. Co., 28 Fla. 251, 9 So. 696; South Florida R. Co. *v.* Weese, 32 Fla. 212, 13 So. 436.

Georgia. — Ingram *v.* Hilton & D. L. Co., 108 Ga. 194, 33 S. E. 961. See also Cooper *v.* Mullins, 30 Ga. 146.

Indiana. — Bier *v.* Jeffersonville M. & I. R. Co., 132 Ind. 78, 31 N. E. 471; Indianapolis & G. R. T. Co. *v.* Foreman, 162 Ind. 85, 69 N. E. 669.

Iowa. — Treka *v.* Burlington C. R. & N. R. Co., 100 Iowa 205, 69 N. W. 422; Sullivan *v.* Mississippi & M. R. Co., 11 Iowa 421.

Louisiana. — Merrit *v.* Victoria Lumb. Co., 111 La. 159, 35 So. 497.

Maine. — Carle *v.* Bangor & P. C. & R. Co., 43 Me. 269; Blake *v.* Maine Cent. R. Co., 70 Me. 60.

Maryland. — Wonder *v.* Baltimore & O. R. Co., 32 Md. 411; Yates *v.* McCullough Iron Co., 69 Md. 370, 16 Atl. 280; Norfolk & W. R. Co. *v.* Hoover, 79 Md. 253, 29 Atl. 994.

Michigan. — Quincy M. Co. *v.* Kitts, 42 Mich. 34, 3 N. W. 240; Adams *v.* Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270.

Minnesota. — Foster *v.* Minnesota

as subjection to control by the same general master in the common object suffices.[27]

B. Departments of Service. — Proof that the servants were engaged in different departments,[28] or that they received their orders from different superiors,[29] is not sufficient to show the non-existence of the relation of fellow servants.

C. Difference in Grade or Compensation. — Evidence that the servants are of different grades or rank,[30] or receive different com-

Cent. R. Co., 14 Minn. 360; Neal *v.* Northern Pac. R. Co., 57 Minn. 365, 59 N. W. 312; Connelly *v.* Minneapolis E. R. Co., 38 Minn. 80, 35 N. W. 582; Brown *v.* Minneapolis & St. L. R. Co., 31 Minn. 553, 18 N. W. 834.

Mississippi. — Lagrone *v.* Mobile & O. R. Co., 67 Miss. 592, 7 So. 432; N. O. J. & G. N. R. Co. *v.* Hughes, 49 Miss. 258. (Section 193, constitution of 1890, defines fellow servants.)

Montana. — Hastings *v.* Montana U. R. Co., 118 Mont. 493, 46 Pac. 264.

New Hampshire. — Fifield *v.* Northern R. Co., 42 N. H. 225.

New Jersey. — McAndrews *v.* Burns, 39 N. J. L. 117; Hardy *v.* Delaware L. & W. R. Co., 57 N. J. L. 505, 31 Atl. 281; Ewan *v.* Lippincott, 47 N. J. L. 192.

New York. — Slater *v.* Jewett, 85 N. Y. 61.

Ohio. — Railroad Co. *v.* Ranney, 37 Ohio St. 665.

Pennsylvania. — Baird *v.* Pettit, 70 Pa. St. 477; Mullan *v.* Philadelphia &. S. M. S. S. Co., 78 Pa. St. 25; Lehigh Valley Coal Co. *v.* Jones, 86 Pa. St. 432; Keystone Bridge Co. *v.* Newberry, 96 Pa. St. 246; Lewis *v.* Seifert, 116 Pa. St. 628, 11 Atl. 514; Spees *v.* Boggs, 198 Pa. St. 112, 47 Atl. 875.

Texas. — Texas & P. R. Co. *v.* Harrington, 62 Tex. 597.

West Virginia. — Jackson *v.* Norfolk & W. R. Co., 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258.

Wisconsin. — Toner *v.* Chicago M. & St. P. R. Co., 69 Wis. 188, 31 N. W. 104, 33 N. W. 433.

27. Ingram *v.* Hilton & D. Lumb. Co., 108 Ga. 194, 33 S. E. 961.

28. *United States.* — New York & N. E. R. Co. *v.* Hyde, 56 Fed. 188; Louisville & N. R. Co. *v.* Stuber, 108 Fed. 934, *reversing* 102 Fed. 421.

California. — Callan *v.* Bull, 113 Cal. 593, 45 Pac. 1017.

Idaho. — Snyder *v.* Viola Min. & Smelt. Co., 2 Idaho 771, 26 Pac. 127.

Indiana. — Columbus & I. C. R. Co. *v.* Arnold, 31 Ind. 174.

Maryland. — Wonder *v.* Baltimore & O. R. Co., 32 Md. 411; Baltimore Elev. Co. *v.* Neal, 65 Md. 438, 5 Atl. 338.

Michigan. — Enright *v.* Toledo A. A. & N. M. R. Co., 93 Mich. 409, 53 N. W. 536.

Minnesota. — Foster *v.* Minnesota Cent. R. Co., 14 Minn. 277.

Mississippi. — Lagrone *v.* Mobile & O. R. Co., 67 Miss. 592, 7 So. 432.

Rhode Island. — Brodeur *v.* Valley Falls Co., 16 R. I. 448, 17 Atl. 54.

South Carolina. — Jenkins *v.* Richmond & D. R. Co., 39 S. C. 507, 18 S. E. 182.

Texas. — Texas & P. R. Co. *v.* Harrington, 62 Tex. 597; Trinity & S. R. Co. *v.* Mitchell, 72 Tex. 609, 10 S. W. 698.

Virginia. — Norfolk & W. R. Co. *v.* Nuckol, 91 Va. 193, 21 S. E. 342.

Contra. — If such departments are so disconnected that each one may be regarded as a separate undertaking. Atchison & Eastern Bridge Co. *v.* Miller (Kan.), 80 Pac. 18; St. Louis & S. F. R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408; Dixon *v.* Chicago & A. R. Co., 109 Mo. 413, 19 S. W. 412; Schlereth *v.* Missouri Pac. R. Co., 115 Mo. 87, 21 S. W. 1110; Sullivan *v.* Missouri Pac. R. Co., 97 Mo. 113, 10 S. W. 852. But see Grattis *v.* Kansas City P. & G. R. Co., 153 Mo. 380, 55 S. W. 108.

Limited to Railroad Companies in Tennessee. — Coal Creek Min. Co. *v.* Davis, 90 Tenn. 711, 18 S. W. 387.

29. Trcka *v.* Burlington C. R. & N. R. Co., 100 Iowa 205, 69 N. W. 422; Adams *v.* Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270; Knahtla *v.* Oregon S. L. & U. N. R. Co., 21 Or. 136, 27 Pac. 91; Slater *v.* Jewett, 85 N. Y. 61.

30. Columbus & I. C. R. Co. *v.*

pensation,[31] is in itself immaterial in determining whether the relation of fellow servants exists.

4. Con-association Doctrine. — A. Generally. — Under this doctrine, in order to establish the relation of fellow servants it must be shown that the servants were co-operating with each other in the particular business at hand in such manner or were brought into such habitual association that they influenced each other.[32]

B. Division Into Departments. — Proof that the servants were not working in the same department is not conclusive that they were not fellow servants,[33] and, on the other hand, the fact that they were working in the same department is not conclusive that they were fellow servants.[34]

Arnold, 31 Ind. 174; Peterson *v.* Whitebreast C. & M. Co., 50 Iowa 673; Lindvall *v.* Woods, 41 Minn. 212, 42 N. W. 1020; Wallace *v.* Boston & M. R. Co., 72 N. H. 504, 57 Atl. 913; Ell *v.* Northern Pac. R. Co., 1 N. D. 336, 48 N. W. 222; Mast *v.* Kern, 34 Or. 247, 54 Pac. 950; Lehigh Valley Coal Co. *v.* Jones, 86 Pa. St. 432; New York L. E. & W. R. Co. *v.* Bell, 112 Pa. St. 400, 4 Atl. 50; Jenkins *v.* Richmond & D. R. R. Co., 39 S. C. 507, 18 S. E. 182; Coal Creek Min. Co. *v.* Davis, 90 Tenn. 711, 18 S. W. 387; National Fertilizer Co. *v.* Travis, 102 Tenn. 16, 49 S. W. 832; International & G. N. R. Co. *v.* Ryan, 82 Tex. 565, 18 S. W. 219; Rogers *v.* Ludlow Mfg. Co., 144 Mass. 198, 11 N. E. 77; O'Brien *v.* American Dredging Co., 53 N. J. L. 291, 21 Atl. 324; Kimmer *v.* Weber, 151 N. Y. 417, 45 N. E. 860; Griffiths *v.* New Jersey & N. Y. R. Co., 5 Misc. 320, 25 N. Y. Supp. 812; Norfolk & W. R. Co. *v.* Nuckol, 91 Va. 193, 21 S. E. 342.

In McLean *v.* Blue Point Gravel M. Co., 51 Cal. 255, the court said: "The law of this state . . . recognizes no distinction growing out of the grades of employment of the respective employes; nor does it give any effect to the circumstance that the fellow servant through whose negligence the injury came was the superior of the plaintiff in the general service in which they were, in common, engaged." See also Daves *v.* Southern Pacific Co., 98 Cal. 19, 32 Pac. 708; Cal. Civ. Code, § 1970.

31. Coal Creek Min. Co. *v.* Davis, 90 Tenn. 711, 18 S. W. 387.

32. Chicago & E. I. R. Co. *v.* Geary, 110 Ill. 383; Chicago & A. R. Co. *v.* Swan, 176 Ill. 424, 52 N. E. 916; Illinois Steel Co. *v.* Coffey, 205 Ill. 206, 68 N. E. 751; Pittsburg, C. & St. L. R. Co. *v.* McGrath, 15 Ill. App. 85; Union Pac. R. Co. *v.* Erickson, 41 Neb. 1, 59 N. W. 347; San Antonio & A. P. R. Co. *v.* Harding, 11 Tex. Civ. App. 497, 33 S. W. 373; Daniels *v.* Union Pac. R. Co., 6 Utah 357, 23 Pac. 762.

33. Chicago & E. I. R. Co. *v.* White, 209 Ill. 124, 70 N. E. 588; Joliet Steel Co. *v.* Shields, 146 Ill. 603, 34 N. E. 1108; Chicago & A. R. Co. *v.* Kelly, 127 Ill. 637, 21 N. E. 203; Cleveland C. C. & St. L. R. Co. *v.* McLaughlin, 56 Ill. App. 53; Card *v.* Eddy, 129 Mo. 510, 28 S. W. 979.

34. In Chicago & A. R. Co. *v.* O'Brien, 155 Ill. 630, 40 N. E. 1023, one of a section gang was injured as a result of a fence gang running into the crew of which he was a member, while returning to work. There was evidence that the section boss had supervision of the fence gang while at work on his section, and that the members of the two gangs came into casual contact in going to and from work, but there was no evidence that the gangs worked together or that their duties were the same. *Held*, as a matter of law that they were not fellow servants. See also North Chicago Rolling Mill Co. *v.* Johnson, 114 Ill. 57, 29 N. E. 186.

Conclusive in Missouri. — In Missouri the fact that the two servants were working under the same superior seems to be conclusive that they were fellow servants. Foster *v.* Missouri Pac. R. Co., 115 Mo. 165, 21 S. W. 916; Ryan *v.* McCully, 123

C. Acquaintance With Other Servants or Duration of Employment. — Evidence as to whether a servant was acquainted with other servants,[35] or of the length of time he had been employed,[36] is immaterial under either doctrine in determining whether the relation of fellow servants existed.

5. Power to Control. — In many jurisdictions evidence that one servant has the power to control[37] or hire and discharge[38] other servants is immaterial in determining whether one is a vice-principal, while in other jurisdictions proof of such fact is sufficient to render one a vice-principal,[39] and under this latter rule the power to hire

Mo. 636, 27 S. W. 533; Higgins *v.* Missouri Pac. R. Co., 104 Mo. 413, 16 S. W. 409. See also Volz *v.* Chesapeake & O. R. Co., 95 Ky. 188, 24 S. W. 119.

35. Chicago City R. Co. *v.* Leach, 208 Ill. 198, 70 N. E. 222; Chicago & E. I. R. Co. *v.* White, 209 Ill. 124, 70 N. E. 588; Chicago & A. R. Co. *v.* Hoyt, 16 Ill. App. 237; Klees *v.* Chicago & E. I. R. Co., 68 Ill. App. 244; Atchison & Eastern Bridge Co. *v.* Miller (Kan.), 80 Pac. 18.

36. Klees *v.* Chicago & E. I. R. Co., 68 Ill. App. 244.

37. *Arkansas.* — Fones *v.* Phillips, 39 Ark. 17.

Indiana. — Indiana Car Co. *v.* Parker, 100 Ind. 181.

Louisiana. — Mattise *v.* Consumers Ice Mfg. Co., 46 La. Ann. 1535, 16 So. 400.

Maine. — Blake *v.* Maine Cent. R. Co., 70 Me. 60.

Maryland. — Yates *v.* McCullough Iron Co., 69 Md. 370, 16 Atl. 280.

Massachusetts. — Howard *v.* Hood, 155 Mass. 391, 29 N. E. 630; Moody *v.* Hamilton Mfg. Co., 159 Mass. 70, 34 N. E. 185.

Michigan. — Adams *v.* Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270.

Minnesota. — O'Connor *v.* Chicago M. & St. P. R. Co., 27 Minn. 166, 6 N. W. 481.

New Jersey. — O'Brien *v.* American Dredging Co., 53 N. J. L. 291, 21 Atl. 324.

New York. — Sherman *v.* Rochester & S. R. Co., 17 N. Y. 153.

Virginia. — Moore Lime Co. *v.* Richardson, 95 Va. 326, 28 S. E. 334.

38. The mere fact that one servant, otherwise subordinate, has the right to employ and discharge will not render him a vice-principal.

United States. — Alaska Treadwell Gold Min. Co. *v.* Whelan, 168 U. S. 86; Balch *v.* Haas, 73 Fed. 974.

California. — Stevens *v.* San Francisco & N. P. R. Co., 100 Cal. 554, 35 Pac. 165; Noyes *v.* Wood, 102 Cal. 389, 36 Pac. 766; McLean *v.* Blue Point Gravel M. Co., 51 Cal. 255.

Indiana. — Peirce *v.* Oliver, 18 Ind. App. 87, 47 N. E. 485.

Michigan. — Schroeder *v.* Flint & P. M. R. Co., 103 Mich. 213, 61 N. W. 663.

Mississippi. — Lagrone *v.* Mobile & O. R. Co., 67 Miss. 592, 7 So. 432.

Montana. — Hastings *v.* Montana U. R. Co., 18 Mont. 493, 46 Pac. 264.

New Jersey. — Gilmore *v.* Oxford Iron & Nail Co., 55 N. J. L. 39, 25 Atl. 707.

North Dakota. — Ell *v.* Northern Pac. R. Co., 1 N. D. 336, 48 N. W. 222.

Pennsylvania. — Casey *v.* Pennsylvania Asphalt P. Co., 198 Pa. St. 348, 47 Atl. 1128; Rummell *v.* Dilworth, 111 Pa. St. 343, 2 Atl. 355, 363.

39. *Illinois.* — Consolidated Coal Co. *v.* Wombacher, 134 Ill. 57, 24 N. E. 627; Mobile & O. R. Co. *v.* Massey, 152 Ill. 144, 38 N. E. 787.

Missouri. — Taylor *v.* Missouri Pac. R. Co., 16 S. W. 206; Foster *v.* Missouri Pac. R. Co., 115 Mo. 165, 21 S. W. 916; Hoke *v.* St. Louis, K. & N. R. Co., 88 Mo. 360; Miller *v.* Missouri Pac. R. Co., 109 Mo. 350, 19 S. W. 58.

Nebraska. — Union Pac. R. Co. *v.* Doyle, 50 Neb. 555, 70 N. W. 43.

North Carolina. — Patton *v.* Western N. C. R. Co., 96 N. C. 455, 1 S. E. 863; Dobbin *v.* Richmond & D. R. Co., 81 N. C. 446.

Tennessee. — Louisville & N. R. Co. *v.* Bowler, 9 Heisk. 866.

and discharge is treated as a determinative evidential element or fact.[40] Evidence of a mere request is not sufficient to show an order.[41]

6. Non-Delegable Duties. — That a servant has been invested with the general management of the master's business as respects the employment and control of other servants, and the duty of furnishing safe machinery, appliances and a place to work, is usually sufficient to render the employe a vice-principal.[42] In some decisions

Washington. — Northern Pac. R. Co. *v.* O'Brien, 1 Wash. 599, 21 Pac. 32.

Material But Not Conclusive. Mason *v.* Edison Mach. Wks., 28 Fed. 228; Gravelle *v.* Minneapolis & St. L. R. Co., 10 Fed. 711; Thompson *v.* Chicago M. & St. P. R. Co., 14 Fed. 564; Miller *v.* Union Pac. R. Co. 17 Fed. 67; Deavers *v.* Spencer, 70 Fed. 480; Consolidated Coal Co. of St. Louis *v.* Fleischbein, 109 Ill. App. 509, *affirmed* in 207 Ill. 593, 69 N. E. 963; Westville Coal Co. *v.* Schwartz, 177 Ill. 272, 52 N. E. 276.

40. *United States.* — Mason *v.* Edison Mach. Wks., 28 Fed. 228; Woods *v.* Lindvall, 48 Fed. 73.

Illinois. — Chicago B. & Q. R. Co. *v.* Blank, 24 Ill. App. 438; Chicago Dredging & Dock Co. *v.* McMahon, 30 Ill. App. 358.

Kansas. — Kansas Pac. R. Co. *v.* Little, 19 Kan. 267.

Michigan. — Palmer *v.* Michigan Cent. R. Co., 93 Mich. 363, 53 N. W. 397.

Missouri. — Glover *v.* Kansas City Bolt & Nut Co., 153 Mo. 327, 55 S. W. 88; Rowland *v.* Missouri Pac. R. Co., 20 Mo. App. 463.

Nebraska. — Union Pac. R. Co. *v.* Doyle, 50 Neb. 555, 70 N. W. 43.

North Carolina. — Patton *v.* Western N. C. R. Co., 96 N. C. 455, 1 S. E. 863; Logan *v.* North Carolina R. Co., 116 N. C. 940, 21 S. E. 959; Webb *v.* Richmond & D. R. Co., 97 N. C. 387, 2 S. E. 440.

Washington. — Zintek *v.* Stimson Mill Co., 9 Wash. 395, 37 Pac. 340.

Immaterial. — When. — In Lincoln Coal & Min. Co. *v.* McNally, 15 Ill. App. 181, evidence of a power to control was held immaterial in the absence of proof that the injury resulted by reason of its exercise.

Source of Power Immaterial. — In Fort Worth & D. C. R. Co. *v.* Peters, 87 Tex. 222, 27 S. W. 257, evidence as to the particular source of the power to control was held immaterial.

41. Bradley *v.* Nashville C. & St. L. R. Co., 14 Lea (Tenn.) 374.

42. *United States.* — Hough *v.* Railway Co., 100 U. S. 213; Baltimore & O. R. Co. *v.* Baugh, 149 U. S. 368; Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346; Woods *v.* Lindvall, 48 Fed. 73; Texas & P. R. Co. *v.* Thompson, 70 Fed. 944; Atchison T. & S. F. R. Co. *v.* Mulligan, 67 Fed. 569; Western Coal & Min. Co. *v.* Ingraham, 70 Fed. 219.

District of Columbia. — Baltimore & P. R. Co. *v.* Elliott, 9 App. D. C. 341.

Alabama. — Walker *v.* Bolling, 22 Ala. 294; Tyson *v.* South & North Alabama R. Co., 61 Ala. 554.

Arkansas. — Fones *v.* Philips, 39 Ark. 17.

California. — Beeson *v.* Green Mountain Gold Min. Co., 57 Cal. 20; Sanborn *v.* Madera Flume & Trad. Co., 70 Cal. 261, 11 Pac. 710; Donnelly *v.* San Francisco Bridge Co., 117 Cal. 417, 49 Pac. 559; Nixon *v.* Selby Smelt. & Lead Co., 102 Cal. 458, 36 Pac. 803; Brown *v.* Sennett, 68 Cal. 225, 9 Pac. 74.

Colorado. — Wells *v.* Coe, 9 Colo. 159, 11 Pac. 50; Denver Tram. Co. *v.* Crumbaugh, 23 Colo. 363, 48 Pac. 503; Denver S. P. & P. R. Co. *v.* Discoll, 12 Colo. 520, 21 Pac. 708.

Connecticut. — Wilson *v.* Williamantic Linen Co., 50 Conn. 433; Darringan *v.* New York & N. E. R. Co., 52 Conn. 285.

Delaware. — Murphy *v.* Hughes, 1 Pen. 250, 40 Atl. 187; Foster *v.* Pusey, 8 Houst. 168.

Florida. — Duval *v.* Hunt, 34 Fla. 85, 15 So. 876.

Georgia. — Cheeney *v.* Ocean S. S. Co., 92 Ga. 726, 19 S. E. 33.

it has in effect been held to be the determining fact in all cases.[42]

Idaho. — Palmer *v.* Utah & N. R. Co., 2 Idaho 290, 13 Pac. 425.

Illinois. — Pullman Palace Car Co. *v.* Laack, 143 Ill. 242, 32 N. E. 285; Chicago & A. R. Co. *v.* Maroney, 170 Ill. 520, 48 N. E. 953; Chicago & A. R. Co. *v.* Scanlan, 170 Ill. 106, 48 N. E. 826; Edward Hines Lumb. Co. *v.* Ligas, 172 Ill. 315, 50 N. E. 225.

Indiana. — Robertson *v.* Chicago & E. R. Co., 146 Ind. 486, 45 N. E. 655; Kerner *v.* Baltimore & O. S. W. R. Co., 149 Ind. 21, 48 N. E. 364; Cincinnati H. & D. R. Co. *v.* McMullen, 117 Ind. 439, 20 N. E. 287; Atlas Engine Works *v.* Randall, 100 Ind. 293.

Iowa. — Fink *v.* Des Moines Ice Co., 84 Iowa 321, 51 N. W. 155; Brann *v.* Chicago R. I. & P. R. Co., 53 Iowa 595, 6 N. W. 5.

Kansas. — Atchison T. & S. F. R. Co. *v.* McKee, 37 Kan. 592, 15 Pac. 484; Missouri Pac. R. Co. *v.* Dwyer, 36 Kan. 58, 12 Pac. 352; St. Louis & S. F. R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408.

Kentucky. — Kentucky C. R. Co. *v.* Carr, 19 Ky. L. Rep. 1172, 43 S. W. 193; McLeod *v.* Ginther, 80 Ky. 399.

Louisiana. — Ferris *v.* Hernsheim, 51 La. Ann. 178, 24 So. 771; Evans *v.* Louisiana Lumb. Co., 111 La. 534, 35 So. 736.

Maine. — Small *v.* Allington & C. Mfg. Co., 94 Me. 551, 48 Atl. 177.

Massachusetts. — Ford *v.* Fitchburg R. Co., 110 Mass. 240; Wheeler *v.* Wason Mfg. Co., 135 Mass. 294.

Michigan. — Schroeder *v.* Flint & P. M. R. Co., 103 Mich. 213, 61 N. W. 663; Van Dusen *v.* Letellier, 78 Mich. 492, 44 N. W. 572; Fox *v.* Spring Lake Iron Co., 89 Mich. 387, 50 N. W. 860.

Minnesota. — Brown *v.* Winona & St. P. R. Co., 27 Minn. 162, 6 N. W. 484; Lindvall *v.* Woods, 41 Minn. 212, 42 N. W. 1020.

Missouri. — Moore *v.* Wabash St. L. & P. R. Co., 85 Mo. 588; Schaub *v.* Hannibal & St. J. R. Co., 106 Mo. 74, 16 S. W. 924; Coontz *v.* Missouri Pac. R. Co., 121 Mo. 652, 26 S. W. 661; Long *v.* Pacific R. Co., 65 Mo. 225; Dayharsh *v.* Hannibal & St. J. R. Co., 103 Mo. 570, 15 S. W. 554.

Montana. — Kelley *v.* Cable Co., 7 Mont. 70, 14 Pac. 633.

Nebraska. — Chicago, B. & Q. R. Co. *v* Kellogg, 54 Neb. 127, 74 N. W. 454.

New Mexico. — Cerrillos C. R. Co. *v.* Deserant, 9 N. M. 49, 49 Pac. 807.

New York. — Booth *v.* Boston & A. R. Co., 73 N. Y. 38; Benzing *v.* Steinway, 101 N. Y. 547, 5 N. E. 449; Corcoran *v.* Holbrook, 59 N. Y. 517; Mann *v.* Delaware & H. C. Co., 91 N. Y. 495.

North Carolina. — Chesson *v.* John L. Roper Lumb. Co., 118 N. C. 59, 23 S. E. 925.

North Dakota. — Ell *v.* Northern Pac. R. Co., 1 N. D. 336, 48 N. W. 222; Cameron *v.* Great Northern R. Co., 8 N. D 124, 77 N. W. 1016.

Oregon. — Anderson *v.* Bennett, 16 Or. 515, 19 Pac. 765.

Pennsylvania. — Prescott *v.* Ball Engine Co., 176 Pa. St. 459, 35 Atl. 224; Ross *v.* Walker, 139 Pa. St. 42, 21 Atl. 157, 159.

Rhode Island. — Hanna *v.* Granger, 18 R. I. 507, 28 Atl. 659; Mulvey *v.* Rhode Island Locomotive Wks., 14 R. I. 204.

South Carolina. — Whaley *v.* Bartlett, 42 S. C. 454, 20 S. E. 745; Wilson *v.* Charleston & S. R. Co., 51 S. C. 79, 28 S. E. 91.

Texas. — Texas & P. R. Co. *v.* Kirk, 62 Tex. 227; Houston & T. C. R. Co. *v.* Marcelles, 59 Tex. 334; Missouri Pac. R. Co. *v.* Williams, 75 Tex. 4, 12 S. W. 835.

Utah. — Johnson *v.* Union Pac. Coal Co., 76 Pac. 1089.

Vermont. — Davis *v.* Central Vermont R. Co., 55 Vt. 84; Houston *v.* Brush, 66 Vt. 331, 29 Atl. 380.

Virginia. — Richmond Granite Co. *v.* Bailey, 92 Va. 554, 24 S. E. 232; Russell Creek Coal Co. *v.* Wells, 96 Va. 416, 31 S. E. 614.

West Virginia. — Jackson *v.* Norfolk & W. R. Co., 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258.

Wisconsin. — Brabbits *v.* Chicago & N. W. R. Co., 38 Wis. 289; McMahon *v.* Idaho Min. Co., 95 Wis. 308, 70 N. W. 478; Hulehan *v.* Green Bay W. & S. T. P. R. Co., 68 Wis. 520, 32 N. W. 529.

43. Baltimore & O. R. Co. *v.*

VII. NEGLIGENCE.

1. Of the Master. — A. Selection and Retention of Servants. a. *General Presumption.* — The presumption is that the master has exercised due care in the selection of competent and fit servants,[44] and having used such due care he has a right to rely upon the continuation of these qualifications until he acquires knowledge to the contrary.[45] The burden of showing negligence of the master in performing this duty is on the servant.[46]

b. *Evidence To Rebut.* — **(1.) Generally.** — This presumption may be overcome by showing that the master failed to exercise due care in the original employment,[47] or that he retained the servant after

Baugh, 149 U. S. 368; Minneapolis *v.* Lundin, 58 Fed. 525; New Pittsburgh Coal & Coke Co. *v.* Peterson, 136 Ind. 398, 37 N. E. 7; McElligott *v.* Randolph, 61 Conn. 157, 22 Atl. 1094; Justice *v.* Pennsylvania Co., 130 Ind. 321, 30 N. E. 303; Sofield *v.* Guggenheim Smelt. Co., 64 N. J. L. 605, 46 Atl. 711; Curley *v.* Hoff, 62 N. J. L. 758, 42 Atl. 731; Schroeder *v.* Flint & P. M. R. Co., 103 Mich. 213, 61 N. W. 663; Ross *v.* Walker, 139 Pa. St. 42, 21 Atl. 157, 159.

44. *United States.* — Mentzer *v.* Armour, 18 Fed. 373; Gravelle *v.* Minneapolis & St. L. R. Co., 10 Fed. 711; Southern Pacific Co. *v.* Hetzer, 135 Fed. 272; Central R. Co. *v.* Keegan, 160 U. S. 259.

Alabama. — Conrad *v.* Gray, 109 Ala. 130, 19 So. 398.

Colorado. — Summerhays *v.* Kansas Pac. R. Co., 2 Colo. 484.

Illinois. — Chicago & E. I. R. Co. *v.* Myers, 83 Ill. App. 469.

Maine. — Blake *v.* Maine Cent. R. Co., 70 Me. 60.

Michigan. — Davis *v.* Detroit & M. R. Co., 20 Mich. 105.

Pennsylvania. — Snodgrass *v.* Carnegie Steel Co., 173 Pa. St. 228, 33 Atl. 1104.

Texas. — Southern Cotton Oil Co. *v.* De Vond (Tex. Civ App.), 25 S. W. 43.

45. Chicago & E. I. R. Co. *v.* Myers, 83 Ill. App. 469; Walkowski *v.* Penokee & G. Consol. Mines, 115 Mich. 629, 73 N. W. 895; Chapman *v.* Erie R. Co., 55 N. Y. 579.

46. *Alabama.* — Mobile & O. R. Co. *v.* Thomas, 42 Ala. 672.

Colorado. — Colorado C. R. Co. *v.* Ogden, 3 Colo. 499.

Georgia. — Central R. & Bkg. Co. *v.* Kelly, 58 Ga. 107.

Illinois. — Chicago & E. I. R. Co. *v.* Geary, 110 Ill. 383; St. Louis Pressed Brick Co. *v.* Kenyon, 57 Ill. App. 640.

Iowa. — Wicklund *v.* Saylor Coal Co., 119 Iowa 335, 93 N. W. 305.

Kansas. — Kansas Pac. R. Co. *v.* Salmon, 11 Kan. 83; *s. c.*, 14 Kan. 512.

Maine. — Beaulieu *v.* Portland Co., 48 Me. 291.

Maryland. — Wonder *v.* Baltimore & O. R. Co., 32 Md. 411.

Michigan. — Davis *v.* Detroit & M. R. Co., 20 Mich. 105.

Missouri. — Murphy *v.* St. Louis & I. M. R. Co., 4 Mo. App. 565; Roblin *v.* Kansas City St. J. & C. B. R. Co., 119 Mo. 476, 24 S. W. 1011.

New York. — Wright *v.* New York Cent. R. Co., 25 N. Y. 562.

Pennsylvania. — Frazier *v.* Pennsylvania R. Co., 38 Pa. St. 104.

Utah. — McCharles *v.* Horn Sil. Min. & Smelt. Co., 10 Utah 470, 37 Pac. 733.

In Chicago & A. W. R. Co. *v.* O'Brien, 132 Fed. 593, the court held that § 2071 of the Iowa Code, providing that railroad companies shall be liable for all damages to employes resulting by reason of the negligence of other employes, did not change the burden of proof.

47. *Alabama.* — Conrad *v.* Gray, 109 Ala. 130, 19 So. 398.

Arkansas. — St. Louis, I. M. & S. R. Co. *v.* Harper, 44 Ark. 524.

Colorado. — Kindel *v.* Hall, 8 Colo. App. 63, 44 Pac. 781.

Illinois. — Hinckley *v.* Horazdowsky, 133 Ill. 359, 24 N. E. 421.

he knew, or should have known, of his incompetency.[48] In some jurisdictions proof of incompetency at the time of the employment is held sufficient to make a *prima facie* case of negligence,[49] but this holding is not universally followed.[50]

(2.) **Minority.** — Evidence that the servant was a minor when employed is not ordinarily sufficient to show negligence on the part of the master.[51] It is some evidence of negligence, however, if the employment is in violation of a criminal statute.[52]

(3.) **Inefficiency or Failure to Follow Rule.** — Mere inefficiency of a servant is no evidence of negligence in the employment,[53] but evidence that a servant was promoted without the usual inquiry and examination required by a rule of the master tends to show negligence in the promotion.[54]

Indiana. — Bogard *v.* Louisville, E. & St. L. R. W. Co., 100 Ind. 491.

Maryland. — Baltimore Elev. Co. *v.* Neal, 65 Md. 438, 5 Atl. 338.

Pennsylvania. — Snodgrass *v.* Carnegie Steel Co., 173 Pa. St. 228, 33 Atl. 1104.

Texas. — Consumers Cotton Co. *v.* Jonte (Tex. Civ. App.), 80 S. W. 847; Trinity & S. R. Co. *v.* Mitchell, 72 Tex. 609, 10 S. W. 698; Campbell *v.* Wing, 5 Tex. Civ. App. 431, 24 S. W. 360.

In Hermann *v.* Port Blakely Mill Co., 71 Fed. 853, evidence that a servant was incompetent by reason of the use of intoxicating liquors, or some physical defect, and that the master knew, or ought to have known, such fact, was held sufficient to render the master liable.

Evidence that an engineer was near sighted when employed is not sufficient to show negligence in the employment. Texas & P. R. Co. *v.* Harrington, 62 Tex. 597.

Evidence that the master was negligent in employing a servant is not admissible unless the fact is pleaded. Elwell *v.* Hacker, 86 Me. 416, 30 Atl. 64.

48. *Colorado.* — Kindel *v.* Hall, 8 Colo. App. 63, 44 Pac. 781.

Indiana. — Ohio & M. R. Co. *v.* Dunn, 138 Ind. 18, 36 N. E. 702, 37 N. E. 546; Bogard *v.* Louisville E. & St. L. R. W. Co., 100 Ind. 491.

Maine. — Blake *v.* Maine Cent. R. Co., 70 Me. 60.

Maryland. — Baltimore Elev. Co. *v.* Neal, 65 Md. 438, 5 Atl. 338.

Missouri. — Murphy *v.* St. Louis & I. M. R. Co., 71 Mo. 202.

Pennsylvania. — Snodgrass *v.* Carnegie Steel Co., 173 Pa. St. 228, 33 Atl. 1104.

Texas. — Trinity & S. R. Co. *v.* Mitchell, 72 Tex. 609, 10 S. W. 698.

Utah. — McCharles *v.* Horn Sil. Min. & Smelt. Co., 10 Utah 470, 37 Pac. 733.

49. Crandall *v.* McIlrath, 24 Minn. 127; Hicks *v.* Southern Ry., 63 S. C. 559, 41 S. E. 753.

In Lee *v.* Michigan Cent. R. Co., 87 Mich. 574, 49 N. W. 909, evidence that an employe had been in the master's employ only two or three weeks, and was incompetent when employed, need not be supplemented by proof of the master's knowledge of such incompetency in the absence of evidence of care in his selection.

50. Roblin *v.* Kansas City, St. J. & C. B. R. Co., 119 Mo. 476, 24 S. W. 1011; Thomas *v.* Herrall, 18 Or. 546, 23 Pac. 497.

51. McMillan *v.* Grand Trunk R. Co. of Canada, 130 Fed. 827; Ash *v.* Verlenden, 154 Pa. St. 246, 26 Atl. 374.

52. Marino *v.* Lehmaier, 62 App. Div. 43, 70 N. Y. Supp. 790.

53. Penwell Coal Min. Co. *v.* Diefenthaler, 48 Ill. App. 616.

54. In Evansville & T. H. R. Co. *v.* Guyton, 115 Ind. 450, 17 N. E. 101, an action was brought by a brakeman to recover for injuries alleged to have been received by reason of the negligence of the master in selecting the conductor of the train upon which he was injured. The conductor had been promoted from the position of brakeman shortly before the accident, and, as the evi-

(4.) Evidence to Show Knowledge. — (A.) DRUNKENNESS. — The fact that a servant had been known to use intoxicating liquors is no evidence that the master knew such fact,[55] but proof of a notorious habit to drink to excess is sufficient for such purpose.[56] Evidence that the servant had been seen on the premises of the master the day before the accident in an intoxicated condition,[57] or that the superintendent of the master had told the servant that he would have to stop drinking,[58] is admissible to show knowledge of the master.

(B.) SINGLE ACT OF NEGLIGENCE. — A single act of negligence of an employe is no evidence that the master knew or ought to have known such fact,[59] and even if the master has knowledge thereof, retention in service is not sufficient to show negligence of the master.[60]

(C.) GENERAL REPUTATION. — Evidence of the general reputation of the servant as to competency and fitness is admissible to show knowledge of the master.[61] So, also, is evidence that a number of men

dence tended to show, without the usual inquiry required by the rules of the company. In rendering judgment the court said: "In view of the fact that Stice had been promoted to the position of conductor but recently before the accident, and that more than ordinary vigilance and aptitude were required for the control and safe management of trains such as the one he was intrusted with, and in view of the further fact that there is good evidence which tends to show that, contrary to the requirements of the general rules of the company, Stice had been assigned to duty as conductor without the usual inquiry or examination in respect to his qualifications, we are constrained to hold that the evidence tends to support what the jury must have found, viz., that Stice was incompetent to act as conductor of a wild train, and that the railroad company was remiss in its duty in selecting him for that service."

55. Delory *v.* Blodgett, 185 Mass. 126, 69 N. E. 1078.

56. In Hilts *v.* Chicago & G. T. R. R., 55 Mich. 437, 21 N. W. 878, evidence that an engineer used intoxicating liquors to such excess that his condition was known by the employes and others coming in contact with him for a period of several months, and that the officers of the company could have learned such fact by inquiry or observation, was held sufficient to render the master liable.

57. In Lyons *v.* New York C. & H. R. R. Co., 39 Hun (N. Y.) 385, evidence that the engineer of the engine causing the injury had been seen in an intoxicated condition in the yards of the defendant the day before the accident was held admissible.

58. Chapman *v.* Erie R. Co., 55 N. Y. 579.

59. Wicklund *v.* Saylor Coal Co., 119 Iowa 335, 93 N. W. 305; Baltimore *v.* War, 77 Md. 593, 27 Atl. 85; Peaslee *v.* Fitchburg R. Co., 152 Mass. 155, 25 N. E. 71; Huffman *v.* Chicago R. I. & P. R. Co., 78 Mo. 50; Couch *v.* Watson Coal Co., 46 Iowa 17; Baltimore Elev. Co. *v.* Neal, 65 Md. 438, 5 Atl. 338; Harvey *v.* New York, C. & H. R. Co., 88 N. Y. 481; Conrad *v.* Gray, 109 Ala. 130, 19 So. 398.

60. Holland *v.* Southern Pacific Co., 100 Cal. 240, 34 Pac. 666; Cosgrove *v.* Pitman, 103 Cal. 268, 37 Pac. 232; McDermott *v.* Hannibal & St. J. R. Co., 87 Mo. 285; Baulec *v.* New York & H. R. R. Co., 59 N. Y. 356.

61. Giordano *v.* Brandywine Granite Co., 3 Pen. (Del.) 423, 52 Atl. 332; Chicago R. I. & P. R. Co. *v.* Doyle, 18 Kan. 58; Baulec *v.* New York & H. R. R. Co., 59 N. Y. 356. See also Schulte *v.* Holliday, 54 Mich. 73, 19 N. W. 752.

In Metropolitan West Side Elev. R. Co. *v.* Fortin, 203 Ill. 454, 67 N. E. 477, an action to recover for injuries caused by the backing of a motor car into the car which the plaintiff was uncoupling, evidence of the general

refused to work with the servant on account of his incompetency.[62]

(D.) Knowledge of, and Statements to, Foreman or Superintendent. Evidence that the general manager, who also had the power to discharge,[63] or that a foreman whose duty it was to look after the men and make reports to his superior officer, had heard[64] of the incompetency of a servant, is admissible to charge the master with knowledge. A mere declaration made to the chief engineer that a servant was incompetent is not competent to show knowledge of the master.[65] So, also, a conversation between the injured servant and the superintendent after the accident is incompetent as original evidence of notice or knowledge.[66]

(5.) Evidence To Show Competency or Incompetency. — (A.) Minority. The mere fact of minority of a servant is not of itself evidence of incompetency,[67] but, taken with other circumstances, may be sufficient to raise a presumption of incompetency.[68]

reputation of the motorman in running and managing the motor car — that he frequently passed signals and had been reprimanded for his carelessness — was held admissible as tending to show knowledge of the master.

In Cosgrove *v.* Pitman, 103 Cal. 268, 37 Pac. 232, evidence of the general reputation of the servant as to intemperance was held admissible to show the master's knowledge of his incompetency. See Lambrecht *v.* Pfizer, 49 App. Div. 82, 63 N. Y. Supp. 591, holding evidence of general reputation no evidence of knowledge.

62. Giordano *v.* Brandywine Granite Co., 3 Pen. (Del.) 423, 52 Atl. 332.

63. Havens *v.* Rhode Island S. R. Co. (R. I.), 58 Atl. 247.

64. Williams *v.* Missouri Pac. R. Co., 109 Mo. 475, 18 S. W. 1098.

65. In Snodgrass *v.* Carnegie Steel Co., 173 Pa. St. 228, 33 Atl. 1104, the declaration contained no statement as to how or why the servant was incompetent.

66. In White *v.* Lewiston & Y. F. R. Co., 94 App. Div. 4, 87 N. Y. Supp. 901, a conversation between the injured servant and defendant's superintendent, subsequent to the accident, as to the latter's knowledge of the intemperate habits of the servant through whose fault the injury occurred, was held incompetent as original evidence of notice.

67. Sutherland *v.* Troy & B. R. Co., 125 N. Y. 737, 26 N. E. 609.

68. Molaske *v.* Ohio Coal Co., 86 Wis. 220, 56 N. W. 475, was an action to recover damages for an injury alleged to have resulted by reason of the employment of an incompetent servant. The defendant had employed plaintiff to unload coal from the hold of a vessel. His duty was to shovel coal into buckets, which when filled were hoisted by steam power to the adjacent dock, and empty buckets lowered into the hold by the same power, by means of a wire rope attached to a derrick, passing through a movable pulley. A boy twelve to fifteen years of age was employed to give the signal to the engineer when the buckets were ready to be hoisted. The boy, without being directed to do so by the plaintiff, gave the signal to the engineer to hoist, as a result of which plaintiff caught his hand in the pulley and lost two fingers.

In rendering judgment the court said: "The presumption of the common law is that a child under fourteen years of age is incapable of committing a crime; but as applied to a child over seven years of age this presumption may be rebutted by evidence. . . . In analogy to that rule, and having due regard to what we deem most persuasive considerations of public policy, we hold that on the proofs in this case the presumption of law is that the boy employed by the coal company to give the signals was incompetent for that duty, and that the company employed him at its peril of being able to prove,

(B.) Specific, Single or Prior Acts of Negligence. — A specific act of negligence, in the absence of evidence that the master knew of it, is not admissible.[69] Evidence of a single act of negligence is not sufficient to show incompetency.[70] Former acts of negligence are no evidence of neglect on the particular occasion in question,[71] although evidence of such acts is admissible to show incompetency.[72] Evidence as to the manner in which the servant had been performing his work is admissible to show his incompetency.[73]

if sued for injuries resulting from his negligence, that he was in fact competent."

69. Southern Pacific Co. *v.* Hetzer, 135 Fed. 272; Frazier *v.* Pennsylvania R. Co., 38 Pa. St. 104.

70. In Conrad *v.* Gray, 109 Ala. 130, 19 So. 398, the court held that a single act of negligence on the occasion of the injury would not prove either incompetency or notice to the master.

May Be Sufficient With Other Circumstances. — In Chicago & E. I. R. Co. *v.* Myers, 83 Ill. App. 469, an action was brought to recover for the death of an employe alleged to have resulted by reason of the retention of an incompetent engineer after knowledge of his incompetency. Evidence of a single act of negligence was held insufficient to show incompetency, but the court said: "A single act may, under some circumstances, show an individual to be an improper and unfit person for a position of trust, or any particular service, as when such act is done wantonly, regardless of consequences, or maliciously," *citing* Baulec *v.* New York & H. R. R. Co., 59 N. Y. 356; Holland *v.* Southern Pacific Co., 100 Cal. 240, 34 Pac. 666.

71. Baltimore Elev. Co. *v.* Neal, 65 Md. 438, 5 Atl. 338.

72. Railway Co. *v.* Ruby, 38 Ind. 294; Giordano *v.* Brandywine Granite Co., 3 Pen. (Del.) 423, 52 Atl. 332; Grube *v.* Missouri Pac. R. Co., 98 Mo. 330, 11 S. W. 736.

73. Consolidated Coal Co. *v.* Seniger, 179 Ill. 370, 53 N. E. 733, was an action to recover for injuries sustained while being lowered into the mine in which plaintiff was employed, by reason of the alleged incompetency of the engineer in lowering and raising the cages of the mine. The engineer had a certificate of competency from the state board of mine examiners as required by law. A number of witnesses testified, against the objection of the defendant, that the engineer frequently ran the machinery so fast that it was impossible to control the cage by the brake; that sometimes he would let the cage almost drop, and sometimes seemed to catch it before it reached the bottom and then let it go bumping to the bottom; that sometimes he would run it up swiftly above the landing, and that sometimes the man could hardly stand on the cage, and stood on tiptoe to lessen the shock and internal jar. In holding such evidence admissible the court said: "If we understand counsel, the claim is, first, that the incompetency of the engineer could only be shown by a general bad reputation for incompetency; and, secondly, that the fact of incompetency could not be proved by his conduct, because it contradicted his certificate of competency given him by the state board of examiners. We do not think the evidence incompetent on either ground. It is true that a competent engineer may be negligent on a particular occasion and not above the ordinary frailties of human nature, and that incompetency is not shown by some particular act of negligence; and yet one who knows how to run and handle an engine properly, and who has the physical strength to do so, cannot be said to be competent for the position of engineer if he is habitually imprudent, careless and reckless. . . . Such certificate does not conclusively establish the competency of the person, but may be considered with other evidence upon that question. The state board of mine examiners had no power to adjudicate upon the question so as to bind

(C.) Experience of Servant. — Mere inexperience in a particular service not requiring any great amount of skill or intelligence is no evidence of the servant's incompetency,[74] but evidence as to the length of time he had been employed and the number of times he had performed the service is admissible and may raise a presumption of competency.[75] Evidence that an engineer, formerly employed as a fireman, had never run an engine except on extra occasions is not sufficient to show his incompetency;[76] and, on the other hand, the fact that one had been a competent brakeman for a number of years is no evidence that he was a competent conductor.[77]

(D.) Mere Accident. — Accident is not sufficient to establish either incompetency[78] or that an injury resulted by reason of known incompetency of a servant.[79]

(E.) General Reputation. — The general reputation of the servant as respects competency and fitness is generally held admissible,[80] although the contrary has been held.[81] As showing the general

the defendant or its men, and plaintiff was not debarred from proving that Rasor was in fact incompetent and unfit, and that defendant had notice of it."

74. In National Fertilizer Co. *v.* Travis, 102 Tenn. 16, 49 S. W. 832, the incompetency of an engineer was attempted to be shown by evidence that he was inexperienced. There was evidence that he was not entirely familiar with the engine, and that he had run it for only nine months, and that prior to such time he had been a shipping clerk and then foreman. In rendering judgment the court said: "Inexperience is not conclusive and can hardly be held to be even persuasive of incompetency. The most thoroughly competent machinists and experts were at one time inexperienced, but this frequently leads to greater care than is exercised by the party who has become careless through continual service about the work."

75. Hinckley *v.* Horazdowsky, 133 Ill. 359, 24 N. E. 421, was an action by an infant to recover for injuries sustained while oiling certain machinery, as directed by the foreman, on the ground that he did not have sufficient capacity and intelligence to understand the dangers, and that the foreman knew such fact. *Held*, evidence that the plaintiff had done the work for some time prior to the accident, and the number of times he had done so, was proper for the consideration of the jury in determining whether he was competent.

The fact that a servant had been engaged in the same position for twenty-three years is *prima facie* evidence of his competency. Chicago & E. I. R. Co. *v.* Myers, 83 Ill. App. 469.

76. Ohio & M. R. Co. *v.* Dunn, 138 Ind. 18, 36 N. E. 702, 37 N. E. 546.

77. Evansville & T. H. R. Co. *v.* Guyton, 115 Ind. 450, 17 N. E. 101.

78. Mobile & O. R. Co. *v.* Godfrey, 155 Ill. 78, 39 N. E. 590; Levins *v.* Bancroft (La.), 38 So. 72; Terrell *v.* Russell, 16 Tex. Civ. App. 573, 42 S. W. 129 (engineer ran his engine off the track).

79. Brady *v.* Western Union Tel. Co., 113 Fed. 909.

80. Southern Pacific Co. *v.* Hetzer, 135 Fed. 272; Giordano *v.* Brandywine Granite Co., 3 Pen. (Del.) 423, 52 Atl. 332; Illinois Cent. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435; Texas & P. R. Co. *v.* Johnson, 89 Tex. 519, 35 S. W. 1042.

81. Evidence of the general reputation of an engineer was held inadmissible in an action for wrongful death alleged to have been caused by his act. Lexington & C. C. Min. Co. *v.* Huffman, 17 Ky. L. Rep. 775, 32 S. W. 611.

In Malcom *v.* Fuller, 152 Mass. 160, 25 N. E. 83, evidence of the general reputation of the servant was

reputation of a servant among other employes, evidence of their actions and emotions, and what they gave as their reasons at times when they refused to work with him, is admissible.[82]

(F.) Former Discharge or Suspension. — Evidence of a former discharge, in the absence of a showing as to the time or cause, is not admissible to show incompetency.[83] The fact that a servant was subsequently suspended is no evidence of incompetency.[84]

(G.) Physical Defects or Appearance. — Evidence that an engineer was near-sighted is not sufficient to show incompetency;[85] nor is evidence that he ran his engine off the track admissible to show incompetency by reason of old age and defective vision.[86] Incompetency of a servant cannot be found by the jury on what they saw or supposed they saw or read in his face while testifying.[87]

(H.) Remarks or Opinions of Third Persons. — Remarks made at the time of an accident by a third person are not sufficient to show

held inadmissible when he was admitted to be incompetent.

In McCarty *v.* Ritch, 59 App. Div. 145, 69 N. Y. Supp. 129, evidence of the servant's general reputation was held inadmissible after proof of specific acts of the servant showing incompetency.

82. Giordano *v.* Brandywine Granite Co., 3 Pen. (Del.) 423, 52 Atl. 332.

83. Couch *v.* Watson Coal Co., 46 Iowa 17.

84. In East Tennessee & W. N. C. R. Co. *v.* Collins, 85 Tenn. 227, 1 S. W. 883, an action to recover for injuries alleged to have resulted from the negligence of an engineer in backing one car against another while plaintiff was engaged in coupling the two, plaintiff was permitted to prove, over the objection of the defendant, that another railroad company subsequently employing the engineer suspended him for running ahead of time. In holding this error, the court said: "The incompetent evidence introduced may have led the jury to believe the engineer did not have proper skill and care."

The non-employment of a servant as a driver after an accident, unexplained, tends to show that the master considered him careless and incompetent. Martin *v.* Towle, 59 N. H. 31.

85. Texas & P. R. Co. *v.* Harrington, 62 Tex. 597.

86. Ransier *v.* Minneapolis & St. L. R. Co., 30 Minn. 215, 14 N. W. 883.

87. Corson *v.* Maine Cent. R. Co., 76 Me. 244.

Conduct Before the Jury. — In Keith *v.* New Haven & N. Co., 140 Mass. 175, 3 N. E. 28, an action to recover damages for an injury sustained by reason of an alleged defective car, the defect consisting of a weakened hand-hold at the top of a ladder, there was evidence tending to show that the ladder was defective, but on the cross-examination of the car inspector he stated that he did not remember having inspected the train or having seen any defective ladders. The jury was instructed that it might consider the appearance and conduct of the inspector in determining whether he was competent. In holding this proper the court said: "It is impossible for us to say that, in addition to the other evidence — as that which tended to show that the car was defective, that, although informed of the accident on the same night, the inspector had no recollection of having inspected the train or having seen defective ladders, and that he did not remember having inspected any particular train before it started out — his appearance and conduct in the presence of the jury might not be legally sufficient to satisfy them that he was an incompetent person."

incompetency.[88] Persons familiar with and present when the servant was performing the service cannot, in some jurisdictions, give their opinions as to his incompetency;[89] in others, it seems, they may.[90]

B. Supplying Servants. — Whether a master has supplied a sufficient number of servants to perform the work with reasonable safety is usually a question for the jury.[91]

C. Rules and Instructions. — a. *General Presumption.* — The presumption is that the master has adopted and enforced proper rules and regulations,[92] and that he has given the servant proper and necessary instructions.[93]

b. *Existence and Sufficiency of Rules.* — Directions of the master to his representative in reference to promulgating rules are not admissible;[94] nor is evidence that two or three other companies adopted similar rules admissible, but a general custom to adopt such rules must be shown.[95] Whether rules are reasonable is a question

88. Davis *v.* Detroit & M. R. Co., 20 Mich. 105.

89. One who had been previously employed as express messenger and baggage man, and who was on one or two trips with plaintiff, cannot testify as to the qualifications, capacity and fitness of the plaintiff to discharge the duties of express messenger and baggage man. Moore *v.* Chicago B. & Q. R. Co., 65 Iowa 505, 22 N. W. 650.

90. In Terrell *v.* Russell, 16 Tex. Civ. App. 573, 42 S. W. 129, it was held that a witness who had fourteen years of experience as fireman, yard master and engineer might testify that an engineer was careless, reckless and unskillful in running his engine.

91. Georgia Pac. R. Co. *v.* Propst, 90 Ala. 1, 7 So. 635; Supple *v.* Agnew, 191 Ill. 439, 61 N. E. 392; Means *v.* Carolina Cent. R. Co., 122 N. C. 990, 29 S. E. 939; *s. c.*, 124 N. C. 574, 32 S. E. 960; Gates *v.* Chicago M. & St. P. R. Co., 2 S. D. 422, 50 N. W. 907.

Admissibility and Sufficiency. Evidence that immediately after an accident the master employed more servants is admissible to show there was an insufficient number of employes at the time of the accident. Harvey *v.* New York C. & H. R. R. Co., 19 Hun (N. Y.) 556.

Where the evidence tends to show that the injury resulted by reason of the servant's own negligence, evidence of a request for help and refusal by the master is not admissible. Berlick *v.* Ashland Sulphite & Fiber Co., 93 Wis. 437, 67 N. W. 712.

Evidence that the usual number of servants were not engaged at the time of the accident is generally sufficient to show a failure to supply an adequate number of servants. South West Imp. Co. *v.* Smith, 85 Va. 306, 7 S. E. 365.

92. *United States.* — Central R. Co. *v.* Keegan, 160 U. S. 259.

Georgia. — Florida C. R. Co. *v.* Burney, 98 Ga. 1, 26 S. E. 730; East Tennessee V. & G. R. Co. *v.* Maloy, 77 Ga. 237, 2 S. E. 941.

Idaho. — Minty *v.* Union Pac. R. Co., 2 Idaho 471, 21 Pac. 660.

Illinois. — Joliet Steel Co. *v.* Shields, 146 Ill. 603, 34 N. E. 1108.

Missouri. — Smith *v.* Missouri Pac. R. Co., 113 Mo. 70, 20 S. W. 896.

New York. — Rose *v.* Boston & A. R. Co., 58 N. Y. 217.

Pennsylvania. — Allegheny Heating Co. *v.* Rohan, 118 Pa. St. 223, 11 Atl. 789; Philadelphia & R. R. Co. *v.* Hughes, 119 Pa. St. 301, 13 Atl. 286.

West Virginia. — Stewart *v.* Ohio River R. Co., 40 W. Va. 188, 20 S. E. 922.

93. Grimmelman *v.* Union Pac. R. Co., 101 Iowa 74, 70 N. W. 90.

94. Weeks *v.* Scharer, 129 Fed. 333.

95. St. Louis & S. F. R. Co. *v.* Nelson, 20 Tex. Civ. App. 536, 49 S. W. 710.

for the court,[96] but the sufficiency of them is for the jury.[97] Parol evidence is admissible, in the absence of better evidence, to show the existence of a rule,[98] but the general supposition or understanding of employes is not admissible for such purpose.[99]

c. *Evidence To Show Instruction or Lack Of.* — Evidence that other masters directed their servants in the same manner is not sufficient to show lack of negligence,[1] but a custom may thrust an additional duty to instruct upon the master.[2] On an issue as to whether proper instructions were given, it is not competent to show that other employes were warned,[3] nor on the other hand is their testimony that they had not been warned admissible.[4] The employe himself may testify that he was not instructed.[5]

D. Providing Machinery, Appliances and Place to Work. a. *Presumptions.* — The master is presumed to have performed his duty of providing safe and proper machinery[6] and a reasonably safe

96. Railway Co. *v.* Hammond, 58 Ark. 324, 24 S. W. 723; St. Louis I. M. & S. R. Co. *v.* Adcock, 52 Ark. 406, 12 S. W. 874; Chicago B. & Q. R. Co. *v.* McLallen, 84 Ill. 109.

97. Chicago B. & Q. R. Co. *v.* McLallen, 84 Ill. 109; Van Tassell *v.* New York L. E. & W. R. Co., 1 Misc. 299, 20 N. Y. Supp. 708; McNee *v.* Coburn Trolley Track Co., 170 Mass. 283, 49 N. E. 437.

98. Parol proof of a regulation requiring an engineer to ring the bell was held admissible where it did not appear that there was any better mode of proving it. Sobieski *v.* St. Paul & D. R. Co., 41 Minn. 169, 42 N. W. 863.

Cannot Testify Where Rules Are Written. — A witness cannot testify as to the rules of a railroad company when it appears that they have been printed in book form. Georgia Pac. R. Co. *v.* Propst, 90 Ala. 1, 7 So. 635; Missouri Pac. R. Co. *v.* Lamothe, 76 Tex. 219, 13 S. W. 194.

99. James *v.* Northern Pac. R. Co., 46 Minn. 168, 48 N. W. 783.

1. Kansas City M. & B. R. Co. *v.* Burton, 97 Ala. 240, 12 So. 88.

2. In an action to recover for an injury sustained while working in a mine, alleged to have resulted by reason of a failure to properly instruct, evidence of a custom in Utah mines to have an experienced miner work with a new man was held admissible even though not shown to have been of such duration as to constitute a common-law custom. Pence *v.* California Min. Co., 27 Utah 378, 75 Pac. 934.

3. Verdelli *v.* Gray's Harbor Com. Co., 115 Cal. 517, 47 Pac. 364; Grant *v.* Varney, 21 Colo. 329, 40 Pac. 771.

4. Where a road master testified that he had given the deceased proper instructions, testimony of other employes that he had given them no instructions is not admissible. Chicago & N. W. R. Co. *v.* Moranda, 108 Ill. 576.

5. Giordano *v.* Brandywine Granite Co., 3 Pen. (Del.) 423, 52 Atl. 332; Texas & P. R. Co. *v.* Brick, 83 Tex. 598, 20 S. W. 511.

6. *Arkansas.* — St. Louis I. M. & S. R. Co. *v.* Gaines, 46 Ark. 555; St. Louis I. M. & S. R. Co. *v.* Rice, 51 Ark. 467, 11 S. W. 699.

Georgia. — Railey *v.* Garbutt, 112 Ga. 288, 37 S. E. 360; Palmer Brick Co. *v.* Chenall, 119 Ga. 837, 47 S. E. 329.

Illinois. — Illionis Cent. R. Co. *v.* Barslow, 55 Ill. App. 203.

Indiana. — Pennsylvania Co. *v.* Whitcomb, 111 Ind. 212, 12 N. E. 380; Louisville N. A. & C. R. Co. *v.* Sandford, 117 Ind. 265, 19 N. E. 770.

Missouri. — Glasscock *v.* Swafford Bros. Dry Goods Co., 106 Mo. App. 657, 80 S. W. 364.

New York. — Cahill *v.* Hilton, 106 N. Y. 512, 13 N. E. 339.

Oregon. — Kincaid *v.* Oregon S. L. & U. N. R. Co., 22 Or. 35, 29 Pac. 3; Knahtla *v.* Oregon S. L. & U. N. R. Co., 21 Or. 136, 27 Pac. 91.

Pennsylvania. — Philadelphia & R.

place in which to work,[7] and the burden is on the servant to show that he has not.[8] Negligence will not ordinarily be presumed from the mere happening of an accident.[9]

R. Co. *v.* Hughes, 119 Pa. St. 301, 13 Atl. 286.

7. Little Rock & Ft. S. R. Co. *v.* Eubanks, 48 Ark. 460, 3 S. W. 808; Mickee *v.* Walter A. Wood Mow. & Reap. Mach. Co., 77 Hun 559, 28 N. Y. Supp. 918; Borden *v.* Delaware L. & W. R. Co., 131 N. Y. 671, 30 N. E. 586; Crown *v.* Orr, 140 N. Y. 450, 35 N. E. 648.

8. *United States.* — Flippen *v.* Kimball, 87 Fed. 258; Texas & P. R. Co. *v.* Barrett, 166 U. S. 617; Hodges *v.* Kimball, 104 Fed. 745; Mountain Copper Co. *v.* Van Buren, 123 Fed. 61.

Alabama. — Smoot *v.* Mobile & M. R. Co., 67 Ala. 13; Mobile & O. R. Co. *v.* Thomas, 42 Ala. 672.

Arkansas. — St. Louis I. M. & S. R. Co. *v.* Harper, 44 Ark. 524.

California. — Sappenfield *v.* Main St. & A. P. R. Co., 91 Cal. 48, 27 Pac. 590.

Georgia. — Railey *v.* Garbutt, 112 Ga. 288, 37 S. E. 360.

Illinois. — Chicago & A. R. Co. *v.* Few, 15 Ill. App. 125; Chicago & E. I. R. Co. *v.* Geary, 110 Ill. 383.

Indiana. — Louisville N. A. & C. R. Co. *v.* Sandford, 117 Ind. 265, 19 N. E. 770; Louisville & N. R. Co. *v.* Orr, 84 Ind. 50.

Maryland. — O'Connell *v.* Baltimore & O. R. Co., 20 Md. 212; Hanrathy *v.* Northern C. R. Co., 46 Md. 280.

Massachusetts. — Robinson *v.* Blake Mfg. Co., 143 Mass. 528, 10 N. E. 314.

Michigan. — Peppett *v.* Michigan Cent. R. Co., 119 Mich. 640, 78 N. W. 900.

Missouri. — Krampe *v.* St. Louis Brew. Ass'n, 59 Mo. App. 277.

New Jersey. — Fenderson *v.* Atlantic City R. Co., 56 N. J. L. 708, 31 Atl. 767; Schaumberger *v.* Somerset Chemical Co., 69 N. J. L. 234, 54 Atl. 247.

New York. — Painton *v.* North Cent. R. Co., 83 N. Y. 7; Corcoran *v.* New York, N. H. & H. R. Co., 58 App. Div. 606, 69 N. Y. Supp. 73.

Pennsylvania. — Snodgrass *v.* Carnegie Steel Co., 173 Pa. St. 228, 38 Atl. 1104; Spees *v.* Boggs, 198 Pa. St. 112, 47 Atl. 875.

Tennessee. — East Tennessee V. & G. R. Co. *v.* Stewart, 13 Lea 432.

Texas. — Gulf C. & S. F. R. Co. *v.* Redeker, 67 Tex. 181, 2 S. W. 513.

West Virginia. — Humphreys *v.* Newport News & M. V. R. Co., 33 W. Va. 135, 10 S. E. 39; Comer *v.* Consolidated Coal & Min. Co., 34 W. Va. 533, 12 S. E. 476.

See further on this subject the article "NEGLIGENCE."

9. *United States.* — Smith *v.* Memphis & L. R. Co., 18 Fed. 304; Patton *v.* Texas & P. R. Co., 179 U. S. 658; Posey *v.* Scoville, 10 Fed. 140 (the explosion of a boiler was held to be *prima facie* evidence of negligence, under § 4418 Rev. Stat). See also Baltimore & O. R. Co. *v.* Burris, 111 Fed. 882, construing statute of Ohio.

Arkansas. — St. Louis I. M. & S. R. Co. *v.* Harper, 44 Ark. 524.

California. — Madden *v.* Occidental & O. S. S. Co., 86 Cal. 445, 25 Pac. 5; Brymer *v.* Southern Pacific Co., 90 Cal. 496, 27 Pac. 371.

Colorado. — Murray *v.* Denver & R. G. R. Co., 11 Colo. 124, 17 Pac. 484.

Georgia. — Palmer Brick Co. *v.* Chenall, 119 Ga. 837, 47 S. E. 329.

Illinois. — Garden City Wire Spring Co. *v.* Boecker, 94 Ill. App. 96; Omaha Packing Co. *v.* Murray, 112 Ill. App. 233.

Iowa. — Kuhns *v.* Wisconsin I. & N. R. Co., 70 Iowa 561, 31 N. W. 868.

Michigan. — Toomey *v.* Eureka Iron & Steel Works, 89 Mich. 249, 50 N. W. 850; Robinson *v.* Wright, 94 Mich. 283, 53 N. W. 938; Hennig *v.* Globe Foundry Co., 112 Mich. 616, 71 N. W. 156.

Missouri. — Blanton *v.* Dold, 109 Mo. 64, 18 S. W. 1149; Smith *v.* Missouri Pac. R. Co., 113 Mo. 70, 20 S. W. 896.

Oklahoma. — Neeley *v.* Southwest-

b. *Admissibility of Evidence.* — **(1.) Condition of Machinery Before and After Accident.** — Evidence of the condition of machinery shortly prior to the accident is admissible to show the condition at the time of the accident,[10] and especially where the condition was permanent in its nature,[11] but Indiana has held to the contrary.[12] Some jurisdictions hold that evidence of the condition of the machinery immediately after the accident is admissible,[13] while other courts hold the contrary,[14] and under either doctrine such evidence is not admissible where the condition was such as was likely to result by reason of the accident.[15] Evidence that the defective condition could have been made safe with slight alteration is admissible as tending to show want of due care,[16] but if the servant knows of the dangers such evidence is immaterial.[17]

(2.) Insurance Against Loss. — It is immaterial what motive the master may have had for being careful, but the question is whether he actually exercised due care,[18] and evidence that he insured himself against loss by reason of injuries to employes is immaterial.[19]

ern C. S. O. Co., 13 Okla. 356, 75 Pac. 537.

Pennsylvania. — Ash *v.* Verlenden, 154 Pa. St. 246, 26 Atl. 374.

Virginia. — Moore Lime Co. *v.* Johnston, 48 S. E. 557.

For a discussion of the doctrine "*Res Ipsa Loquitur*" see article "NEGLIGENCE."

10. Little Rock & Ft. S. R. Co. *v.* Eubanks, 48 Ark. 460, 3 S. W. 808; Pioneer Cooperage Co. *v.* Romanowicz, 186 Ill. 9, 57 N. E. 864; Brewing Co. *v.* Bauer, 50 Ohio St. 560, 35 N. E. 55; Towle *v.* Stimson Mill Co., 33 Wash. 305, 74 Pac. 471.

Not Necessarily Conclusive of Negligence. — The fact that such evidence is admissible does not necessarily tend to show negligence, the purpose being to show the condition of the machinery, and not necessarily notice to the master. Herrick *v.* Quigley, 101 Fed. 187.

11. Dolphin *v.* Plumley, 175 Mass. 304, 56 N. E. 281.

12. Evidence that a state mining inspector had found, prior to the accident, that the safety catches used on the cages had been removed, is not admissible to show the condition at the time of the accident. Diamond Block Coal Co. *v.* Edmonson, 14 Ind. App. 594, 43 N. E. 242.

13. Gutridge *v.* Missouri Pac. R. Co., 94 Mo. 468, 7 S. W. 476; St. Louis P. & N. R. Co. *v.* Dorsey, 89 Ill. App. 555.

In Woods *v.* Long Island R. Co., 159 N. Y. 546, 54 N. E. 1095, evidence of the condition of car brakes twenty minutes after the accident was held admissible.

In Reese *v.* Morgan Sil. Min. Co., 17 Utah 489, 54 Pac. 759, it was held that one who had visited a mine four days after an accident, and who had seen the ladder causing the accident, might testify as to its condition.

14. Dacey *v.* New York N. H. & H. R. Co., 168 Mass. 479, 47 N. E. 418; Perry *v.* Michigan Cent. R. Co., 108 Mich. 130, 65 N. W. 608; Ketterman *v.* Dry Fork R. Co., 48 W. Va. 606, 37 S. E. 683.

15. Robinson *v.* Wright, 94 Mich. 283, 53 N. W. 938.

16. Turner *v.* Goldsboro Lumb. Co., 119 N. C. 387, 26 S. E. 23.

17. O'Connor *v.* Whittal, 169 Mass. 563, 48 N. E. 844; Tenanty *v.* Boston Mfg. Co., 170 Mass. 323, 49 N. E. 654; Smith *v.* Beaudry, 175 Mass. 286, 56 N. E. 596. See further on this subject the article "NEGLIGENCE."

18. Willey *v.* Boston Elec. L. Co., 168 Mass. 40, 46 N. E. 395; Sawyer *v.* J. M. Arnold Shoe Co., 90 Me. 369, 38 Atl. 333; Barrett *v.* Bonham Oil & Cotton Co. (Tex. Civ. App.), 57 S. W. 602.

19. Anderson *v.* Duckworth, 162

(3.) **Statements, Admissions and Declarations.** — (A.) Of Other Employes. — Statements, admissions or declarations of a foreman or superintendent are generally admissible when they show knowledge of the conditions prior to or at the time of the accident,[20] or are part of the *res gestae*.[21] Opinions of a foreman are not admissible to bind the master.[22]

(B.) Of the Servant or Master. — Admissions, statements or declarations of the injured servant are not usually admissible in his behalf[23] unless they are part of the *res gestae*.[24] Admissions of the master against his interest are admissible in behalf of the servant.[25]

2. Of the Servant. — Violation of Rules. — A. In General. The master may defeat an action by the servant to recover for injuries by showing that the injury resulted by reason of the violation of known rules adopted by the former,[26] and evidence of the

Mass. 251, 38 N. E. 510; Herrin *v.* Daly, 80 Miss. 340, 31 So. 790.

20. Held Admissible. — Colorado City *v.* Liafe, 28 Colo. 468, 65 Pac. 630; Missouri K. & T. R. Co. *v.* Young, 4 Kan. App. 219, 45 Pac. 963.

In Brady *v.* Norcross, 174 Mass. 442, 54 N. E. 874, a conversation between two foremen as to the defective condition of a scaffolding was held admissible to show knowledge.

In Krogg *v.* Atlanta & W. P. R. Co., 77 Ga. 202, a statement by the general manager of a railroad as to the condition of the road, made directly after the accident, was held admissible to show condition of the road and knowledge of the company. See also St. Louis & S. F. R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408.

Held Inadmissible. — In Verry *v.* Burlington, C. R. & M. R. Co., 47 Iowa 549, a declaration of a car repairer that he knew of the defective condition of a car is not admissible unless made while in the performance of his duties as repairer.

In Baker *v.* Allegheny Valley R. Co., 95 Pa. St. 211, a statement of an agent of a master was held inadmissible unless it showed knowledge of the condition prior to the accident.

Statements of mine employes as to how another employe lost his life are inadmissible unless made immediately after and at the place of the accident. Lexington & C. C. Min. Co. *v.* Huffman, 17 Ky. L. Rep. 775, 32 S. W. 611.

21. Elledge *v.* National City & O. R. Co., 100 Cal. 282, 34 Pac. 720.

Statements and declarations have been held inadmissible as part of the *res gestae* in Norfolk & C. R. Co. *v.* Suffolk Lumb. Co., 92 Va. 413, 23 S. E. 737; Garrick *v.* Florida C. & P. R. Co., 53 S. C. 448, 31 S. E. 334.

22. Leistritz *v.* American Zylonite Co., 154 Mass. 382, 28 N. E. 294, was an action by an infant to recover for injuries sustained in defendant's mill. Plaintiff having testified that he told the foreman immediately after the accident that it was caused by a machine at which he was set to work by the sub-foreman, cannot testify that the foreman then said that it was just like the sub-foreman to set him on a machine that he didn't know anything about. See also Fisher *v.* Nubian Iron Enamel Co., 60 Ill. App. 568.

23. Howard *v.* Savannah F. & W. R. Co., 84 Ga. 711, 11 S. E. 452.

In Miles *v.* Chicago R. I. & P. R. Co., 76 Mo. App. 484, a statement by an injured servant to one having charge of the work as to how the injury occurred, on the understanding that it should not be repeated, was held inadmissible.

24. Little Rock, M. & R. & T. R. Co. *v.* Leverett, 48 Ark. 333, 3 S. W. 150.

25. Strahlendorf *v.* Rosenthal, 30 Wis. 674. See further on this subject the article "Negligence."

26. *United States.* — West *v.* Southern Pacific Co., 85 Fed. 392; Richmond & D. R. Co. *v.* Finley, 63 Fed. 228; Gleason *v.* Detroit, G. H. & M. R. Co., 73 Fed. 647; Terre Haute & I. R. Co. *v.* Mansberger, 65 Fed. 196; E. S. Higgins Carpet Co. *v.* O'Keefe, 79 Fed. 900.

Alabama. — Louisville & N. R. Co. *v.* Stutts, 105 Ala. 368, 17 So. 29; Richmond & D. R. Co. *v.* Thomason, 99 Ala. 471, 12 So. 273; Shorter *v.* Southern R. Co., 121 Ala. 158, 25 So. 853; Pryor *v.* Louisville & N. R. Co., 90 Ala. 32, 8 So. 55.

Arkansas. — St. Louis I. M. & S. R. Co. *v.* Rice, 51 Ark. 467, 11 S. W. 699.

California. — Leahy *v.* Southern Pac. R. Co., 65 Cal. 150, 3 Pac. 622.

Georgia. — East Tennessee V. & G. R. Co. *v.* Kane, 92 Ga. 187, 18 S. E. 18; Bird *v.* Sparks, 100 Ga. 616, 28 S. E. 395; Central R. & Bkg. Co. *v.* Kitchens, 83 Ga. 83, 9 S. E. 827.

Illinois. — Illinois Cent. R. Co. *v.* Neer, 26 Ill. App. 356; Illinois Cent. R. Co. *v.* Patterson, 93 Ill. 290; Chicago & A. R. Co. *v.* Myers, 95 Ill. App. 578; Illinois Cent. R. Co. *v.* Winslow, 56 Ill. App. 462; Abend *v.* Terre Haute & I. R. Co., 111 Ill. 202.

Indiana. — Louisville, N. A. & C. R. Co. *v.* Heck, 151 Ind. 292, 50 N. E. 988; Lake Shore & M. S. R. W. Co. *v.* McCormick, 74 Ind. 440; Louisville E. & St. L. Consol. R. Co. *v.* Utz, 133 Ind. 265, 32 N. E. 881.

Iowa. — York *v.* Chicago M. & St. P. R. Co., 98 Iowa 544, 67 N. W. 574; Horan *v.* Chicago St. P. M. & O. R. Co., 89 Iowa 328, 56 N. W. 507; Sedgwick *v.* Illinois Cent. R. Co., 76 Iowa 340, 41 N. W. 35; Deeds *v.* Chicago R. I. & P. R. Co., 74 Iowa 154, 37 N. W. 124.

Kentucky. — Louisville & N. R. Co. *v.* Hiltner, 22 Ky. L. Rep. 1141, 60 S. W. 2; Louisville & N. R. Co. *v.* Scanlon, 22 Ky. L. Rep. 1400, 60 S. W. 643.

Michigan. — Conger *v.* Flint & P. M. R. Co., 86 Mich. 76, 48 N. W. 695; Lyon *v.* Detroit L. & L. M. R. Co., 31 Mich. 429; Nichols *v.* Chicago & W. M. R. Co., 125 Mich. 394, 84 N. W. 470; Fluhrer *v.* Lake Shore & M. S. R. Co., 121 Mich. 212, 80 N. W. 23.

Minnesota. — Merritt *v.* Great Northern R. Co., 81 Minn. 496, 84 N. W. 321; Green *v.* Brainerd & N. M. R. Co., 85 Minn. 318, 88 N. W. 974; Nordquist *v.* Great Northern R. Co., 89 Minn. 485, 95 N. W. 322.

Mississippi. — Memphis & C. R. Co. *v.* Thomas, 51 Miss. 637; Richmond & D. R. Co. *v.* Rush, 71 Miss. 987, 15 So. 133.

Missouri. — Barry *v.* Hannibal & St. J. R. Co., 98 Mo. 62, 11 S. W. 308; Dickson *v.* Omaha & St. L. R. Co., 124 Mo. 140, 27 S. W. 476; Zumwalt *v.* Chicago & A. R. Co., 35 Mo. App. 661; Renfro *v.* Chicago R. I. & P. R. Co., 86 Mo. 302.

New York. — Sutherland *v.* Troy & B. R. Co., 125 N. Y. 737, 26 N. E. 609; La Croy *v.* New York L. E. & W. R. Co., 132 N. Y. 570, 30 N. E. 391; Cullen *v.* National Sheet Metal Roofing Co., 114 N. Y. 45, 20 N. E. 831. But see case of Gross *v.* Pennsylvania P. & B. R. Co., 62 Hun 619, 16 N. Y. Supp. 616, *holding* that nonobservance of rule was not necessarily contributory negligence.

North Carolina. — Rittenhouse *v.* Wilmington St. R. Co., 120 N. C. 544, 26 S. E. 922.

Pennsylvania. — Northern C. R. Co. *v.* Husson, 101 Pa. St. 1.

Rhode Island. — McGrath *v.* New York & N. E. R. Co., 15 R. I. 95, 22 Atl. 927.

Tennessee. — East Tennessee V. & G. R. Co. *v.* Smith, 89 Tenn. 114, 14 S. W. 1077; Louisville & N. R. R. *v.* Reagan, 96 Tenn. 128, 33 S. W. 1050.

Texas. — Gulf C. & S. F. R. Co. *v.* John, 9 Tex. Civ. App. 342, 29 S. W. 558; Fritz *v.* Missouri K. & G. R. Co., (Tex. Civ. App.), 30 S. W. 85; Galveston & S. A. R. Co. *v.* Adams, 94 Tex. 100, 58 S. W. 831; Pilkinton *v.* Gulf C. & S. F. R. Co., 70 Tex. 226, 70 S. W. 805; San Antonio & A. P. R. Co. *v.* Wallace, 76 Tex. 636, 13 S. W. 565.

Virginia. — Norfolk & W. R. Co. *v.* Williams, 89 Va. 165, 15 S. E. 522; Richmond & D. R. Co. *v.* Dudley, 90 Va. 304, 18 S. E. 274; Norfolk & W. R. Co. *v.* Briggs, 14 S. E. 753.

West Virginia. — Johnson *v.* Chesapeake & O. R. Co., 38 W. Va. 206, 18 S. E. 573; Davis *v.* Nuttallsburg Coal & Coke Co., 34 W. Va. 500, 12 S. E. 539.

Wisconsin. — Baltzer *v.* Chicago M. & N. R. Co., 83 Wis. 459, 53 N. W. 885; Lockwood *v.* Chicago & N. W. R. Co., 55 Wis. 50, 12 N. W. 401; Hulien *v.* Chicago & N. W. R. Co., 107 Wis. 122, 82 N. W. 710.

rules is admissible for such purpose,[27] although such evidence has been held inadmissible in the absence of any showing that the servant violated the rules.[28] Rules are admissible without proof of the servant's knowledge thereof, as the latter fact only goes to the effect and not to the admissibility.[29]

B. Evidence To Show Knowledge of Rules. — It is unnecessary for the master to prove that he has delivered a copy of the rules to the servant, but he may show that he has posted the same where orders were usually posted,[30] and it has been held that where the rules have been posted and distributed among the employes it is unnecessary to show knowledge thereof by any particular servant.[31] Evidence that an engineer had a book of rules is no evidence that a switchman had any knowledge of them.[32] An application for employment is admissible to show knowledge of rules.[33] Where the evidence is conflicting as to whether the servant knew, it is for the jury to determine.[34]

C. Waiver of Rules by Master. — Evidence of a custom of employes to violate rules,[35] or of occasional violations to the knowl-

27. Memphis & C. R. Co. *v.* Askew, 90 Ala. 5, 7 So. 823.

A rule of a railroad company providing, "Employes are warned against taking risks in entering between cars while in motion to uncouple them. An employe careless of himself is liable to discharge," is admissible against the objection that it is merely advisory. Ford *v.* Chicago, R. I. & P. R. Co., 91 Iowa 179, 59 N. W. 5.

28. Lake E. & W. R. Co. *v.* Mugg, 132 Ind. 168, 31 N. E. 564; Jeffrey *v.* Keokuk & D. M. R. Co., 51 Iowa 439, 1 N. W. 765.

29. Helton *v.* Alabama M. R. Co., 97 Ala. 275, 12 So. 276; Parker *v.* Georgia Pac. R. Co., 83 Ga. 539, 10 S. E. 233.

30. Lehigh Valley R. Co. *v.* Synder, 56 N. J. L. 326, 28 Atl. 376.

31. Alcorn *v.* Chicago & A. R. Co. (Mo.), 16 S. W. 229.

32. Springs *v.* Southern R. Co., 130 N. C. 186, 41 S. E. 100.

33. In an action by a brakeman for an injury received while attempting to uncouple cars while in motion, the contract he made with the company wherein he acknowledged that he was acquainted with a rule forbidding the uncoupling of cars while in motion, and in which he agreed to hold the company harmless for any injury received while doing the forbidden act, was held admissible, not only because it showed the existence of the rule, but because it also showed knowledge of the servant. Sedgwick *v.* Illinois Cent. R. Co., 73 Iowa 158, 34 N. W. 790.

34. Louisville & N. R. Co. *v.* Watson, 90 Ala. 68, 8 So. 249.

35. St. Louis A. & T. R. Co. *v.* Triplett, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266; Hissony *v.* Richmond & D. R. Co., 91 Ala. 514, 8 So. 766; Alabama G. S. R. Co. *v.* Ritchie, 111 Ala. 297, 20 So. 49; Louisville & N. R. Co. *v.* Richardson, 100 Ala. 232, 14 So. 209; Strong *v.* Iowa C. R. Co., 94 Iowa 380, 62 N. W. 799; Gulf C. & S. F. R. Co. *v.* McMahan, 6 Tex. Civ. App. 601, 26 S. W. 159.

In Central Georgia R. Co. *v.* Goodwin, 120 Ga. 83, 47 S. E. 641, an employe agreed to abide by certain rules of the railroad company, and an issue having been raised as to whether those rules had been mutually abandoned, it was held that evidence of the non-observance of such rules prior to the agreement was not admissible.

Where it is claimed that a rule of a railroad company forbidding the uncoupling of cars while in motion has been waived on the whole system, evidence that its violation was acquiesced in at a point on the road other than where the injury occurred

edge of the master,[36] is admissible as showing that the master waived compliance with his rules, or that they were not imperative.

VIII. ACTIONS BY THIRD PERSONS FOR INJURIES.

1. Competency of Servant. — Evidence that a servant was possessed of the proper skill and experience is admissible to show his competency,[37] and on the other hand, evidence of the habits of the employe is competent to show that he could not be trusted with such work,[38] or that the master knew of his unfitness.[39] Evidence that the servant was prudent and careful is not admissible to show that he exercised due care on the occasion of the injury,[40] and on the other hand, evidence of the general incapacity of the servant[41] is not admissible on the question of negligence.

2. Drunkenness. — Evidence that a servant had taken several drinks on the day of the accident is admissible, even though it is admitted that he was not intoxicated at the time of the accident.[42] Evidence that the master knew of the servant's intemperate habits is admissible.[43]

3. Rules, Orders or Directions to Servant. — Where the alleged negligence was the violation of rules adopted by the master, a book containing such rules is admissible,[44] but the contrary has been held

is admissible. Spaulding *v.* Chicago St. P. & K. C. R. Co., 98 Iowa 205, 67 N. W. 227.

Where a rule of a railroad company provided that the engineer should not give another charge of his engine, evidence that he gave a watchman temporary charge during a sick spell is admissible to show that the rule was not intended to apply to such a case. East Line & R. R. R. Co. *v.* Scott, 71 Tex. 703, 10 S. W. 298.

36. Knowledge by the Master Must Be Shown. — Wallace *v.* Boston & M. R. R., 72 N. H. 504, 57 Atl. 913.

37. Peterson *v.* Adamson, 67 Iowa 739, 21 N. W. 709.

38. Where plaintiff was damaged by the negligence of a contractor employed by defendant, testimony as to the habits of the contractor was held admissible to show that he could not be trusted with such work, and to compel the defendant to show that he used proper care in selecting the contractor. Berg *v.* Parsons, 90 Hun 267, 35 N. Y. Supp. 780.

39. A servant's notorious habit of leaving his team unhitched in the street is admissible to show that the master knew of such acts. Schulte *v.* Holliday, 54 Mich. 73, 19 N. W. 752.

40. Towle *v.* Pacific Imp. Co., 98 Cal. 342, 33 Pac. 207.

41. Central R. & Bkg. Co. *v.* Roach, 64 Ga. 635. See also Fonda *v.* St. Paul City R. Co., 71 Minn. 438, 74 N. W. 166.

42. Vernon *v.* Cornwell, 104 Mich. 62, 62 N. W. 175.

In an action for injuries alleged to have been caused by the negligence of the driver of defendant's team and carriage, evidence that the driver was not addicted to the use of intoxicating liquors was held immaterial and to be raising a collateral issue where the question was whether or not he was intoxicated at or about the time of the accident. Williams *v.* Edmunds, 75 Mich. 92, 42 N. W. 534.

43. Vernon *v.* Cornwell, 104 Mich. 62, 62 N. W. 175.

44. In an action by a passenger to recover for injuries alleged to have resulted by reason of the failure of defendant's servants to follow the rules adopted by the company, a book containing such rules was held admissible. Hobbs *v.* Eastern R. Co., 66 Me. 572.

in Minnesota.[45] A witness may testify that he heard the master order the servants not to do the act complained of,[46] although it has been held that evidence of the instructions given by the master is inadmissible.[47] The master may show where his servants were authorized to go on a particular day to show that if one was present at the place of the accident he was not acting within the scope of his employment.[48]

45. Fonda *v.* St. Paul City R. Co., 71 Minn. 438, 74 N. W. 166.

46. In Moe *v.* Job, 1 N. D. 140, 45 N. W. 700, an action to recover damages occasioned by fires alleged to have been set by defendant's servants, it was held proper to allow a witness to testify that he heard the defendant order the servant not to set fires.

47. Read *v.* Pennsylvania R. Co., 44 N. J. L. 280.

48. In an action to recover for injuries alleged to have been caused by the negligent driving of an employe of defendant, the latter may show where each of its drivers was authorized to go on that particular day, and that none of them were authorized to travel over the street where the accident occurred, and that if one was there he was not acting within the scope of his employment. Perlstein *v.* American Exp. Co., 177 Mass. 530, 59 N. E. 194.

MATERIALITY.

By Charles A. Robbins.

CROSS-REFERENCES:

Competency;
Relevancy.

I. DEFINITION AND DISTINCTION.

1. In General. — The terms materiality and immateriality, as used in the law of evidence, do not appear to have been clearly defined or distinguished from the terms relevancy and irrelevancy, either by courts or text writers. That materiality has been used interchangeably with relevancy — that is, as meaning a logical sequence between the fact offered in evidence and the fact to be proved — is apparent in numerous cases[1] and texts.[2] It even appears to have been used occasionally where competency would seem the appropriate term.[3] It has been definitely decided, however, that an objection to evidence as "immaterial" does not present the question of its competency.[4]

2. Materiality in Contrast With Admissibility. — A discriminating writer uses materiality in contrast with admissibility, "the former denoting the status of the proposition in the case at large [as matter of substantive law], and the latter defining the relation of an evidentiary fact to some proposition." Again he says a fact offered is

1. People *v.* Manning, 48 Cal. 335; Lane *v.* Boston & A. R. Co., 112 Mass. 455; Meyer *v.* Berlandi, 53 Minn. 59, 54 N. W. 937; Claflin *v.* New York Standard Watch Co., 7 Misc. 668, 28 N. Y. Supp. 42.

An objection to testimony as "immaterial" was overruled on the ground that it was "relevant" under the issues. Freese *v.* Veith, 26 N. Y. St. 113, 7 N. Y. Supp. 134.

In Pangburn *v.* State (Tex. Crim.), 56 S. W. 72, the court said that "materiality does not have the same signification as relevancy," but the distinction was not pointed out.

2. Apparently no distinction between materiality and relevancy is made in the works of Best, Bradner, Elliott, Greenleaf, Phillips, Rice, Stephen, Wharton.

Material and relevant seem to be used interchangeably in characterizing testimony upon which a charge of perjury is founded (Ros. Crim. Ev., p. 849), or testimony upon which a witness may be impeached by evidence of contradictory statements. Josephi *v.* Furnish, 27 Or. 260, 41 Pac. 424; Elliott on Ev., § 1020. See article "Impeachment of Witnesses," Vol. VII, p. 78.

3. Waymire *v.* Waymire, 141 Ind. 164, 40 N. E. 523. See also Durst *v.* Burton, 47 N. Y. 167; Cowles *v.* Merchants, 140 Mass. 377, 5 N. E. 288.

4. People *v.* Manning, 48 Cal. 335; Averill *v.* Hurd, 15 Civ. Proc. 162 2 N. Y. Supp. 166.

immaterial when the "proposition desired to be proved is either not tenable by the substantive law or is not issuable by the law of pleading."[5] The use of the term immaterial to characterize evidence of collateral facts having no legal significance in the particular action seems justified by usage;[6] but the term irrelevant is even more frequently applied to such evidence.[7]

3. Materiality as Weight or Importance. — The term materiality appears to be used also in a sense approximating importance or weight as applied to otherwise relevant evidence.[8] So evidence of a fact admitted by the other party,[9] or that could not have influenced

5. Wigmore on Ev., § 2.

6. *California.* — Barnhart *v.* Fulkerth, 93 Cal. 497, 29 Pac. 50; Faivre *v.* Daley, 93 Cal. 664, 29 Pac. 256; Burke *v.* Koch, 75 Cal. 356, 17 Pac. 228.

Massachusetts. — Cowles *v.* Merchants, 140 Mass. 377, 5 N. E. 288; Reyer *v.* Odd Fellows Fraternal Acc. Ass'n, 157 Mass. 367, 32 N. E. 469, 34 Am. St. Rep. 288.

Michigan. — Davis *v.* Gerber, 69 Mich. 246, 37 N. W. 281.

New York. — Schuchman *v.* Winterbottom, 130 N. Y. 699, 30 N. E. 63; Chapin *v.* Hollister, 7 Lans. 456; Green *v.* Rochester Iron Mfg. Co., 1 Thomp. & C. 5.

West Virginia. — Kyger *v.* Roberts, 27 W. Va. 418.

See also Durst *v.* Burton, 47 N. Y. 167.

Evidence to support an immaterial issue has been called immaterial. Fry *v.* Provident Sav. L. Assur. Soc. (Tenn. Ch.), 38 S. W. 116.

7. Galbreath *v.* Cole, 61 Ala. 139; Martin *v.* Tobin, 123 Mass. 85; Mathias *v.* O'Neill, 94 Mo. 520, 6 S. W. 253; Capron *v.* Adams, 28 Md. 529; Fonda *v.* Lape, 56 Hun 639, 8 N. Y. Supp. 792; Thomas *v.* Black, 84 Cal. 221, 23 Pac. 1037; Indianapolis Journal Newspaper Co. *v.* Pugh, 6 Ind. App. 510, 33 N. E. 991.

See article "RELEVANCY."

8. Dexter *v.* Clemans, 17 Pick. (Mass.) 175.

"Material is used in a double sense. It may express the amount of weight to be given to a fact approximating to relevant in meaning, or it may be that certain facts in issue are material —*i. e.*, necessary to be proved." Underhill, § 7.

"Having legal significance in the cause; having such a relation to the question in controversy that it may or ought to have some influence on the determination of the cause." — Century Dictionary.

"Materialty — The property of substantial importance or influence, especially as distinguished from formal requirement. Capability of properly influencing the result of the trial." — Bouvier's Law Dictionary.

"Material Evidence — Evidence important to a just determination of the issue; capable of affecting the result. Immaterial Evidence — Evidence not directly pertinent to the issue; not important enough to change the result." — Anderson's Law Dictionary.

"Evidence offered in a cause, or a question propounded, is material when 'it is relevant and goes to the substantial matters in dispute, or has a legitimate and effective influence or bearing on the decision of the case.'— Black's Law Dictionary. Relevant, as applied to evidence, must be understood as meaning that it touches upon the issues which the parties have made by their pleadings so as to assist in getting at the truth of the facts disputed." McAdam, J., in Porter *v.* Valentine, 18 Misc. 213, 41 N. Y. Supp. 507. Hence the policy of insurance upon which the action was founded was not immaterial.

Material evidence, within the meaning of a statute requiring the corroboration of plaintiff in an action for breach of promise of marriage, means sufficient evidence to justify submitting the case to a jury. Bessela *v.* Stern, 2 C. P. Div. (Eng.) 265; Wiedemann *v.* Walpole, 2 Q. B. 534.

9. Smith *v.* Satterlee, 12 N. Y. St.

the result of the action,[10] has been called immaterial. In this sense, also, the word material is applied to newly discovered evidence in the law at new trials.[11]

626; Vogel *v.* Harris, 112 Ind. 494, 14 N. E. 385; White *v.* Old Dominion S. S. Co., 102 N. Y. 661, 6 N. E. 289. See article "CUMULATIVE EVIDENCE," Vol. IV, p. 925.

10. Morrissey *v.* Ingham, 111 Mass. 63; Allendorph *v.* Wheeler, 101 N. Y. 649, 5 N. E. 42; Bartlett *v.* Hubert, 21 Tex. 8.

11. Spelling on New Trials, § 220 *et seq.*; 1 Graham & Waterman on New Trials, p. 463 *et seq.*

MAYHEM.

By A. P. Rittenhouse.

I. BURDEN OF PROOF. — PRESUMPTIONS.

1. Malicious and Intentional Injury. — In order to convict a person of the crime of mayhem it is incumbent on the prosecution to prove that the injury was inflicted by the defendant maliciously and intentionally.[1]

1. State *v.* Simmons, 3 Ala. 497; State *v.* Ma Foo, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414; State *v.* Cody, 18 Or. 506, 23 Pac. 891.

Three Facts Must Be Established. In the case of United States *v.* Gunther, 5 Dak. 234, 38 N. W. 79, the court declared that the evidence must establish three facts, viz., that the defendant inflicted the injury; that it was done maliciously; that it was done with intent to maim or disfigure. In the case of United States *v.* Scroggins, 1 Hemp. 478, 27 Fed. Cas. No. 16,243, it was said that the real injury was whether a limb or member

2. Premeditation and Deliberation. — As a general rule it is not necessary to prove premeditation or deliberation;[2] but in some jurisdictions it is required.[3]

3. Burden of Proof. — Reasonable Doubt. — It is incumbent upon the prosecution to establish beyond a reasonable doubt every fact necessary to constitute the crime.[4]

4. Intent Presumed From Nature of Act. — When it is fully proved that the defendant inflicted the injury, intent may be inferred from the nature of the act, without being expressly proved.[5]

5. Malice Inferred From Circumstances. — Malice may be inferred from the circumstances attending the perpetration of the injury.[6]

6. Intentional Injury Implies Malice. — Where the infliction of the injury is proved to be intentional the law presumes it to be malicious.[7]

7. Injury Presumed To Be Permanent. — Where an injury is proved to have had the effect of disabling or disfiguring a person, it

had been disabled or disfigured purposely and maliciously, and with intent to maim or disfigure.

2. State *v.* Simmons, 3 Ala. 497; People *v.* Wright, 93 Cal. 564, 29 Pac. 240; State *v.* Girkin, 23 N. C. 121; State *v.* Terrell, 86 Tenn. 523, 8 S. W. 212.

3. **Premeditated Design Not Inferred from Act.** — In New York a premeditated design must be shown by proof that the defendant lay in wait for the purpose of committing the act, or in some other manner evinced design. The existence of such design cannot be found simply from proof of the commission of the act itself. Godfrey *v.* People, 63 N. Y. 207.

The manner in which such premeditated design is evinced, and the circumstances establishing it, are matters of evidence to be given at the trial. Tully *v.* People, 67 N. Y. 15.

Premeditated Design Must Be Shown. — State *v.* Cody, 18 Or. 506, 23 Pac. 891; Respublica *v.* Langcake, 1 Yeates (Pa.) 415.

4. State *v.* Simmons, 3 Ala. 497; State *v.* Ma Foo, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414; United States *v.* Gunther, 5 Dak. 234, 38 S. W. 79.

Burden Never Shifts. — The facts necessary to constitute the crime of mayhem must be proven by the prosecution. The burden of showing the non-existence of such facts is never on the defendant. State *v.* Conahan, 10 Wash. 268, 38 Pac. 996.

5. An intent to maim or disfigure is *prima facie* to be inferred from proof of the act which does in fact maim or disfigure, and when such act is proved it is not necessary to otherwise prove the specific intent, unless evidence of a different intent, or of the absence of the intent mentioned in the statute be adduced. State *v.* Girkin, 23 N. C. 121; State *v.* Skidmore, 87 N. C. 509; State *v.* Crawford, 13 N. C. 425; State *v.* Evans, 2 N. C. 325; State *v.* Irwin, 2 N. C. 130; State *v.* Hair, 37 Minn. 351, 34 N. W. 893; Terrell *v.* State, 86 Tenn. 523, 8 S. W. 212; Davis *v.* State, 22 Tex. App. 45, 2 S. W. 630; United States *v.* Gunther, 5 Dak. 234, 38 N. W. 79.

6. Respublica *v.* Langcake, 1 Yeates (Pa.) 415. The law presumes an act malicious where the attendant circumstances are the ordinary symptoms of a wicked, depraved, malignant heart. Foster (Eng.) 256.

7. **Malice Involved in Act of Maiming.** — When the act is proved, the law presumes that it was done maliciously, unless evidence tends to show the contrary. People *v.* Wright, 93 Cal. 564, 29 Pac. 240. Malice is necessarily involved in the act of maiming, if intentionally perpetrated. State *v.* Crawford, 13 N. C. 425.

is presumed that such effect is permanent until proof is given to the contrary.[8]

II. MODE OF PROOF.

1. **Time When Malicious Design Was Formed Immaterial.** — If malice is proved to exist when the injury is inflicted it need not be shown when the malicious design was formed.[9]

2. **Direct Proof of Intent and Malice.** — Intent and malice may be shown by evidence of the conduct and declarations of the defendant in relation to the injured person at the time the injury was inflicted, and previous thereto.[10]

3. **Evidence of Premeditation and Deliberation.** — When it is necessary under a statute to prove premeditation and deliberation, they may be shown by evidence of defendant's conduct toward the injured person, and his declarations concerning him before the infliction of the injury.[11]

III. MATTERS OF DEFENSE.

1. **Disproving Intent and Malice.** — The defendant may introduce in his defense any evidence which tends to disprove malice or intent.[12]

2. **Self-Defense.** — The defendant may show that the injury was necessarily inflicted in defense of his own person.[13]

3. **Accidental Injury.** — The defendant may show that the infliction of the injury was accidental.[14]

4. **Son Assault Demesne.** — The defense of *son assault* is good if it be shown by the evidence that the act resulting in the alleged mayhem was in proportion to the nature of the injury offered to the defendant.[15]

8. Baker *v.* State, 4 Ark. 56.

9. State *v.* Simmons, 3 Ala. 497. United States *v.* Gunther, 5 Dak. 234, 38 N. W. 79.

10. State *v.* Hair, 37 Minn. 351, 34 N. W. 893.

Conduct of Accused.— The conduct of the accused before and at the time of the transaction, the preparations made, threats and declarations tending to show his intention in making the assault, and lying in wait, may be given in evidence to prove intention, premeditation and deliberation. Tully *v.* People, 67 N. Y. 15.

Enmity. — Previous ill-feeling, bad blood, or threats tending to show a probable motive for the crime may be given in evidence by the prosecution; and threats toward the father of children to injure him and his family are competent evidence on a charge of mayhem on one of the children. State *v.* Fry, 67 Iowa 475, 25 N. W. 738.

11. Tully *v.* People, 67 N. Y. 15; Respublica *v.* Langcake, 1 Yeates (Pa.) 415.

12. The defendant is entitled to offer any testimony which tends to prove that the violence inflicted upon the injured party was not intentional or malicious, and it is error to reject it. Bowers *v.* State, 24 Tex. App. 542, 7 S. W. 247, 5 Am. St. Rep 901.

13. State *v.* Hair, 37 Minn. 351, 34 N. W. 893; State *v.* Crawford, 13 N. C. 425; State *v.* Girkin, 23 N. C. 121.

14. State *v.* Hair, 37 Minn. 351, 34 N. W. 893; State *v.* Crawford, 13 N. C. 425; State *v.* Girkin, 23 N. C. 121.

15. In a prosecution for mayhem a previous assault upon a defendant is evidence in justification under a

5. Threats of Prosecutor Not Admissible. — A defendant is not permitted to offer evidence of antecedent and communicated threats of personal violence made against him by the prosecutor.[16]

plea of not guilty, but in order to make it a good justification it must appear that the striking by the defendant was in his own defense, and in proportion to the attack made on him. Hayden *v.* State, 4 Blackf. (Ind.) 546.

16. State *v.* Norton, 82 N. C. 628; State *v.* Skidmore, 87 N. C. 509.

MEASURE OF DAMAGES.—See Damages ; Value.

MECHANICS' LIENS.

By Chas. M. Bufford.

I. EVIDENCE IN ACTIONS ON MECHANICS' LIENS IN GENERAL.

In a proceeding to enforce a mechanic's lien the ordinary rules of evidence,[1] and those governing the competency[2] and examination[3]

1. Under the mechanic's lien law of 1806 no particular kind of evidence is prescribed as necessary to prove that the secured demand was in fact contracted, but the ordinary rules of evidence apply. Church *v.* Davis, 9 Watts (Pa.) 304.

In Illinois a proceeding to foreclose a mechanic's lien being a chancery proceeding, rules of evidence prevalent in such proceedings apply. Kimball *v.* Cook, 6 Ill. 423, Young, J., *dissenting.* So an answer to a petition filed to foreclose a mechanic's lien, so far as responsive to the petition filed therein, and if under oath, is admissible as evidence. Tracy *v.* Rogers, 69 Ill. 662; Garrett *v.* Stevenson, 8 Ill. 261. Likewise the evidence may be taken on deposition. Kimball *v.* Cook, 6 Ill. 423.

2. Kimball *v.* Cook, 6 Ill. 423, Young, J., *dissenting.*

Witness Disqualified by Interest. In an action by an indirect lienor — a material man — to enforce a mechanic's lien, where the original contractor and the owner are joined as parties defendant, although no personal judgment can be rendered against the original contractor, yet he has an interest in the event of the suit, as the judgment might be evidence in an action against him to enforce his liability, and so he is not a competent witness unless a release is executed in his favor by the owner. Dickinson College *v.* Church, 1 Watts & S. (Pa.) 462.

3. In an action to foreclose a mechanic's lien, where a person who had purchased the liened property

of witnesses, are applicable in the absence of special statutory provisions to the contrary.[4]

The General Rule Applied. — Thus no particular order of proof is essential.[5] Where an averment in the petition filed to enforce the lien is admitted by the counter-pleadings evidence thereon is properly excluded.[6] A written contract is the best evidence of its terms.[7] Questions of fact, if any, are to be determined by the jury,[8] and under certain circumstances the jury may take papers with them on their retirement.[9]

and had given a note in part payment therefor, about which he afterward cautioned the public by notice and refused to pay by reason of the lien, is a witness for the defense, it is competent on cross-examination to ask him what he had said and done about the note, for the purpose of showing all his relations to the case. Goulding *v.* Smith, 114 Mass. 487.

4. Although in Illinois an action to foreclose a mechanic's lien is a chancery proceeding, yet under the statute oral testimony is admissible as in suits at law. Kimball *v.* Cook, 6 Ill. 423.

5. In an action to foreclose a mechanic's lien, where plaintiff offers proof that certain materials were used in a building, and afterward offers proof that the notice of claim was duly filed, it is error to sustain the objection to the proof that the filing of the notice must be proved before the fact that the materials were used in the building. "What difference could there be in effect on the adverse party if the furnishing of the material was first shown, and then the filing of the lien?" Bardwell *v.* Anderson, 13 Mont. 87, 32 Pac. 285.

6. Where an action to foreclose a mechanic's lien arising out of a contract to furnish certain machinery is commenced, and the defendants admit the existence of the written contract as set out in the complaint filed therein, it is not error to refuse to permit defendant to introduce such contract in evidence. Kankakee Coal Co. *v.* Crane Bros. Mfg. Co., 28 Ill. App. 371, *reversed* on other points, 128 Ill. 627, 21 N. E. 500.

7. Where a mechanic's lien arises by reason of materials furnished an original contractor in performance of a written contract, the written contract is, in the absence of proof of its loss or destruction, the best evidence of its terms, and the admission of oral testimony of its terms is error. Trammell *v.* Hudmon, 86 Ala. 472, 6 So. 4.

8. The question whether or not there is a lien is an issue upon which the jury are bound to pass, and the court has no right to withdraw it from them; yet under the facts appearing in this case the court ought to instruct the jury that there was no lien to enforce. Williams *v.* Porter, 51 Mo. 441.

Where the testimony in support of a lien makes a *prima facie* case and is uncontradicted, it is proper to instruct the jury to find for plaintiff. Where, however, the evidence is conflicting, or evidence of alleged defensive matters has been given, the determination of the facts is a question for the jury. Camden Wood Turning Co. *v.* Malcolm, 190 Pa. St. 62, 42 Atl. 458.

Where the evidence is conflicting it is the province of the jury to consider the evidence and determine the facts, and an instruction that directs the jury as to their determination is error. Kelly *v.* McGehee, 137 Pa. St. 443, 20 Atl. 623.

9. In a proceeding by a material man to enforce a mechanic's lien for materials furnished a subcontractor, where the claimant's notice of claim of lien contained a bill of particulars shown to be correct, there is no error in permitting the claim as filed to go out with the jury. Odd Fellows' Hall *v.* Masser, 24 Pa. St. 507, 64 Am. Dec. 675.

II. CONSENT OR ESTOPPEL OF OWNER OF LIENED PROPERTY.

1. Burden of Proof of Consent or Estoppel. — Consent or estoppel of the owner must be proved by the plaintiff in an action to enforce the lien.[10]

2. Where Estoppel Prima Facie Shown. — Under the laws of some states the failure of the owner to disclaim responsibility for work done without his express consent is *prima facie* evidence of an estoppel against him, but in such case the owner, to rebut the inference of estoppel, may show that he promptly disclaimed responsibility for the work as soon as matters charging him with notice thereof came to his attention.[11]

3. Necessity of Showing Liability Under Contract. — It is necessary, in cases of valid contracts, for the claimant of a lien to prove the performance of work on the contract with the owner under which he claims,[12] and the fact that at the time the notice of claim of lien was given by him a sum already earned on the contract remained unpaid in the contracting-owner's hands.[13] These are questions of

10. The burden is on a subcontractor who brings suit to foreclose a lien to prove the terms of the contract. Wookey *v.* Slemmons, 65 Ill. App. 553. The plaintiff in a foreclosure suit must show that the defendant was liable in some amount on the alleged lien. Wynn *v.* South River Brick Co., 99 Ga. 126, 24 S. E. 869.

So where a building contract provided that in case of the default of the contractor the owner might finish the work and charge the cost of finishing against himself, and he does in fact so finish it, and the contract further provides that the architect's certificate of the cost of finishing the building shall be conclusive against the defaulting contractor, in an action by an indirect lienor claiming under the defaulting contractor to enforce his lien the certificate is also conclusive evidence in the absence of fraud or mistake, and its exclusion is error.

11. Under a statute providing that the interest of a non-contracting-owner shall be subject to mechanics' liens, in the absence of disclaimer by him after notice of the improvement was received by him, the burden of proof of the making of the disclaimer of liability is on the non-contracting-owner. McCausland *v.* West Duluth Land Co., 51 Minn. 246, 53 N. W. 464.

12. See Tanxley *v.* Lampkin, 113 Ga. 1007, 39 S. E. 473, *holding* that the lien-claimant must show that he has completed his contract.

13. The lien-claimant must affirmatively show the existence of the sum unpaid or to become due the original contractor from the owner at the time of filing his claim. Wookey *v.* Slemmons, 65 Ill. App. 553; Madden *v.* Lennon, 23 Misc. 704, 52 N. Y. Supp. 8; Keavey *v.* De Rago, 20 Misc. 105, 45 N. Y. Supp. 77; Lemieux *v.* English, 19 Misc. 545, 43 N. Y. Supp. 1066; Haswell *v.* Goodchild, 12 Wend. (N. Y.) 373.

"A *prima facie* case is not made out by proving merely the value of the material furnished, and that it was used in the improvement of the real estate, the contract price of the improvements made not being a matter so peculiarly within the knowledge of the owner of the property as to cast upon him the burden of showing that the claim of lien exceeds the amount which he agreed to pay the contractor." Stevens *v.* Georgia Land Co. (Ga.), 50 S. E. 100.

Where in an action by a subcontractor to foreclose a mechanic's lien no evidence is introduced to show that there was any balance remaining due the original contractor by the owner at the time the notice to stop payments was served, a judgment

fact, in all cases when in dispute, to be determined by the jury.[14]

4. Evidence of Agency for Owner of Person Who Contracted. — As the owner may have contracted through an agent who represented him in entering into the contract, evidence that the person who entered into the contract was the agent of the owner of the property to be charged is admissible.[15]

foreclosing the lien cannot be sustained. Schmelzer *v.* Chicago Ave. Sash & Door Mfg. Co., 85 Ill. App. 596.

In an action to foreclose a mechanic's lien, where the original contractor had abandoned the work and it was completed by the owner, and the claimants of liens arising under the original contractor had filed liens, the burden of proof is on them to show the existence of a balance of the contract price in the owner's possession after the cost of completion by him was deducted from the amount lawfully paid the original contractor, such balance being lawfully demandable by such claimants of liens. Beecher *v.* Schuback, 1 App. Div. 359, 37 N. Y. Supp. 325, *affirmed* 158 N. Y. 687, 53 N. E. 1123.

Prima Facie Proof. — It seems that the burden of showing *prima facie* that there is an amount remaining due from the contracting-owner to the original contractor, under whom the plaintiff claims, is met by showing the substantial completion of the improvement together with the fact of non-payment. Rudd *v.* Davis, 1 Hill (N. Y.) 277.

Competency of Evidence and Witnesses. — In an action by a material man to foreclose a mechanic's lien accruing under an original contractor's contract, evidence of the contractor's statements and declarations is not admissible to charge the owner of the property. Grace *v.* Nesbitt, 109 Mo. 9, 20, 18 S. W. 1118.

In an action by an indirect lienor to foreclose a mechanic's lien the owner is competent to testify that before the filing of the notice of claim of lien he had made payments to the original contractor of the amount then owing him. Parsley *v.* David, 106 N. C. 225, 233, 10 S. E. 1028.

Presumption. — Where a building contract provided that the owner might at his option require changes to be made in the plans whereby the contract price might be increased or diminished, in the absence of evidence of what the contract price as finally adjusted amounted to it cannot be presumed, from the fact that payments were made, either that they were in full or in excess of the contract price. Hannah & Lay Mercantile Co. *v.* Hartzell, 125 Mich. 177, 84 N. W. 52.

Work Abandoned Before Completion. — Where an original contractor has abandoned his contract when partially completed, and certain persons under contract with him claim liens, it is error to exclude evidence offered by defendant, (1) as to the value of the work done at the time of abandonment when measured by the standard of the whole contract price, and (2) as to the cost of completing the building according to the plans and specifications. McDonald *v.* Hayes, 132 Cal. 490, 64 Pac. 850.

14. Whether there has been a completion of an improvement, and whether there was a trivial imperfection in the execution of the work, are questions of fact. Marble Lime Co. *v.* Lordsburg Hotel Co., 96 Cal. 332, 31 Pac. 164.

Whether or not a contractor has substantially completed a building contract, by reason whereof he claims a lien on the building and land, is a question for the jury, the evidence being conflicting. Rhodes *v.* Jones, 26 Tex. Civ. App. 568, 64 S. W. 699.

15. Admissible Evidence. — In an action to foreclose a mechanic's lien against a wife's separate property, the building contract having been made by the husband, under a statute providing that proof of a wife's knowledge and consent is *prima facie* evidence that she authorized the contract, where the question is the existence of such knowledge and consent, evidence that she saw the work in progress, and conversed with the

5. Void Contract as Evidence of Measure of Consent. — While a contract void for non-compliance with the lien law cannot furnish a limit to the owner's liability, yet where no estoppel intervenes it is evidence of the sort of improvement consented to by the owner.[16]

III. LIENABLE CHARACTER OF WORK AND IMPROVEMENTS.

1. In General. — It is for the plaintiff to show that the object upon which the work or materials are bestowed, the general nature of the work, and the particular nature of the work or materials furnished by the individual claimant, are all within the purview of the statute conferring liens.[17]

Opinion Evidence. — Expert evidence is admissible as to whether any part of the work is new or old, but not as to whether the operation as a whole constituted the construction of a new building or merely the repair or alteration of an old.[18]

2. Materials. — In case of the furnishing of materials there are usually two special statutory requisites to a lien: That they were furnished for a specific purpose, and that they were actually used in the accomplishment of that purpose.

A. Specific Purpose. — Burden of Proof and Presumptions.

contractor and assured him that payment would be forthcoming, is erroneously excluded. McCarthy *v.* Caldwell, 43 Minn. 442, 45 N. W. 723.

Inadmissible Evidence. — That a lessee of certain lands contracted for certain improvements thereon and had an agreement with the lessor by which deductions were to be made from the rent of the premises in consideration of the improvements, does not constitute evidence that the lessee was the landlord's agent in contracting for the work. Much less is the mere fact of the relation of landlord and tenant between them evidence thereof. Rothe *v.* Bellingrath, 71 Ala. 55.

Burden of Proof. — In a foreclosure action, where the improvement was contracted for by a lessee of the owner, and a subcontractor of the lessee claims a lien, the burden is on the subcontractor to prove that the non-contracting-owner of the fee "was really principal" in all the transactions resulting in the accrual of the lien. Winslow Bros. Co. *v.* McCully Stone Mason Co., 169 Mo. 236, 248, 69 S. W. 304.

Rebuttable Presumption. — Where one person owns certain premises and another person who resides thereon enters into a contract for certain improvements to the residence thereon, the presumption derivable from the former person's ownership and knowledge of the work and his furnishing part of the funds therefor that the latter was his agent, so as to bind the former for the work, is a presumption of fact which may be rebutted. Shinn *v.* Matheny, 48 Ill. App. 135.

Question for Jury. — The question whether or not a certain person was merely the agent of a contracting-owner, or an original contractor, is a question for the jury. Goodfellow *v.* Manning, 148 Pa. St. 96, 23 Atl. 1052.

16. Thus it is evidence tending to show whether or not the building has been substantially completed. Barker *v.* Doherty, 97 Cal. 10, 31 Pac. 1117.

17. In order to establish his right to recover, plaintiff must show among other things that his debt was contracted for work done or materials furnished for or about the construction of the building against which the lien is claimed. Noar *v.* Gill, 111 Pa. St. 488, 4 Atl. 552.

18. Caldwell *v.* Keating, 10 Pa. Super. Ct. 297.

The burden, it seems, is on the plaintiff to show the purpose for which the material was furnished.[19] In Ohio, however, where a material-man furnishes suitable material to a person who he knows is erecting a building, the law presumes that the materials were furnished for that particular building.[20]

Oral evidence is admissible to show for what building the materials were furnished.[21] The contractor to whom the materials were furnished is competent to testify that they were purchased and delivered to be used in a particular structure.[22] His declarations, however, to that effect are not admissible;[23] nor, at least in Missouri, is his statement to the material-man at the time of the purchase as to the purpose of the purchase admissible by itself.[24] Whether the mere fact of delivery of the materials by the material-man at the site of the improvement may be proved is in dispute.[25]

B. Actual Use. — Nature and Particularity of Proof Requisite. — In the absence of evidence to the contrary, slight evidence that the materials were actually used in the particular

19. Lamb Lumb. Co. *v.* Benson, 90 Minn. 403, 97 N. W. 143, *holding* that in this case the material-man must show that the lumber was furnished for the barn.

20. Kunkle *v.* Reeser, 5 Ohio N. P. 401.

21. Church *v.* Davis, 9 Watts (Pa.) 304.

22. Odd Fellows Hall *v.* Masser, 24 Pa. St. 507, 64 Am. Dec. 675.

23. In an action by a material-man to foreclose a lien for materials furnished an original contractor, the declaration of the contractor to the material-man that the materials were purchased for use in the contracting-owner's building is not admissible against the owner as tending to show the purpose of their furnishing. "As the relation of principal and agent between the owner and the contractor does not exist, there is no principle of law upon which the declarations of the latter are admissible against the former." Deardorff *v.* Everhartt, 74 Mo. 37.

24. The mere statement of an original contractor to a material-man that he was buying certain materials to be used on a certain building is not, at least where proof is not also offered that the material-man acted on this representation in selling the material, admissible to prove that the materials were sold for the purpose of being used on the particular building — that is, were sold on the credit of the building. Crane Co. *v.* Neel, 104 Mo. App. 177, 77 S. W. 766.

25. **Delivery May Be Proved.** — In an action by an indirect lienor to enforce a lien for materials a receipt for such materials made by the original contractor and given to the lienor is admissible as part of the *res gestae* to prove delivery of the materials. Treusch *v.* Shryock, 51 Md. 162.

Delivery Cannot Be Proved. — The fact that a material-man delivered materials on the site of a certain improvement is not admissible as evidence that they were sold to be used in such improvement. "The plaintiff may have . . . sold the material in question without reference to any particular place where it might be used, as material-men sometimes do where the financial standing of the contractor appears to be a sufficient guaranty for the price of the materials, or, in other words, where the sole credit is given to the contractor." Crane Co. *v.* Neel, 104 Mo. App. 177, 77 S. W. 766; Henry & Coatsworth Co. *v.* Starr, 36 Neb. 869, 55 N. W. 262; Henry & Coatsworth Co. *v.* McCurdy, 36 Neb. 863, 55 N. W. 261.

structure is sufficient where the fact appears that the materials were furnished to be used therein.[26]

3. Lienability of Structure. — Whether or not the object upon which the work or materials are bestowed is within the purview of the mechanic's lien statute is, when the facts are disputed, a question for the jury.[27]

26. In a case where the lien-claimant showed that he actually furnished materials to be used in the building, that he supposed they were used in it, and that as to a few articles they were in fact so used, the court said: "When materials are contracted for use in a proposed building, when they are delivered in pursuance of such contract, and when the building is in fact completed, and there is no testimony tending to raise even a suspicion that the materials therefore were elsewhere obtained, or that those contracted for were not used therein, and especially when some of the materials are shown to have actually entered into its construction, it is fair to conclude and say that such materials did in fact go into the building, and that the seller has a mechanic's lien therefor.

"Of course, cases may arise where more stringent proof is required, as, if for any reason there should be a fair and well-grounded suspicion that the contractor had used the materials purchased for some other building, or for some other purpose. If, for instance, it should appear that more materials were furnished than were in fact used in the building, then it might be fair that the sellers should be able to show specifically that the materials they sold were in fact those which entered into the building, so that the owner should be charged with the cost only of that of which he actually received the benefit." Rice *v.* Hodge Bros., 26 Kan. 164.

In order to warrant a judgment sustaining a material-man's lien it is not necessary to prove that some one saw every stick of it put into the house. "If such rigid proof was required, few liens could be enforced." Darlington Lumb. Co. *v.* Harris, 107 Mo. App. 148, 80 S. W. 688.

To sustain a material-man's lien it is not necessary to prove that every bit of material was actually used in the improvement; when the proof is reasonably complete and specific it will be presumed that the material was all so used. Allen *v.* Elwert, 29 Or. 428, 44 Pac. 823, 48 Pac. 54.

27. American Brick & Tile Co. *v.* Drinkhouse (N. J.), 36 Atl. 1034, where the question was whether or not a machine was a fixture for manufacturing purposes within the meaning of the lien law.

Where the facts are undisputed, the question whether the work was the construction of a new building or the alteration or repair of an old one is a question of law for the court. Caldwell *v.* Keating, 18 Pa. Super. Ct. 297; Keim *v.* McRoberts, 18 Pa. Super. Ct. 167; Melh *v.* Fisher, 13 Pa. Super. Ct. 330.

Where the facts are disputed or the inferences to be drawn from the evidence are doubtful, it is for the jury to determine whether a structure is a new building or an old one repaired. It is only where there is no evidence from which a jury ought to be permitted to hold that the work is merely repairs, or *vice versa*, that the court can take it from them. McDowell *v.* Riley, 16 Pa. Super. Ct. 515.

Where it is difficult to decide whether the work was the construction of a new building or the alteration or repair of an old one the question should be left to the jury. If it is clear from the evidence it becomes incumbent on the court to decide this question. Goeringer *v.* Schappert, 10 Kulp (Pa.) 95; Grable *v.* Helman, 5 Pa. Super. Ct. 324; Furman *v.* Masson, 6 Phila. (Pa.) 222. Whether or not the question is easy or difficult is a preliminary question for the trial judge. Furman *v.* Masson, 6 Phila. (Pa.) 222.

The question whether the work is the construction of a new building or the alteration or repair of an old one is for the jury. Barber *v.* Roth, 19 Pa. Co. Ct. 366; Norris' Appeal, 30 Pa. St. 122, *modifying*

IV. PROCEEDINGS TO PERFECT LIEN.

1. **Burden of Proof in General.** — In order to warrant the enforcement of his lien, the plaintiff must, if the issue is made, prove compliance with the statutory prerequisites to obtaining a lien, as averred in the complaint.[28] Thus the plaintiff must show the filing of a notice of claim of lien within the time limited by law,[29] and in the

(same case under name Smedley *v.* Conaway) 5 Clark (Pa.) 417; Terry's Appeal, same; Armstrong *v.* Ware, 20 Pa. St. 519, *reversing* 1 Phila. (Pa.) 213.

Whether or not the changes made in an existing building constitute the changed structure a "new building" within the meaning of the lien law is a question for the court, not the jury. Smith *v.* Nelson, 2 Phila. (Pa.) 113.

Cannot Be Determined by Parties. The parties to a building contract cannot, by calling the work to be done thereunder construction, or alteration, or repair, determine that fact, but in every case it is a question for the court or jury to determine the effect of the changes as amounting to one or the other in the contemplation of the law. Keim *v.* McRoberts, 18 Pa. Super. Ct. 167.

Lienable Nature of Particular Materials Furnished. — Whether or not materials alleged to have been furnished are such materials as could be used in the construction of a building is generally a question for the jury. So it is not error for the court to refuse to charge that brushes, balls of twine, a tin bucket, nail punch, bucket rim and poultry wire, which the lien-claimant testified "went into the erection of these houses," are not materials that could be used in the erection or construction of a building. Coverdill *v.* Heath, 12 Pa. Super. Ct. 15.

28. Wynn *v.* South River Brick Co., 99 Ga. 126, 24 S. E. 869; McGlauflin *v.* Wormser, 28 Mont. 177, 72 Pac. 428; Noar *v.* Gill, 111 Pa. St. 488, 4 Atl. 552.

29. Stidger *v.* McPhee, 15 Colo. App. 252, 62 Pac. 332. In the absence of such proof the action is properly dismissed. Landvoight *v.* Melovich, 1 App. D. C. 498.

Date When Last Material Furnished. — Lamb Lumb. Co. *v.* Benson, 90 Minn. 403, 97 N. W. 143.

Date of Accrual of Account. — A material-man's notice of claim being required to be filed within four months of the accrual of the account on which it is founded, evidence of the date of the accrual of the account is essential to sustain a judgment enforcing the lien. Darlington *v.* Eldridge, 88 Mo. App. 525.

Evidence of Completion. — Where an indirect lienor brings an action to foreclose a mechanic's lien for materials it is error to permit him to introduce against the owner the original contractor's declaration made on a certain date tending to show that at that time the structure was not finished. For the declarations of the contractor, not having been authorized by the contracting-owner, were not evidence against him. There was no agency on the contractor's part permitting him to so bind the owner. Treusch *v.* Shryock, 51 Md. 162, 170.

Determination of Time of Completion. — It cannot be said, as matter of law, that work done by a mechanic under a contract substantially performed at an earlier date is only colorable and not done in the completion of the work, because it is trifling in amount and done with the ulterior purpose of prolonging the time within which a notice of claim of lien can be filed. Monaghan *v.* Putney, 161 Mass. 338, 37 N. E. 171.

Burden of Proving Cessation. Where a defendant in a lien case claims that by reason of a thirty days' stoppage the notice was filed too late, the burden of proof is on him to show such stoppage. Marble Lime Co. *v.* Lordsburg Hotel Co., 96 Cal. 332, 31 Pac. 164.

manner required thereby.[30] Under the lien laws prevailing in some jurisdictions, where a particular claimant furnishes work or materials for use in an improvement under a series of separate contracts, the time for filing his notice of claim runs from each furnishing, rendering a series of notices successively filed essential, but in case they are furnished under an entire contract, the time for filing runs from the completion of the entire contract, so that but one notice of claim is requisite. This provision of law has given rise to a presumption as to the existence of separate or one entire contract.[31]

2. The Notice of Claim of Lien as Evidence. — A notice of claim of lien is proper evidence in behalf of the lien-claimant.[32] A notice of

30. Landvoight *v.* Melovich, 1 App. D. C. 498.

31. **Nebraska.** — Where an interval in excess of four months elapses between two occasions on which labor or materials were furnished on an improvement, the presumption is that the work was done or materials furnished under separate contracts. This presumption of separate contracts may be rebutted by proof that there was but one contract covering the whole. Cornell *v.* Kime (Neb.), 89 N. W. 254. See also Hansen *v.* Kinney, 46 Neb. 207, 64 N. W. 710; Buchanan *v.* Selden, 43 Neb. 559, 61 N. W. 732.

The presumption does not apply where the evidence shows a contract made prior to the first furnishing under which all the material was furnished. Henry & Coatsworth Co. *v.* Fisherdick, 37 Neb. 207, 224, 55 N. W. 643.

Arkansas. — Where a lumber merchant at short intervals furnished various lots of lumber needed in the construction of a building, and at the time of furnishing the first lot the owner said that he might need more, the presumption is that all the material was furnished under one contract, and the time for filing the notice of claim will run accordingly. Kizer Lumb. Co. *v.* Mosely, 56 Ark. 544, 20 S. W. 409.

32. Adams *v.* Shaffer, 132 Ind. 331, 31 N. E. 1108.

Where the fact of recordation of a notice of claim is shown, it seems that an original notice of claim is competent. Greene *v.* Finnell, 22 Wash. 186, 60 Pac. 144.

Necessity of Preliminary Proof. As prerequisite to placing a notice of claim in evidence, it is not necessary to prove the signature genuine or that the notice was in fact filed by the claimant. It is enough that a notice in his name, authorized by law, is found on file. By bringing an action founded on it the claimant adopts it as his own. The identity of the person named in this notice with the claimant is thus presumed, from the identity of the name. Moreover, the paper being one that the claimant was authorized to file, and being found so filed, the presumption is that it was filed by him. Jennings *v.* Newman, 52 How. Pr. (N. Y.) 282.

A notice of claim is sufficiently identified as the one filed for record where the claimant produces the notice on the trial and testifies that he filed it, and the certificate of the auditor under seal as to his filing and recording of the instrument is attached thereto. Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 719.

Objections to Competency of Notice as Evidence. — Where material is furnished for a structure under a single contract, but at different times, and the notice of claim must be filed within three months of the time the last of the material under any one contract was delivered, a notice is not rendered incompetent as evidence by reason of the fact that it showed on its face that some of the material for which it was filed was furnished more than three months before the filing thereof, where other material was furnished within the three

claim is evidence of its own existence and verification.[33] It is not, however, in itself evidence of the existence of any other fact upon which the right of lien is founded.[34] A certified copy of the record of notice of claim is generally admissible under statutes admitting copies of the records of papers duly recorded.[35]

months. New Ebenezer Ass'n *v.* Gress Lumb. Co., 89 Ga. 125, 14 S. E. 892.

The law being that a claimant can file only one valid notice of claim on one demand against specific property, where upon a notice of claim being offered in evidence it is objected that it is invalid as being a subsequent claim, in order that it may be excluded from evidence it must affirmatively be made to appear by the objecting party that a previous notice has been filed by the same party against the same property on the same demand, and that it is valid; otherwise the notice is admissible. Hormann *v.* Wirtel, 59 Mo. App. 646.

Estoppel to Object to Competency. Where the pleadings on the part of defendant in an action to foreclose a mechanic's lien do not traverse the averment of the complaint that the notice of claim was duly filed, the defendant is estopped from raising the objection to the introduction of this notice that it had not been recorded. Royal *v.* McPhail, 97 Ga. 457, 25 S. E. 512.

33. An original notice of claim, when offered in evidence with evidence of its filing, establishes that there was filed in a certain office a notice of claim of lien of certain form and contents. Jennings *v.* Newman, 52 How. Pr. (N. Y.) 282.

34. The notice of claim does not constitute evidence of the performance of any act requisite to entitle the claimant to a lien, except the filing and verification thereof. Wakefield *v.* Latey, 39 Neb. 285, 57 N. W. 1002.

A notice of claim is not competent evidence of the fact that materials were furnished to be used, or of the fact that they were actually used, on the particular improvement. Hassett *v.* Curtis, 20 Neb. 162, 29 N. W. 295.

A notice of claim is not evidence of the facts set forth in it. Hills *v.* Elliott, 16 Serg. & R. (Pa.) 56. That there was in fact an original contract between the alleged owner and the contractor under which the lien-claimant claims cannot be proved by the mere recitals of the notice of claim to that effect. Jose *v.* Hoyt, 106 Mo. App. 594, 81 S. W. 468.

The affidavit attached to the notice does not constitute evidence of the correctness of the account on which the claim of lien is founded, nor of the date of its accrual, and cannot sustain a judgment, other evidence of the date of accrual being wanting. Darlington *v.* Eldridge, 88 Mo. App. 525.

35. A duly certified copy of the record of a notice of claim, duly recorded in the proper book, is admissible. Ricker *v.* Joy, 72 Me. 106.

A copy of any public paper, certified by the officer intrusted with its custody, is admissible where the original would be. So a certified copy of a notice of claim is properly admitted, especially as Rev. Stat., § 6709, contemplates that the original notice shall remain in the custody of the clerk with whom it was filed. Van Riper *v.* Morton, 61 Mo. App. 440.

"A certified copy produced and read under objection and exceptions proved nothing, except at best that such a paper was on the files of the clerk's office. It did not dispense with proof of its genuineness and when it was filed. The certificate of the county clerk, if in due form, could verify nothing but the paper itself and what appeared upon it. The clerk could not certify an independent fact not appearing on its face." Sampson *v.* Buffalo, N. Y. & P. R. Co., 2 Hun (N. Y.) 512.

In an action to foreclose a mechanic's lien, the record of the notice of intention to hold a lien, contained in the lien record made and kept by the recorder of the county, is relevant to an issue in the cause — namely, the right of plaintiff to a lien — and is admissible in evidence. For "the plaintiff had filed the no-

V. WHERE CONTRACT NOT DIRECTLY WITH OWNERS.

1. In General. — Where the claimant did not contract directly with the owner, but claims indirectly by virtue of a contract with an original or subcontractor, evidence of the claimant's contract with the person with whom he contracted, with proof of its performance[36] and the value or contract price of the work or materials furnished,[37] is necessary. Any evidence ordinarily competent is admissible to prove that the debt was in fact contracted.[38]

2. Of the Claimant's Contract. — The contract between the claimant and his contractor is admissible to show the agreed value of the work or materials furnished, where the contract price is fixed therein.[39] A stipulation between the claimant and his contractor as to the amount due the claimant is admissible.[40]

tice in due time, and in proper terms, and the record was evidence tending to prove it." Merritt *v.* Pearson, 58 Ind. 385.

When Recorded in Wrong Book. When a notice of claim of lien is recorded in the wrong book it is error to admit in evidence the record. Adams *v.* Shaffer, 132 Ind. 331, 31 N. E. 1108.

It is proper to permit the auditor by whom a notice of claim was recorded to read from his original record the transcript of such notice. Greene *v.* Finnell, 22 Wash. 186, 60 Pac. 144.

36. In order to support a judgment foreclosing a lien, evidence that the lien-claimant has completed his contract is essential. Tanxley *v.* Lampkin, 113 Ga. 1007, 39 S. E. 473.

37. Evidence that there was a debt owing claimant by his contractor is necessary. Haswell *v.* Goodchild, 12 Wend. (N. Y.) 373; Noar *v.* Gill, 111 Pa. St. 488, 4 Atl. 552.

Evidence as to Amount and Value of Work Done. — In an action to enforce a lien for painting a house, the testimony of a measurer of painter's work as to the quantity and value of the painting is admissible. Thorn *v.* Heugh, 1 Phila. (Pa.) 322, 5 Clark 169.

38. Church *v.* Davis, 9 Watts (Pa.) 304.

39. The price or value of the work for which plaintiff claims is shown by proving the contract for the work with a price named in it, together with the value of certain extra work. Cassidy *v.* Fontham, 38 N. Y. St. 177, 14 N. Y. Supp. 151.

In an action by a subcontractor on a mechanic's lien, evidence of the price agreed upon in the contract between the subcontractor and the direct lienor, by whom he was employed, is admissible. Cattanach *v.* Stroud, 1 Phila. (Pa.) 285, 5 Clark 144.

Objections to Competency of Contract. — Where in an action by a material-man the contract between him and the original contractor is offered in evidence, the fact that knowledge of such contract had not been brought home to the owner to be charged does not render it inadmissible. Treusch *v.* Shryock, 51 Md. 162, 170.

40. It is admissible as against both the contractor and the owner. For the contracting-owner upon paying the amount adjudged due is entitled to a credit of that amount against the original contractor under whom the demand accrued; "and when, either by the contract or a subsequent agreement between the contractor and a subcontractor, the price of material or labor furnished is fixed and liquidated, and the payment of such price by the owner would be binding against the principal contractor [he being a party to the action], there seems to be no good reason why such contract or agreement should not, at least *prima facie*, constitute evidence against the owner of the value of such materials or labor." Charles *v.* E. F. Hallack Lumb. & Mfg. Co., 22 Colo. 283, 43 Pac. 548.

Not Evidence of Estoppel Between Claimants. — Under a provision in the lien act that if within five days

3. Of Admissions. — The contractor's admissions are admissible against him and the owner to show the amount due the claimant, and, in case of a material-man's claim, that the materials were actually received.[41]

4. Books of Account and Notes. — It has been held that a claimant's book of entries is also admissible[42] where the claims accruing against the owner to be charged are segregated therein.[43] A promissory note given by the contractor to the claimant is proper evidence of the contract price.[44]

VI. PROPERTY TO BE CHARGED AND OWNERSHIP THEREOF.

Evidence as to the extent of the property covered by the lien,[45] and

after an original contractor receives notice from the contracting-owner that a subcontractor has filed a notice of claim of lien with him the original contractor fails to notify him that he disputes the amount of the lien, the amount thereof becomes conclusive on the original contractor. In an action to foreclose mechanics' liens, where conflicting claims are set up, a claimant cannot be permitted as against another claimant to show that his claim was not contested by the original contractor, but the burden of proof is on every claimant to prove every fact necessary to support his lien. Bender *v.* Stettinius, 10 Ohio Dec. (Law Bul.) 186, 19 Wkly. Law Bul. 163.

41. But such evidence should be admitted with great caution and subjected to the nicest scrutiny. Dickinson College *v.* Church, 1 Watts & S. (Pa.) 462. See also Grace *v.* Nesbitt, 109 Mo. 9, 20, 18 S. W. 1118.

42. The original book of entry of the lien-claimant, when supported by the oath of the proper witness, is admissible to substantiate the existence of the demand sought to be satisfied by the foreclosure proceedings. Church *v.* Davis, 9 Watts (Pa.) 304.

An entry in a material-man's book of original entries is competent evidence of the sale and delivery of the materials, the entries being duly proved. McMullen *v.* Gilbert, 2 Whart. (Pa.) 277.

Objections to Competency of Books. — The fact that a contractor's book of original entries shows only a charge against the owner personally does not render it inadmissible as evidence of the existence of the debt alleged to be secured by lien. Nor does the fact that the offer of the book was not accompanied by an offer of other proof of the fact that the materials were furnished on the credit of the building. Noar *v.* Gill, 111 Pa. St. 488, 4 Atl. 552.

The fact that a lien-claimant's book entry of his demand against the owner of the liened property does not afford any indication that the materials were furnished by him on the credit of the building does not render it inadmissible as evidence of the existence of a demand by the claimant against the owner. Church *v.* Davis, 9 Watts (Pa.) 304.

43. Where on a material-man's book certain materials were charged to two distinct buildings without a separation of the materials chargeable to each, and no evidence is offered as to what materials were in fact furnished for each, the book entry is properly excluded from evidence in an action brought by the material-man to enforce his lien. Chambers *v.* Yarnell, 15 Pa. St. 265.

44. Odd Fellows Hall *v.* Masser, 24 Pa. St. 507, 64 Am. Dec. 675.

45. **Admissibility of Evidence.** The boundaries of the land to be charged with a lien are material, and it is error to exclude evidence of their location. Pollock *v.* Morrison, 176 Mass. 83, 57 N. E. 326.

Necessity of Evidence. — Conceding that the construction of improvements on land of a non-contracting-owner will warrant a lien on other land belonging to him and enhanced

as to the ownership thereof, or as to any right, title or interest therein,[46] is admissible.

VII. INTENT TO CHARGE IMPROVEMENT AND WAIVER OF LIEN.

1. Presumption and Burden of Proof. — It is presumed that a material-man who furnished materials actually used in an improvement did so with intent of holding the improvement, if necessary, for their purchase price, and thus in effect furnished them on the "credit of the improvement,"[47] and the burden is on the party con-

in value by such improvements, such other land must be clearly identified. Eastmore *v.* Bunkley, 113 Ga. 637, 39 S. E. 105.

Relevancy of Evidence. — Where a mechanic's lien attaches to a leasehold interest and that alone, evidence of the amount of rent owing by the lessee to the lessor is irrelevant. Likewise evidence of the damage caused to the reversion by the lessee's carelessness is irrelevant. Rothe *v.* Bellingrath, 71 Ala. 55.

46. Character of Evidence. — In an action to foreclose a lien it is not necessary that the defendant's ownership of the property in question be proved by the best evidence, or even by such evidence as would be admissible in an action brought to try title to real estate. Slight evidence will be sufficient to move the court. "If the defendant is not the owner of the property and has no interest therein, he is in no sense harmed by any judgment which may be rendered establishing a mechanic's lien against it; and, on the other hand, the plaintiff gets nothing by establishing his lien against the supposed interest in land of a defendant who really has no interest therein, but merely loses his costs and his pains." Rohan Bros. Boiler Mfg. Co. *v.* St. Louis Malleable Iron Co., 34 Mo. App. 157.

Evidence Unnecessary. — A lien-claimant is not required to prove the contracting-owner's title to the liened property. Williams *v.* Lane, 87 Wis. 152, 58 N. W. 77.

Relevancy of Evidence. — Where defendant's ownership of the liened property is put in issue, a lease of the property to defendant made during the continuance of the work for which a lien is claimed is admissible. Wilson *v.* Merryman, 48 Md. 328.

A deed of land to an alleged contracting-owner made one month prior to the execution of the building contract under which the alleged lien arose raises a presumption that such person continued to own the land at the time of the contract. Badger Lumb. Co. *v.* Muehlebach (Mo. App.), 83 S. W. 546.

Determination of Question. Where a mechanic's lien is claimed for alterations made to a machine affixed to certain property, whether or not the machine was owned by the owner of the realty, so as to warrant the accrual of a lien against the realty, is a question for the jury. American Brick & Tile Co. *v.* Drinkhouse (N. J.), 36 Atl. 1034.

47. A *prima facie* presumption exists that the materials were furnished on the credit of the improvement. Kunkle *v.* Reeser, 5 Ohio N. P. 401; Rider-Ericsson Engine Co. *v.* Fredericks, 25 Pa. Super Ct. 72; Dougherty *v.* Loebelenz, 9 Pa. Super Ct. 344; Green *v.* Thompson, 172 Pa. St. 609, 33 Atl. 702.

Thus plaintiff need not affirmatively prove that the materials were furnished on the credit of the improvement. Noar *v.* Gill, 111 Pa. St. 488, 4 Atl. 552; Hommel *v.* Lewis, 104 Pa. St. 465.

Presumption Rebuttable. — Rider-Ericsson Engine Co. *v.* Fredericks, 25 Pa. Super. Ct. 72; Green *v.* Thompson, 172 Pa. St. 609, 33 Atl. 702.

testing the lien to prove a waiver by showing that the materials were not furnished on the credit of the improvement.[48]

2. Admissibility Generally. — In Pennsylvania an entry in a book of accounts is admissible in evidence on this question,[49] but in Delaware such entry is incompetent.[50] Nor are the declarations of the material-man's contractor admissible for this purpose.[51] Like other questions, this question when contested is to be determined by the jury.[52]

48. Rider-Ericsson Engine Co. *v.* Fredericks, 25 Pa. Super Ct. 72; Dougherty *v.* Loebelenz, 9 Pa. Super. Ct. 344; Green *v.* Thompson, 172 Pa. St. 609, 33 Atl. 702; Noar *v.* Gill, 111 Pa. St. 488, 4 Atl. 552; Hommel *v.* Lewis, 104 Pa. St. 465.

49. Propriety of Entries as Evidence. — An entry in a material man's book of original entries in the following words: J. T. McMullin, Dr. House Sixth St. between Race and Vine St. To 2000 brick at $6.50 per M., $13.00, is proper evidence of the fact that the materials were furnished on the credit of the house, the entries being duly proved. "What better evidence can there be of the subject of the credit than the subject to which it is charged? It is impossible to imagine an objection to the evidence." McMullen *v.* Gilbert, 2 Whart. (Pa.) 277.

Conclusiveness of Entries as Evidence. — Evidence that a material-man has charged on his books materials to an original contractor is merely slight evidence that they were sold on his credit only and not on that of the building, and does not constitute a *prima facie* case. Hommel *v.* Lewis, 104 Pa. St. 465.

It is not necessary that the sale and delivery of materials should be charged to the improvement in a book of original entries; other evidence that the materials were furnished on the credit of the building is competent. Wolf *v.* Batchelder, 56 Pa. St. 87.

The fact that materials are charged in a material-man's book to the original contractor is strong but not conclusive evidence that they were not furnished on the credit of the improvement. Presbyterian Church *v.* Allison, 10 Pa. St. 413.

50. McCartney *v.* Buck, 8 Houst. (Del.) 34, 12 Atl. 717.

51. In an action by an indirect lienor to enforce a lien for materials, the declaration of his original contractor that the materials were furnished on the credit of the building, not made as part of the *res gestae* of the sale, but afterward, is not admissible. "Such testimony would put the owner completely in the power of the contractor and lumberman; and as in general it is only when the contractor is insolvent that resort is had to the building, it is a most dangerous species of proof." Dickinson College *v.* Church, 1 Watts & S. (Pa.) 462.

52. Rider-Ericsson Engine Co. *v.* Fredericks, 25 Pa. Super. Ct. 72; Hommel *v.* Lewis, 104 Pa. St. 465; Presbyterian Church *v.* Allison, 10 Pa. St. 413.

MEDICAL BOOKS.—See Books.

MEMORANDUM.—See Accounts; Entries in Regular Course of Business; Refreshing Memory; Statute of Frauds.

MENTAL AND PHYSICAL STATES.

CROSS-REFERENCES:

Age; Alienating Affections;
Capacity;
Expert and Opinion Evidence;
Injuries to Person; Insanity; Insurance; Intent; Intoxication;
Malice;
Res Gestae;
Wills.

I. BURDEN OF PROOF AND PRESUMPTIONS.

The burden of proof is generally upon the party alleging insanity or mental incapacity,[1] intoxication,[2] anger or malice,[3] disease or injury, or any departure from normal mental and physical conditions.[4] Insanity, once shown, is presumed to continue.[5] But intoxication at any particular time is not presumed from prior intoxication.[6]

II. APPEARANCE AND CONDUCT.

The appearance, demeanor and acts of a person are admissible in evidence to prove his mental or physical condition.[7] Such evidence is admissible to prove mental incapacity[8] or insanity,[9] intoxication,[10]

1. See article "INSANITY," Vol. VII, pp. 456, 460.
2. See article "INTOXICATION," Vol. VII, p. 779.
3. See article "MALICE," this volume.
4. Board of Health *v.* Lederer, 52 N. J. Eq. 675, 29 Atl. 444. See article "INSURANCE," Vol. VII, p. 516. As to the presumption of ability to bear children, see *In re* Apgar, 37 N. J. Eq. 501, and article "CAPACITY," Vol. II, p. 848.
5. See article "INSANITY," Vol. VII, p. 462.
6. See article "INTOXICATION," Vol. VII, p. 778. Bedenbaugh *v.* Southern R. Co., 69 S. C. 1, 48 S. E. 53.
7. See the authorities cited under subdivisions III and V, *infra*.
8. Wilkinson *v.* Pearson, 23 Pa. St. 117; Dinges *v.* Branson, 14 W. Va. 100.
9. See article "INSANITY," Vol. VII, p. 446.
10. See article "INTOXICATION," Vol. VII, p. 778.

mental suffering[11] or excitement,[12] anger or malice,[13] and physical pain, suffering or malady.[14] Photographs are sometimes admissible as evidence of the physical appearance and condition of a person.[15]

III. DECLARATIONS AND EXCLAMATIONS OF PERSON WHOSE CONDITION IS IN ISSUE.

1. Present Condition. — A. Character of Declarations. — a. *In General.* — Evidence of declarations and exclamations is admissible to prove insanity[16] or mental incompetency to make a contract or will,[17] or to prove an angry or malicious state of mind,[18] or alienation of the affections,[19] or to prove a state of consciousness at a particular time.[20] But declarations, which are not of the *res gestae*, are inadmissible, ordinarily, to rebut evidence of malice or criminal intent.[21]

b. *Res Gestae.* — Declarations and exclamations, which are of the *res gestae* of the act, are admissible in evidence to prove physical suffering, condition or injury, or the cause thereof.[22]

c. *Different Rules as to Declarations and Exclamations.* — In a number of jurisdictions, declarations or descriptive statements of present pain, suffering, condition or symptoms, not made to medical attendants, as distinguished from spontaneous and involuntary exclamations, outcries, groans and convulsive movements, are inadmissible to prove the physical or mental condition of the person making them.[23] It is contended that such descriptive statements are hearsay, and that no necessity for their admission in evidence exists where the statute law permits the person making them to testify as a witness.[23] Evidently the exclamations admissible in evidence

11. See article "Injuries to Person," Vol. VII, p. 406.

12. McCraw *v.* Old North State Ins. Co., 78 N. C. 149.

13. See article "Malice," this volume.

14. Meigs *v.* Buffalo, 7 N. Y. St. 855; Rogers *v.* Crain, 30 Tex. 284; Chicago, R. I. & T. R. Co. *v.* Williams (Tex. Civ. App.), 83 S. W. 248.

15. Chicago & J. Elec. R. Co. *v.* Spence, 213 Ill. 220, 72 N. E. 796. *Contra,* Brown *v.* Metropolitan L. Ins. Co., 65 Mich. 306, 32 N. W. 610. 8 Am. St. Rep. 894 (healthy appearance of insured person). See articles "Injuries to Person," Vol. VII, p. 405, and "Photographs."

16. See article "Insanity," Vol. VII, p. 447.

17. Fitzgerald *v.* Shelton, 95 N. C. 519; Wilkinson *v.* Pearson, 23 Pa. St. 117; Dinges *v.* Branson, 14 W. Va. 100.

18. See article "Malice," this volume.

19. Rudd *v.* Rounds, 64 Vt. 432, 25 Atl. 438; Nevins *v.* Nevins, 68 Kan. 410, 75 Pac. 492. See article "Alienating Affections," Vol. I.

20. Hayes *v.* Pitts-Kimball Co., 183 Mass. 262, 67 N. E. 249.

21. Steel *v.* Shafer, 39 Ill. App. 185. See article "Malice," this volume.

22. District of Columbia *v.* Dietrich, 23 App. D. C. 577; Springfield Consol. R. Co. *v.* Hoeffner, 175 Ill. 634, 51 N. E. 884; Baker *v.* Griffin, 10 Bosw. (N. Y.) 140; Powers *v.* West Troy, 25 Hun (N. Y.) 561; Missouri K. & T. R. Co. *v.* Sanders, 12 Tex. Civ. App. 5, 33 S. W. 245.

23. *Georgia.* — Atlanta, K. & N. R. Co. *v.* Gardner, 122 Ga. 82, 49 S. E. 818; Savannah F. & W. R. Co. *v.* Wainwright, 99 Ga. 255, 25 S. E. 622;

under this rule are not always inarticulate.[24] And the distinction between articulate exclamations and declarations termed descriptive is sometimes difficult.[25] Probably in most jurisdictions little distinction is made between exclamations and declarations; and such declarations as are the usual expressions of present mental or physical pain, suffering or symptoms are admissible in evidence.[26] They are

Atlanta St. R. Co. *v.* Walker, 93 Ga. 462, 21 S. E. 48.

Illinois. — Chicago City R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28.

Minnesota. — Williams *v.* Great Northern R. Co., 68 Minn. 55, 70 N. W. 860.

New York. — Ryan *v.* Porter Mfg. Co., 57 Hun 253, 10 N. Y. Supp. 774; Bonelle *v.* Pennsylvania R. Co., 51 Hun 640, 4 N. Y. Supp. 127; Grant *v.* Groton, 77 Hun 497, 28 N. Y. Supp. 1014; Olp *v.* Gardner, 48 Hun 169.

South Dakota. — Klingaman *v.* Fish, 102 N. W. 601. See article "Injuries to Person," Vol. VII, p. 390.

A distinction has been made between evidence of general "complaints" and evidence of complaints of specific pains and their location. West Chicago St. R. Co *v.* Kennelly, 170 Ill. 508, 50 N. E. 996.

Crying. — It was held proper to prove that a woman cried all the afternoon after an injury as symptomatic of pain. Montgomery St. R. Co. *v.* Shanks, 139 Ala. 489, 37 So. 166. See also Kelly *v.* Cohoes Knitting Co., 8 App. Div. 156, 40 N. Y. Supp. 477.

24. Nashville, C. & St. L. R. *v.* Miller, 120 Ga. 453, 47 S. E. 959; Kelly *v.* Cohoes Knitting Co., 8 App. Div. 156, 40 N. Y. Supp. 477.

25. Williams *v.* Great Northern R. Co., 68 Minn. 55, 70 N. W. 680.

26. *United States.* — Travelers L. Ins. Co. *v.* Mosley, 8 Wall. 397.

Alabama. — Montgomery St. R. Co. *v.* Shanks, 139 Ala. 489, 37 So. 166; Helton *v.* Alabama M. R. Co., 97 Ala. 275, 12 So. 276; Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419; Stein *v.* State, 37 Ala. 123; Barker *v.* Coleman, 35 Ala. 221; Phillips *v.* Kelly, 29 Ala. 628; Eckles *v.* Bates, 26 Ala. 655; Rowland *v.* Walker, 18 Ala. 749.

California. — Green *v.* Pacific Lumb. Co., 130 Cal. 435, 62 Pac. 747.

Connecticut. — Kearney *v.* Farrell, 28 Conn. 317, 73 Am. Dec. 677; Kelsey *v.* Universal L. Ins. Co., 35 Conn. 225.

Georgia. — Tilman *v.* Stringer, 26 Ga. 171.

Indiana. — Hancock Co. *v.* Leggett, 115 Ind. 544, 18 N. E. 53; Indianapolis St. R. Co. *v.* Schmidt, 71 N. E. 201; Cleveland, C. C. & I. R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836; Cleveland C. C. & St. L. R. Co. *v.* Carey (Ind. App.), 71 N. E. 244; Alexandria *v.* Young, 20 Ind. App. 672, 51 N. E. 109; Southern Indiana R. Co. *v.* Davis, 32 Ind. App. 569, 69 N. E. 550; Chicago, St. L. & P. R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; Cleveland C. C. & St. L. R. Co. *v.* Prewitt, 134 Ind. 557, 33 N. E. 367; Board of Com'rs *v.* Nichols, 139 Ind. 611, 38 N. E. 526; De Pew *v.* Robinson, 95 Ind. 109; Indiana R. Co. *v.* Maurer, 106 Ind. 25, 66 N. E. 156; Treschman *v.* Treschman, 28 Ind. App. 206, 61 N. E. 961; Huntington *v.* Burke (Ind. App.), 52 N. E. 415.

Iowa. — Crippen *v.* Des Moines, 78 N. W. 688; Yeager *v.* Spirit Lake, 115 Iowa 593, 88 N. W. 1095; Robinson *v.* Halley, 124 Iowa 443, 100 N. W. 328; Battis *v.* Chicago R. I. & P. R. Co., 124 Iowa 623, 100 N. W. 543; Hamilton *v.* Mendota Coal & Min. Co., 120 Iowa 147, 94 N. W. 282; Keyes *v.* Cedar Falls, 107 Iowa 509, 78 N. W. 227.

Kansas. — St. Louis & S. F. R. Co. *v.* Burrows, 62 Kan. 89, 61 Pac. 439.

Kentucky. — Louisville & N. R. Co. *v.* Smith, 27 Ky. L. Rep. 257, 84 S. W. 755.

Maine. — Asbury L. Ins. Co. *v.* Warren, 66 Me. 523, 22 Am. Rep. 590; Kennard *v.* Burton, 25 Me. 39, 43 Am. Dec. 249.

Massachusetts. — Cashin *v.* New York, N. H. & H. R. R. Co., 185 Mass. 543, 70 N. E. 930.

usually regarded as verbal acts rather than hearsay.[27] Such declarations have been admitted to prove aches, pains and physical or mental suffering,[28] and especially so when they were involuntary

Michigan. — Will *v.* Mendon, 108 Mich. 251, 66 N. W. 58; Burleson *v.* Reading, 110 Mich. 512, 68 N. W. 294; Elliott *v.* Van Buren, 33 Mich. 49.

Mississippi. — Fondren *v.* Durfee, 39 Miss. 324.

Missouri. — Marr *v.* Hill, 10 Mo. 320; Wadlow *v.* Perryman, 27 Mo. 279; Estes *v.* Missouri Pac. R. Co., 85 S. W. 627.

New Hampshire. — Plummer *v.* Ossipee, 59 N. H. 55; Howe *v.* Plainfield, 41 N. H. 135.

North Carolina. — Biles *v.* Holmes, 31 N. C. 16; Bell *v.* Morrisett, 51 N. C. 178; Henderson *v.* Crouse, 52 N. C. 623; Wallace *v.* McIntosh, 49 N. C. 434; Lush *v.* McDaniel, 35 N. C. 485, 57 Am. Dec. 566; Roulhac *v.* White, 31 N. C. 63.

North Dakota. — Puls *v.* Grand Lodge A. O. U. W., 102 N. W. 165.

South Carolina. — Gosa *v.* Southern R. Co., 67 S. C. 347, 45 S. E. 810; McClintock *v.* Hunter, Dud. 327; Gray *v.* Young, Harp. 38; Welch *v.* Brooks, 10 Rich. L. 123.

Tennessee. — Jones *v.* White, 11 Humph. 268; Yeatman *v.* Hart, 6 Humph. 375.

Texas. — Rogers *v.* Crain, 30 Tex. 284; Jackson *v.* Missouri K. & T. R. Co., 23 Tex. Civ. App. 319, 55 S. W. 376; Arrington *v.* Texas & P. R. Co. (Tex. Civ. App.), 70 S. W. 551; International & G. N. R. Co. *v.* Cain (Tex. Civ. App.), 80 S. W. 571; Wheeler *v.* Tyler S. E. R. Co., 91 Tex. 356, 43 S. W. 876; St. Louis S. W. R. Co. *v.* Burke (Tex. Civ. App.), 81 S. W. 774; Missouri K. & T. R. Co. *v.* Zwiener (Tex. Civ. App.), 38 S. W. 375; Gulf C. & S. F. R. Co. *v.* Bell, 24 Tex. Civ. App. 579, 58 S. W. 614; Missouri K. & T. R. Co. *v.* Oslin (Tex. Civ. App.), 63 S. W. 1039.

Vermont. — Brown *v.* Mt. Holly, 69 Vt. 364, 38 Atl. 69.

Washington. — Peterson *v.* Seattle Trac. Co., 23 Wash. 615, 63 Pac. 539, 65 Pac. 543.

Wisconsin. — Bridge *v.* Oshkosh, 71 Wis. 363, 37 N. W. 409; Bredlau *v.* York, 115 Wis. 554, 92 N. W. 261; Keller *v.* Gilman, 93 Wis. 9, 66 N. W. 800; Hall *v.* American Masonic Acc. Ass'n, 86 Wis. 518, 57 N. W. 366.

But see Union Pac. R. Co. *v.* Hammerlund (Kan.), 79 Pac. 152.

See article "INJURIES TO PERSON," Vol. VII, p. 387.

Offensive Smells. — Evidence of declarations of a woman since deceased was admitted to prove that she was then suffering from the presence of offensive smells. Kearney *v.* Farrell, 28 Conn. 317, 73 Am. Dec. 677.

Answers to Questions. — It has been suggested that replies to questions should not be considered as spontaneous expressions of suffering. Keller *v.* Gilman, 93 Wis. 9, 66 N. W. 800. But many declarations held admissible were of this character.

27. Travelers Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397; Phillips *v.* Kelly, 29 Ala. 628; Biles *v.* Holmes, 31 N. C. 16; Henderson *v.* Crouse, 52 N. C. 623.

28. *Alabama.* — Rowland *v.* Walker, 18 Ala. 749; Phillips *v.* Kelly, 29 Ala. 628; Stone *v.* Watson, 37 Ala. 279; Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419; Montgomery St. R. Co. *v.* Shanks, 139 Ala. 489, 37 So. 166.

Indiana. — Board of Com'rs *v.* Nichols, 139 Ind. 611, 38 N. E. 526; Chicago St. L. & P. R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; Cleveland, C. C. & St. L. R. Co. *v.* Prewitt, 134 Ind. 557, 33 N. E. 367; Cleveland, C. C. & St. L. R. Co. *v.* Carey (Ind. App.), 71 N. E. 244; Indiana R. Co. *v.* Maurer, 160 Ind. 25, 66 N. E. 156; Huntington *v.* Burke (Ind. App.), 52 N. E. 415; Rhodes *v.* State, 128 Ind. 189, 27 N. E. 866; Cleveland, C. C. & I. R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836; Alexandria *v.* Young, 20 Ind. App. 672, 51 N. E. 109.

Iowa. — Crippen *v.* Des Moines, 78 N. W. 688; Robinson *v.* Halley, 124 Iowa 443, 100 N. W. 328; Battis *v.* Chicago, R. I. & P. R. Co., 124 Iowa 623, 100 N. W. 543; Keyes *v.* Cedar Falls, 107 Iowa 509, 78 N. W.

expressions of present suffering, numbness,[29] dizziness,[30] faintness, bad feeling and sickness,[31] weakness,[32] chills,[33] inability to work or attend to business,[34] pregnancy,[35] internal injury[36] and comparative conditions of feeling.[37] It seems that the exact words of complaint need not be shown.[38]

B. To Whom Made. — a. *Declarations Before Laymen.* — The admissibility of evidence of declarations or exclamations of present pain, suffering or symptoms does not depend on their having been

227; Hamilton *v.* Mendota Coal & Min. Co., 120 Iowa 147, 94 N. W. 282.

Kansas. — Atchison T. & S. F. R. Co. *v.* Johns, 36 Kan. 769, 14 Pac. 237, 59 Am. Rep. 609.

Maine. — Kennard *v.* Burton, 25 Me. 39, 43 Am. Dec. 249.

Michigan. — Will *v.* Mendon, 108 Mich. 251, 66 N. W. 58.

Mississippi. — Fondren *v.* Durfee, 39 Miss. 324.

Missouri. — Estes *v.* Missouri Pac. R. Co., 85 S. W. 627.

New Hampshire. — Plummer *v.* Ossipee, 59 N. H. 55.

North Carolina. — Roulhac *v.* White, 31 N. C. 63; Biles *v.* Holmes, 31 N. C. 16.

North Dakota. — Puls *v.* Grand Lodge A. O. U. W., 102 N. W. 165.

South Carolina. — Oliver *v.* Columbia, N. & L. R. Co., 65 S. C. 1, 43 S. E. 307; Welch *v.* Brooks, 10 Rich. L. 123; Gray *v.* Young, Harp. 38.

Tennessee. — Lewis *v.* Moses, 6 Cold. 193.

Texas. — Newman *v.* Dodson, 61 Tex. 91; International & G. N. R. Co. *v.* Cain (Tex. Civ. App.), 80 S. W. 571; St. Louis S. W. R. Co. *v.* Burke (Tex. Civ. App.), 81 S. W. 774.

Vermont. — Brown *v.* Mt. Holly, 69 Vt. 364, 38 Atl. 69.

Wisconsin. — Bredlan *v.* York, 115 Wis. 554, 92 N. W. 261; Bridge *v.* Oshkosh, 71 Wis. 363, 37 N. W. 409.

Complaints of a "hurt in the back" were held admissible. International & G. N. R. Co. *v.* Cain (Tex. Civ. App.), 80 S. W. 571; St. Louis S. W. R. Co. *v.* Burke (Tex. Civ. App.), 81 S. W. 774.

29. Cleveland, C. C. & I. R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836; Atchison, T. & S. F. R. Co. *v.* Johns, 36 Kan. 769, 14 Pac. 237, 59 Am. Rep. 609; Will *v.* Mendon, 108 Mich. 251, 66 N. W. 58; Bridge *v.* Oshkosh, 71 Wis. 363, 37 N. W. 409. But see Tebo *v.* Augusta, 90 Wis. 405, 63 N. W. 1045.

30. It was held competent to prove a statement made by a person the day after receiving a fall to the effect that he felt bad, and that if he attempted to walk across the room his head became dizzy. Travelers Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397. But *compare* Keller *v.* Gilman, 93 Wis. 9, 66 N. W. 800.

31. *Alabama.* — Rowland *v.* Walker, 18 Ala. 749; Holloway *v.* Cotten, 33 Ala. 529; Helton *v.* Alabama M. R. Co., 97 Ala. 275, 12 So. 276.

Indiana. — Treschman *v.* Treschman, 28 Ind. App. 206, 61 N. E. 961.

South Carolina. — Welch *v.* Brooks, 10 Rich. L. 123.

Texas. — Arrington *v.* Texas & P. R. Co. (Tex. Civ. App.), 70 S. W. 551.

Vermont. — State *v.* Fournier, 68 Vt. 262, 35 Atl. 178.

Wisconsin. — Hall *v.* American Masonic Acc. Ass'n, 86 Wis. 518, 57 N. W. 366.

32. Lewis *v.* Moses, 6 Cold. (Tenn.) 193; Meigs *v.* Buffalo, 7 N. Y. St. 855; Missouri K. & T. R. Co. *v.* Zwiener (Tex. Civ. App.), 38 S. W. 375.

33. Barker *v.* Coleman, 35 Ala. 221.

34. St. Louis S. W. R. Co. *v.* Brown, 30 Tex. Civ. App. 57, 69 S. W. 1010; Biles *v.* Holmes, 31 N. C. 16.

35. De Pew *v.* Robinson, 95 Ind. 109; Wilkinson *v.* Moseley, 30 Ala. 562.

36. Perkins *v.* Concord R. R., 44 N. H. 223.

37. Travelers Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397.

38. Indianapolis St. R. Co. *v.* Schmidt (Ind.), 71 N. E. 201; South-

made to, or in the presence of, medical attendants.[39] But, on the ground of the greater improbability that a person will misrepresent his condition to one to whom he looks for relief,[40] declarations made in the presence of attending physicians are generally entitled to greater consideration than those made to other persons.[41]

b. *Declarations to Physicians.* — Declarations and descriptive statements of present pain, suffering and symptoms are generally admissible in evidence when made to physicians for purposes of diagnosis and treatment.[42] This rule obtains in some jurisdictions

ern Indiana R. Co. *v.* Davis, 32 Ind. App. 569, 68 N. E. 550.

39. *United States.* — Travelers Ins. Co. *v.* Mosley, 8 Wall. 397.

Alabama. — Stein *v.* State, 37 Ala. 123; Stone *v.* Watson, 37 Ala. 279; Eckles *v.* Bates, 26 Ala. 655; Wilkinson *v.* Moseley, 30 Ala. 562.

Kansas. — Atchison T. & S. F. R. Co. *v.* Johns, 36 Kan. 769, 14 Pac. 237, 59 Am. Rep. 609.

Missouri. — Marr *v.* Hill, 10 Mo. 320.

New Hampshire. — Howe *v.* Plainfield, 41 N. H. 135; Perkins *v.* Concord R. R., 44 N. H. 223.

North Carolina. — Biles *v.* Holmes, 31 N. C. 16.

Texas. — Rogers *v.* Crain, 30 Tex. 284.

Vermont. — Brown *v.* Mt. Holly, 69 Vt. 364, 38 Atl. 69; Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287.

But see Tumey *v.* Knox, 7 T. B. Mon. (Ky.) 88. See article "Injuries to Person," Vol. VII, p. 389.

40. "Under such circumstances it is presumed that the party suffering will state truly how she is affected, as otherwise the medical man might be at a loss as to the remedies needful to her condition." Louisville & N. R. Co. *v.* Smith, 27 Ky. L. Rep. 257, 84 S. W. 755; Shade *v.* Covington-Cincinnati Elev. R. & Transfer & Bridge Co., 27 Ky. L. Rep. 224, 84 S. W. 733.

41. Howe *v.* Plainfield, 41 N. H. 135; Rogers *v.* Crain, 30 Tex. 284; Travelers Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397. See article "Injuries to Person," Vol. VII, p. 389.

42. *England.* — Aveson *v.* Kinnaird, 6 East 188, 2 Smith 286, 8 R. R. 455.

United States. — Northern Pac. R. Co. *v.* Urlin, 158 U. S. 271.

Alabama. — Eckles *v.* Bates, 26 Ala. 655.

Connecticut. — Wilson *v.* Granby, 47 Conn. 59.

Illinois. — Globe Acc. Ins. Co. *v.* Gerisch, 61 Ill. App. 140.

Indiana. — Cleveland, C. C. & I. R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836; Board of Com'rs *v.* Pearson, 120 Ind. 426, 22 N. E. 134.

Kansas. — Atchison, T. & S. F. R. Co. *v.* Frazier, 27 Kan. 463.

Kentucky. — Allen *v.* Vancleave, 15 B. Mon. 236, 61 Am. Dec. 184.

Maryland. — Sellman *v.* Wheeler, 95 Md. 751, 54 Atl. 512.

Massachusetts. — Ashland *v.* Marlborough, 99 Mass. 47; Fleming *v.* Springfield, 154 Mass. 520, 28 N. E. 910, 26 Am. St. Rep. 268.

Michigan. — Mulliken *v.* Corunna, 110 Mich. 212, 68 N. W. 141; Heddle *v.* City Elec. R. Co., 112 Mich. 547, 70 N. W. 1096.

New York. — Meigs *v.* Buffalo, 7 N. Y. St. 855; Matteson *v.* New York Cent. R. Co., 62 Barb. 364, 35 N. Y. 487, 91 Am. Dec. 67; Cleveland *v.* New Jersey Steamboat Co., 5 Hun 523.

North Carolina. — Roulhac *v.* White, 31 N. C. 63.

Tennessee. — Yeatman *v.* Hart, 6 Humph. 375.

Texas. — Wheeler *v.* Tyler S. E. R. Co., 91 Tex. 356, 43 S. W. 876; Missouri, K. & T. R. Co. *v.* Sanders, 12 Tex. Civ. App. 5, 33 S. W. 245.

Wisconsin. — Stone *v.* Chicago, St. P. M. & O. R. Co., 88 Wis. 98, 59 N. W. 457; Curran *v.* A. H. Stange Co., 98 Wis. 598, 74 N. W. 377.

But *compare* Mosher *v.* Russell, 44 Hun (N. Y.) 12; Bonelle *v.* Pennsylvania R. Co., 51 Hun 640, 4 N. Y. Supp. 127; Witt *v.* Klindworth, 3 S.

in which evidence of declarations, as distinguished from exclamations, is generally excluded.[43] But, in at least one state, such descriptive statements are inadmissible in evidence even when made to an attending physician.[44] Another court has declared that they are admissible only when testified to by the physician as in part the basis of an expert opinion;[45] but the distinction appears not to have been made by courts generally.[46]

c. *Declarations to Experts.* — In most jurisdictions, descriptive statements of present or past symptoms, made to physicians for the sole purpose of qualifying them to testify as experts in pending or prospective litigation, are inadmissible to prove physical condition.[47] A contrary rule prevails in some states.[48] In the former jurisdictions, purely involuntary exclamations and shrinkings indicating pain or soreness under bodily manipulation by experts are admissible.[49]

& T. (Eng.) 143, 32 L. J. Mat. 179, 8 L. T. 175, 11 W. R. 154.

43. Chicago City R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28; Salem *v.* Webster, 192 Ill. 369, 61 N. E. 323; West Chicago St. R. Co. *v.* Kennelly, 170 Ill. 508, 48 N. E. 996; Edlund *v.* St. Paul City R. Co., 78 Minn. 434, 81 N. W. 214; Jones *v.* Niagara Junction R. Co., 63 App. Div. 607, 71 N. Y. Supp. 647.

44. Atlanta, K. & N. R. Co. *v.* Gardner, 122 Ga. 82, 49 S. E. 818. See also Williams *v.* Great Northern R. Co., 68 Minn. 55, 70 N. W. 860.

45. Williams *v.* Great Northern R. Co., 68 Minn. 55, 70 N. W. 860. See also Gulf C. & S. F. R. Co. *v.* Moore, 28 Tex. Civ. App. 603, 68 S. W. 559.

46. See cases in note 42 *supra*.

47. *United States.* — Delaware, L. & W. R. Co. *v.* Roalefs, 16 C. C. A. 601, 28 U. S. App. 569, 70 Fed. 21.

Connecticut. — Darrigan *v.* New York & N. E. R. Co., 52 Conn. 285, 52 Am. Rep. 590; Rowland *v.* Philadelphia, W. & B. R. Co., 63 Conn. 415, 28 Atl. 102.

Illinois. — Chicago & E. I. R. Co. *v.* Donworth, 203 Ill. 192, 67 N. E. 797; West Chicago St. R. Co. *v.* Carr, 170 Ill. 478, 48 N. E. 992.

Kansas. — Atchison T. & S. F. R. Co. *v.* Frazier, 27 Kan. 463.

Michigan. — Comstock *v.* Georgetown Twp., 100 N. W. 788.

New Jersey. — Consolidated Trac. Co. *v.* Lambertson, 60 N. J. L. 452, 38 Atl. 683, *affirming* 59 N. J. L. 297, 36 Atl. 100.

New York. — Davidson *v.* Cornell, 132 N. Y. 228, 30 N. E. 573.

Ohio. — Pennsylvania Co. *v.* Files, 65 Ohio St. 403, 62 N. E. 1047.

Wisconsin. — Stone *v.* Chicago St. P. M. & O. R. Co., 88 Wis. 98, 59 N. W. 457; Keller *v.* Gilman, 93 Wis. 9, 66 N. W. 800.

See also Louisville, N. A. & C. R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

"Ordinarily when a patient consults a physician with a view to treatment he will state the facts as they are; but, unfortunately, when a party consults a physician preparatory to the trial of his case simply, his statements are not always reliable." Darrigan *v.* New York & N. E. R. Co., 52 Conn. 285, 52 Am. Rep. 590.

But a physician testifying as an expert may give such statements of the injured person as are necessary to an understanding of the reasons for his conclusions. Kansas City, Ft. S. & M. R. Co. *v.* Stoner, 2 C. C. A. 437, 10 U. S. App. 209, 51 Fed. 649.

48. Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287. See article "Injuries to Person," Vol. VII, p. 392.

49. Broyles *v.* Prisock, 97 Ga. 643, 25 S. E. 389; Martin *v.* Wood, 52 Hun 613, 5 N. Y. Supp. 274; Missouri, K. & T. R. Co. *v.* Johnson (Tex. Civ. App.), 67 S. W. 768. See also Heddle *v.* City Elec. R. Co., 112 Mich. 547, 70 N. W. 1096. But see

But it is absolutely necessary that their spontaneity clearly appear.[50]

C. Relation of Declarations and Exclamations to Injury. That declarations or exclamations were uttered too late to be of the *res gestae* of an injury is immaterial when evidence of them is offered to prove the condition of the person at a later time.[51] The pendency of an action for the injury affects the weight of such evidence rather than its competency.[52] Evidence of complaints at different times may tend to prove the seriousness of the malady.[53]

2. Narrative Statements. — Narrative declarations or statements of past pain, symptoms or conditions, or prior attacks of disease, made to other persons than medical attendants, are not competent evidence except as against the persons making them.[54] Such declarations are competent evidence in some jurisdictions when made to attending physicians and considered by them in the diagnosis and treatment of disease.[55] The fact that such declarations are made to

Mosher *v.* Russell, 44 Hun (N. Y.) 12.

50. Comstock *v.* Georgetown Twp. (Mich.), 100 N. W. 788.

51. Southern Indiana R. Co. *v.* Davis, 32 Ind. App. 569, 69 N. E. 550; Huntington *v.* Burke (Ind. App.), 52 N. E. 415; St. Louis & S. W. R. Co. *v.* Gill (Tex. Civ. App.), 55 S. W. 386. See article "Injuries to Person," Vol. VII, p. 391.

52. Cleveland, C. C. & I. R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836; Norris *v.* Haverhill, 65 N. H. 89, 18 Atl. 85; Jackson *v.* Missouri, K. & T. R. Co., 23 Tex. Civ. App. 319, 55 S. W. 376; Kansas City, Ft. S. & M. R. Co. *v.* Stoner, 2 C. C. A. 437, 10 U. S. App. 209, 51 Fed. 649. See article "Injuries to Person," Vol. VII, p. 392.

Evidence of involuntary and instinctive expressions of anguish pending the trial of an action for damages for an injury is admissible. Schuler *v.* Third Ave. R. Co., 1 Misc. 351, 20 N. Y. Supp. 683.

53. Bell *v.* Morrisett, 51 N. C. 178; Plummer *v.* Ossipee, 59 N. H. 55.

54. *United States.* — Travelers Ins. Co. *v.* Mosley, 8 Wall. 397.

Alabama. — Eckles *v.* Bates, 26 Ala. 655; Holloway *v.* Cotten, 33 Ala. 529; Barker *v.* Coleman, 35 Ala. 221; Cunningham *v.* Kelly, 36 Ala. 78.

Illinois. — Winnebago Co. *v.* Rockford, 61 Ill. App. 656.

Indiana. — Hancock Co. *v.* Leggett, 115 Ind. 544, 18 N. E. 53.

Kansas. — Atchison, T. & S. F. R. Co. *v.* Johns, 36 Kan. 769, 14 Pac. 237, 59 Am. Rep. 609.

Kentucky. — Louisville & N. R. Co. *v.* Smith, 27 Ky. L. Rep. 257, 84 S. W. 755; Tumey *v.* Knox, 7 T. B. Mon. 88.

Maine. — Asbury L. Ins. Co. *v.* Warren, 66 Me. 523, 22 Am. Rep. 590.

Maryland. — McCeney *v.* Duvall, 21 Md. 166.

Massachusetts. — Ashland *v.* Marlborough, 99 Mass. 47; Roosa *v.* Boston Loan Co., 132 Mass. 439; Cashin *v.* New York, N. H. & H. R. R. Co., 185 Mass. 543, 70 N. E. 930.

Michigan. — Elliott *v.* Van Buren, 33 Mich. 49.

North Carolina. — Lush *v.* McDaniel, 35 N. C. 485, 57 Am. Dec. 566.

South Carolina. — McClintock *v.* Hunter, Dud. 327.

Vermont. — State *v.* Fournier, 68 Vt. 262, 35 Atl. 178.

Wisconsin. — Tebo *v.* Augusta, 90 Wis. 405, 63 N. W. 1045; Keller *v.* Gilman, 93 Wis. 9, 66 N. W. 800.

Declarations of a person, repeated each morning for weeks, that he had been unable to rest during the night on account of pain, were held to be of a narrative character and inadmissible in evidence. Kelley *v.* Detroit, L. & N. R. Co., 80 Mich 237, 45 N. W. 90, 20 Am. St. Rep. 514.

55. *Alabama.* — Eckles *v.* Bates, 26 Ala. 655; Blackman *v.* Johnson, 35 Ala. 252.

Georgia. — Feagin *v.* Beasley, 23 Ga. 17.

Indiana. — Cleveland, C. C. & I.

physicians does not render them admissible in evidence when they are made after the termination of the disease, or when they are of no assistance in diagnosis.[56]

3. Cause and Nature of Condition. — Cause of Condition. — Except when they are of the *res gestae* of an act,[57] the declarations of an injured person are not admissible to prove the responsible cause of the injury.[58] The rule applies to declarations made to attending physicians.[59] It seems, however, that the rule does not exclude declarations of the immediate cause of an injury, made to a physician to assist him in his diagnosis and treatment.[60]

Character of Disease or Injury. — The declarations of a non-expert as to the nature and name of a disease with which he is afflicted are not competent evidence of the character of a disease whose diagnosis demands medical skill.[61] Nor are his declarations as to the probable

R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836.

Massachusetts. — Roosa *v.* Boston Loan Co., 132 Mass. 439.

Tennessee. — Yeatman *v.* Hart, 6 Humph. 375; Jones *v.* White, 11 Humph. 268; Looper *v.* Bell, 1 Head 373.

Texas. — Rogers *v.* Crain, 30 Tex. 284; Newman *v.* Dodson, 61 Tex. 91; St. Louis S. W. R. Co. *v.* Burke (Tex. Civ. App.), 81 S. W. 774; Gulf, C. & S. F. R. Co. *v.* Moore, 28 Tex. Civ. App. 603, 68 S. W. 559 (as basis of expert opinion); Missouri K. & T. R. Co. *v.* Rose, 19 Tex. Civ. App. 470, 49 S. W. 133; Wheeler *v.* Tyler S. E. R. Co., 91 Tex. 356, 43 S. W. 876.

See also Globe Acc. Ins. Co. *v.* Gerisch, 61 Ill. App. 140; Fleming *v.* Springfield, 154 Mass. 520, 28 N. E. 910, 26 Am. St. Rep. 268.

Contra. — Texas State Fair *v.* Marti, 30 Tex. Civ. App. 132, 69 S. W. 432; Towle *v.* Blake, 48 N. H. 92; Davidson *v.* Cornell, 132 N. Y. 228, 30 N. E. 573; Allen *v.* Vancleave, 15 B. Mon. (Ky.) 236, 61 Am. Dec. 184. But see note 44 *supra*.

56. *United States.* — Boston & A. R. Co. *v.* O'Reilly, 158 U. S. 334.

Alabama. — Blackman *v.* Johnson, 35 Ala. 252.

Colorado. — Equitable Mut. Acc. Ass'n *v.* McCluskey, 1 Colo. App. 473, 29 Pac. 383.

Connecticut. — Rowland *v.* Philadelphia W. & B. R. Co., 63 Conn. 415, 28 Atl. 102.

Illinois. — Winnebago Co. *v.* Rockford, 61 Ill. App. 656; West Chicago St. R. Co. *v.* Carr, 170 Ill. 478, 48 N. E. 992.

Kansas. — Atchison, T. & S. F. R. Co. *v.* Frazier, 27 Kan. 463.

Massachusetts. — Emerson *v.* Lowell Gaslight Co., 6 Allen 146, 83 Am. Dec. 621.

South Carolina. — McClintock *v.* Hunter, Dud. 327.

57. Puls *v.* Grand Lodge A. O. U. W. (N. D.), 102 N. W. 165 (poison); Travelers Protective Ass'n *v.* West, 42 C. C. A. 284, 102 Fed. 226; Travelers Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397. See article "INJURIES TO PERSON," Vol. VII.

58. Hancock Co. *v.* Leggett, 115 Ind. 544, 18 N. E. 53; Roosa *v.* Boston Loan Co., 132 Mass. 439; Nored *v.* Adams, 2 Head (Tenn.) 449; Travelers' Protective Ass'n *v.* West, 42 C. C. A. 284, 102 Fed. 226. See also Steurer *v.* Ried, 56 Ill. App. 245.

59. Jenkin *v.* Pacific Mut. L. Ins. Co., 131 Cal. 121, 63 Pac. 180; Globe Acc. Ins. Co. *v.* Gerisch, 163 Ill. 625, 45 N. E. 563; Shade *v.* Covington-Cincinnati Elev. R. & Transfer & Bridge Co., 27 Ky. L. Rep. 224, 84 S. W. 733.

60. Globe Acc. Ins. Co. *v.* Gerisch, 61 Ill. App. 140; Newman *v.* Dodson, 61 Tex. 91.

A statement by a patient to his physician that an injury was caused by the bite or sting of an insect was held admissible in evidence. Omberg *v.* United States Mut. Ass'n, 19 Ky. L. Rep. 462, 40 S. W. 909.

61. Cunningham *v.* Kelly, 36 Ala.

results or permanency of an injury or disease competent evidence.[62]

4. Ability and Competency of Declarant To Testify. — As already stated, statutes making parties competent witnesses have had the effect, in some jurisdictions, of rendering declarations, as distinguished from exclamations, incompetent evidence of the physical condition of the declarant.[63] But declarations, and exclamations admissible in evidence as verbal acts under the general rules already given, are not rendered inadmissible by the fact that the person making them is able and competent to testify in the pending action.[64] Nor, on the other hand, does the incompetency of the declarant render evidence of his declarations or exclamations inadmissible.[65]

5. Province of Court and Jury. — The court, in the first instance, should pass upon the apparent spontaneity of declarations and exclamations;[66] but the jury must finally determine their genuineness and the weight to be given them as evidence.[67]

IV. DECLARATIONS OF OTHER PERSONS.

The mental or physical condition of a person cannot be proved, ordinarily, by the unsworn declarations of other persons.[68] The rule

78 (dropsy); Corbett *v.* St. Louis, Iron Mt. & S. R. Co., 26 Mo. App. 621 (fracture of skull).

62. Blackman *v.* Johnson, 35 Ala. 252.

63. See note 23 *supra*.

64. See article "Injuries to Person," Vol. VII, p. 390.

65. *Alabama.* — Rowland *v.* Walker, 18 Ala. 749.

Mississippi. — Fondren *v.* Durfee, 39 Miss. 324.

North Carolina. — Roulhac *v.* White, 31 N. C. 63; Biles *v.* Holmes, 33 N. C. 16; Wallace *v.* McIntosh, 49 N. C. 434.

Tennessee. — Jones *v.* White, 11 Humph. 268; Yeatman *v.* Hart, 6 Humph. 375.

Texas. — Rogers *v.* Crain, 30 Tex. 284.

But see Tumey *v.* Knox, 7 T. B. Mon. (Ky.) 88.

66. Hewitt *v.* Eisenbart, 36 Neb. 794, 55 N. W. 252.

67. *United States.* — Travelers Ins. Co. *v.* Mosley, 8 Wall. 397.

Alabama. — Rowland *v.* Walker, 18 Ala. 749.

Connecticut. — Kearney *v.* Farrell, 28 Conn. 317, 73 Am. Dec. 677.

Georgia. — Broyles *v.* Prisock, 97 Ga. 643, 25 S. E. 389.

Illinois. — Globe Acc. Ins. Co. *v.* Gerisch, 61 Ill. App. 140.

Iowa. — Battis *v.* Chicago, R. I. & P. R. Co., 124 Iowa 623, 100 N. W. 543; Keyes *v.* Cedar Falls, 107 Iowa 509, 78 N. W. 227.

Kansas. — Atchison, T. & S. F. R. Co. *v.* Johns, 36 Kan. 769, 14 Pac. 237, 59 Am. Rep. 609.

Missouri. — Bragg *v.* Moberly, 17 Mo. App. 221.

North Carolina. — Roulhac *v.* White, 31 N. C. 63; Biles *v.* Holmes, 33 N. C. 16; Wallace *v.* McIntosh, 49 N. C. 434.

Tennessee. — Yeatman *v.* Hart, 6 Humph. 375; Jackson *v.* Missouri, K. & T. R. Co., 23 Tex. Civ. App. 319, 55 S. W. 376.

See article "Injuries to Person," Vol. VII, p. 389.

68. Blackman *v.* Johnson, 35 Ala. 252; Chicago R. I. & P. R. Co. *v.* Bell, 70 Ill. 102; Harrington *v.* Hamburg, 85 Iowa 272, 52 N. W. 201; Heald *v.* Thing, 45 Me. 392; Wilt *v.* Vickers, 8 Watts (Pa.) 227.

In an action for a personal injury the previous good health of the plaintiff cannot be proved by evidence that he effected insurance on his life a short time before the injury. Lee *v.* Cresco, 47 Iowa 499.

As tending to prove whether sickness and fainting of a woman were actual or feigned, the statements of third persons to her at the time of the

applies to the proof of mental incapacity or insanity[69] and intoxication.[70] The declarations of an attending physician are not competent evidence of the condition of the patient,[71] though made to the patient himself, and in the course of treatment.[72] The physical[73] or mental[74] condition of a person cannot be proved by rumor or reputation. Ordinarily intemperance is not provable by reputation, but such evidence has been admitted in connection with evidence of specific instances of intoxication.[75]

Fear. — Declarations and threats of others may tend indirectly to show that a person was in a state of alarm or fear at a particular time.[76]

V. COMPETENCY OF WITNESSES. — OPINION EVIDENCE.

1. The Person Whose Condition Is in Issue. — A non-expert may testify to his own past or present pain, suffering, symptoms and general state of health, or to an injury or disease which is perceptible to the senses of persons not having scientific knowledge.[77] He may

fainting were admitted in evidence. McRae *v.* Malloy, 93 N. C. 154.

69. Cook *v.* Osborn, 2 Root (Conn.) 31; Gray *v.* Obear, 59 Ga. 675; Kimball *v.* Currier, 5 Gray (Mass.) 458; Renaud *v.* Pageot, 102 Mich. 568, 61 N. W. 3; Barker *v.* Pope, 91 N. C. 165. See article "Insanity," Vol. VII, p. 447.

70. Lake Erie & W. R. Co. *v.* Zoffinger, 107 Ill. 199.

71. Buckley *v.* Cunningham, 34 Ala. 69; Blackman *v.* Johnson, 35 Ala. 252; St. Kevin Min. Co. *v.* Isaacs, 18 Colo. 400, 32 Pac. 822; Goshen *v.* England, 119 Ind. 368, 21 N. E. 977; Heald *v.* Thing, 45 Me. 392; Missouri, K. & T. R. Co. *v.* Criswell (Tex. Civ. App.), 78 S. W. 388; Vicksburg & M. R. Co. *v.* O'Brien, 119 U. S. 99. See article "Injuries to Person," Vol. VII, pp. 380, 394.

But the opinions expressed by physicians, while attending a person who had been poisoned, as to the character of the poisoning were admitted in evidence. Mutual L. Ins. Co. *v.* Tillman, 84 Tex. 31, 19 S. W. 294.

72. Louisville & N. R. Co. *v.* Smith, 27 Ky. L. Rep. 257, 84 S. W. 755.

73. Mosser *v.* Mosser, 32 Ala. 551; Union Pac. R. Co. *v.* Hammerlund (Kan.), 79 Pac. 152; Bois *v.* McAllister, 12 Me. 308 (pregnancy); Home Circle Soc. *v.* Shelton (Tex. Civ. App.), 81 S. W. 84.

74. See article "Insanity," Vol. VII.

75. Neudeck *v.* Grand Lodge A. O. U. W., 61 Mo. App. 97, 1 Mo. App. Rep. 330. See article "Homicide," Vol. VI.

76. Fear. — Statements of strangers to, or in the presence of, a person may tend to prove the state of mind which induced him to jump from a train. Hemmingway *v.* Chicago, M. & St. P. R. Co., 72 Wis. 42, 37 N. W. 804, 7 Am. St. Rep. 823; Spohn *v.* Missouri Pac. R. Co., 122 Mo. 1, 26 S. W. 663.

77. *Illinois.* — Bloomington *v.* Schrock, 17 Ill. App. 40 (apparent labor pains); North Chicago St. R. Co. *v.* Cook, 145 Ill. 551, 33 N. E. 958, *reversing* 43 Ill. App. 634 (pain and confinement to bed).

Kansas. — Topeka *v.* High, 6 Kan. App. 162, 51 Pac. 306 (pain and sleeplessness).

Kentucky. — Louisville & N. R. Co. *v.* Smith, 27 Ky. L. Rep. 257, 84 S. W. 755.

Maryland. — Sellman *v.* Wheeler, 95 Md. 751, 54 Atl. 512 (pain, nervousness and sleeplessness).

Michigan. — Lindley *v.* Detroit, 131 Mich. 8, 90 N. W. 665 (location and character of pain).

Missouri. — Bragg *v.* Moberly, 17 Mo. App. 221 (prolapsus uteri); Dolan *v.* Moberly, 17 Mo. App. 436 (prolapsus uteri and abscesses).

New York. — Corbett *v.* Troy, 53

describe his mental and nervous condition.[78] He is not entitled to testify to his opinion as to the probable effects or permanency of an injury or disease,[79] nor to his contract capacity at a given time.[80]

2. Non-Expert Witnesses. — A. In General. — Laymen or non-expert witnesses are frequently competent to testify to the apparent physical or mental condition of persons whom they have had opportunity to observe. It has been held that the testimony of non-experts should be confined to the *appearance* of such persons.[81] In many cases no such distinction has been made, and non-expert testimony has seemed to involve the opinions of the witnesses upon the fact of disease or injury.[82] In some cases the right of non-experts to testify to conclusions has been expressly upheld.[83] The testimony of non-experts must be based entirely on their own observations, and the particular facts must be given when requested.[84] The opinions of non-experts on matters requiring some degree of medical skill are inadmissible in evidence. Thus such testimony is frequently incom-

Hun 228, 6 N. Y. Supp. 381 (general health); McSwyny *v.* Broadway & S. A. R. Co., 54 Hun 637, 7 N. Y. Supp. 456 (lameness); Cass *v.* Third Ave. R. Co., 20 App. Div. 591, 47 N. Y. Supp. 356 (inability to work).

See article "Injuries to Person," Vol. VII, p. 394.

A man who had been treated for rupture was held competent to testify as to whether he had been cured. Wray *v.* Warner, 111 Iowa 64, 82 N. W. 455. A person injured is not entitled to testify to dreams relating to his injury. Louisville & N. R. Co. *v.* Smith, 27 Ky. L. Rep. 257, 84 S. W. 755.

78. O'Brien *v.* Chicago M. & St. P. R. Co., 89 Iowa 644, 57 N. W. 425; Sellman *v.* Wheeler, 95 Md. 751, 54 Atl. 512.

79. Price *v.* Charles Warner Co., 1 Pen. (Del.) 462, 42 Atl. 699; Hutchinson *v.* Van Cleve, 7 Kan. App. 676, 53 Pac. 888; Pfau *v.* Alteria, 23 Misc. 693, 52 N. Y. Supp. 88. See article "Injuries to Person," Vol. VII, p. 395.

Expectancy of Death. — Evidence that a slave and his attending physician thought he would die, and that the slave prayed, was rejected. Blackman *v.* Johnson, 35 Ala. 252. See also Tumey *v.* Knox, 7 T. B. Mon. (Ky.) 88.

80. O'Connell *v.* Beecher, 21 App. Div. 298, 47 N. Y. Supp. 334.

81. Bell *v.* Morrisett, 51 N. C. 178; Ashland *v.* Marlborough, 99 Mass. 47. See also Billings *v.* Metropolitan L. Ins. Co., 70 Vt. 477, 41 Atl. 516.

82. See cases in notes 89-23 *infra*.

83. Salem *v.* Webster, 95 Ill. App. 120, *affirmed* 192 Ill. 369, 61 N. E. 323; Cleveland, C. C. & St. L. R. Co. *v.* Gray, 148 Ind. 266, 46 N. E. 675; Chattanooga, R. & C. R. Co. *v.* Huggins, 89 Ga. 494, 15 S. E. 848; Shelby *v.* Clagett, 46 Ohio St. 549, 22 N. E. 407, 5 L. R. A. 606.

84. Roberts *v.* Bidwell (Mich.), 98 N. W. 1000; Rouch *v.* Zehring, 59 Pa. St. 74. See articles "Expert and Opinion Evidence," Vol. V, p. 659, *et seq.*, and "Injuries to Person," Vol. VII, p. 398.

It has sometimes been held that a non-expert witness must first state the grounds for his opinion. Southern L. Ins. Co. *v.* Wilkinson, 53 Ga. 535; Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401, 28 N. E. 860; Norton *v.* Moore, 3 Head (Tenn.) 480.

Incapacity for Duty. — A witness who did not testify to facts was not permitted to state that an officer was physically incapable of performing the duties of his office. People *v.* Barker, 1 App. Div. 532, 37 N. Y. Supp. 555.

Rationality. — But one who testifies to the rationality of a person need not base his conclusion on particular facts. Lucas *v.* McDonald (Iowa), 102 N. W. 532.

petent to prove the nature[85] or cause[86] of a disease or injury, and is generally incompetent to prove its probable effects[87] or proper treatment.[88]

B. MENTAL STATES. — In most jurisdictions, non-expert witnesses properly qualified by acquaintance and observation may give their opinions as to the sanity of persons.[89] And even in those jurisdictions where such opinions are not competent evidence a non-expert may testify to the apparent intelligence or coherency or memory of another,[90] or to any apparent change in his intelligence and mental capacity.[91] A non-expert may testify to the apparent intelligence and discretion of a child.[92] In some jurisdictions it seems that non-experts may testify to the testamentary capacity or incapacity of persons;[93] but in other jurisdictions such opinions are inadmissible as conclusions of witnesses upon a mixed question of law and fact.[94]

85. Dominick *v.* Randolph, 124 Ala. 557, 27 So. 481; McLean *v.* State, 16 Ala. 672. See article "EXPERT AND OPINION EVIDENCE," Vol. V, p. 698.

86. Willet *v.* Johnson, 13 Okla. 563, 76 Pac. 174; Tenney *v.* Smith, 63 Vt. 520, 22 Atl. 659. See articles "EXPERT AND OPINION EVIDENCE," Vol. V, p. 698; "INJURIES TO PERSON," Vol. VII, p. 398.

87. Blackman *v.* Johnson, 35 Ala. 252; Baltimore & L. Tpke. Co. *v.* Cassell, 66 Md. 419, 7 Atl. 805; Struth *v.* Decker (Md.), 59 Atl. 727. See article "EXPERT AND OPINION EVIDENCE," Vol. V, p. 698.

A non-expert witness was held incompetent to testify that a person was a physical wreck from the use of morphine and liquor; that he "seemed unable to resist the habit longer," and that he "seemed to be a slave to morphine." Endowment Rank K. of P. *v.* Allen, 104 Tenn. 623, 58 S. W. 241.

88. Baltimore & L. Tpke. Co. *v.* Cassell, 66 Md. 419, 7 Atl. 805.

89. *California.* — *In re* McKenna's Estate, 143 Cal. 580, 77 Pac. 461.

Illinois. — Chicago Union Trac. Co. *v.* Lawrence, 211 Ill. 373, 71 N. E. 1024, *affirming* 113 Ill. App. 269.

Iowa. — Stutsman *v.* Sharpless, 125 Iowa 335, 101 N. W. 105; *In re* Selleck's Will, 125 Iowa 678, 101 N. W. 453; Hull *v.* Hull, 117 Iowa 738, 89 N. W. 979.

Maryland. — Struth *v.* Decker, 59 Atl. 727.

Michigan. — Roberts *v.* Bidwell, 98 N. W. 1000.

Montana. — Spencer *v.* Spencer, 79 Pac. 320.

Contra. — McCoy *v.* Jordan, 184 Mass. 575, 69 N. E. 358. See article "INSANITY," Vol. VII, pp. 468-470.

90. Nash *v.* Hunt, 116 Mass. 237; McCoy *v.* Jordan, 184 Mass. 575, 69 N. E. 358. See also Jones *v.* Collins, 94 Md. 403, 51 Atl. 398.

91. Clark *v.* Clark, 168 Mass. 523, 47 N. E. 510; Barker *v.* Comins, 110 Mass. 477; Com. *v.* Brayman, 136 Mass. 438; Bridge *v.* Oshkosh, 71 Wis. 363, 37 N. W. 409.

92. Hewitt *v.* Taruton St. R. Co., 167 Mass. 483, 46 N. E. 106; Laplante *v.* Warren Cotton Mills, 165 Mass. 487, 43 N. E. 294; Keyser *v.* Chicago & G. T. R. Co., 66 Mich. 390, 33 N. W. 867; St. Louis & S. W. R. Co. *v.* Shifflet (Tex. Civ. App.), 56 S. W. 697. But see Lynch *v.* Smith, 104 Mass. 52, 6 Am. Rep. 188; Stubbs *v.* Houston, 33 Ala. 555.

But not, it was held, where the child was himself examined and cross-examined before the jury. Sprague *v.* Atlee, 81 Iowa 1, 46 N. W. 756.

93. Stuckey *v.* Bellah, 41 Ala. 700; Wise *v.* Foote, 81 Ky. 10; Jones *v.* Collins, 94 Md. 403, 51 Atl. 398; Weems *v.* Weems, 19 Md. 334; Beaubien *v.* Cicotte, 12 Mich. 459; Patten *v.* Cilley, 67 N. H. 520, 42 Atl. 47; Bost *v.* Bost, 87 N. C. 477; Dickinson *v.* Dickinson, 61 Pa. St. 401.

94. Walker *v.* Walker, 34 Ala. 469; Runyan *v.* Price, 15 Ohio St. 1, 86 Am. Dec. 459; Turner's Appeal, 72 Conn. 305, 44 Atl. 310; Hall *v.* Perry, 87 Me. 569, 33 Atl. 160, 47 Am.

So, in some states, the opinions of non-experts as to the contract or business capacity of others seems to be admissible,[95] while in others it is inadmissible.[96] It has been held that a non-expert may testify that a person is easily influenced,[97] but not that he has been unduly influenced in a particular case, or is susceptible to the undue influence of a particular person.[98]

A non-expert witness may give his opinion as to whether a person was intoxicated at a given time,[99] or whether he is a person of intemperate habits.[1] A non-expert witness may testify to the apparent nervousness, excitability, agitation or calmness of another,[2] or to his apparent mental anguish.[3] One who is closely associated with a person may testify to his love and attachment[4] or friendship[5] for

St. Rep. 352; Brown *v.* Mitchell, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64 (full discussion). See also Keithley *v.* Stafford, 126 Ill. 507, 18 N. E. 740.

95. Jones *v.* Collins, 94 Md. 403, 51 Atl. 398; Beaubien *v.* Cicotte, 12 Mich. 459; Culver *v.* Haslam, 7 Barb. (N. Y.) 314; McLeary *v.* Morment, 84 N. C. 235; Wilkinson *v.* Pearson, 23 Pa. St. 117; Galloway *v.* San Antonio & G. R. Co. (Tex. Civ. App.), 78 S. W. 32; Burnham *v.* Mitchell, 34 Wis. 117; Kilgore *v.* Cross, 1 Fed. 578. See also Turner's Appeal, 72 Conn. 305, 44 Atl. 310; Keithley *v.* Stafford, 126 Ill. 507, 18 N. E. 740; Bricker *v.* Lightner, 40 Pa. St. 199.

96. *In re* Carmichael, 36 Ala. 616; Torrey *v.* Burney, 113 Ala. 496, 21 So. 348; Sears *v.* Shafer, 1 Barb. (N. Y.) 408; Aiman *v.* Stout, 42 Pa. St. 114; Mills *v.* Cook (Tex. Civ. App.), 57 S. W. 81; Clum *v.* Barkley, 20 Wash. 103, 54 Pac. 962.

Assent to Act or Contract. — A person may testify to the conduct of another indicating assent to an act or contract. Tompkins *v.* Augusta & K. R. Co., 21 S. C. 420. But not to a conclusion of the witness that the other did or did not assent to such act or contract. Burns *v.* Campbell, 71 Ala. 271; Metz *v.* Luckemeyer, 27 Jones & S. 53, 12 N. Y. Supp. 550. See article "Expert and Opinion Evidence," Vol. V, p. 701.

97. Appeal of Vivian, 74 Conn. 257, 50 Atl. 797; Patten *v.* Cilley, 67 N. H. 520, 42 Atl. 47.

98. Conner *v.* Stanley, 67 Cal. 315, 7 Pac. 723; O'Connor *v.* Madison, 98 Mich. 183, 57 N. W. 105; Sears *v.* Shafer, 1 Barb. (N. Y.) 408; Smith *v.* Smith, 117 N. C. 348, 23 S. E. 270; Dean *v.* Fuller, 40 Pa. St. 474. See also Wallace *v.* Harris, 32 Mich. 380; Rembert *v.* Brown, 14 Ala. 360. But see Howell *v.* Howell, 59 Ga. 145. See article "Expert and Opinion Evidence," Vol. V, p. 690.

99. See article "Intoxication," Vol. VII, p. 777.

Morphine. — Persons who had been acquainted with another for a long time, and who were familiar with her habits and the effect of morphine upon her, were permitted to give their opinion as to whether she was under the influence of morphine at certain times. Burt *v.* Burt, 168 Mass. 204, 46 N. E. 622.

1. See article "Expert and Opinion Evidence." Vol. V, p. 673.

2. McDonald *v.* Franchere, 102 Iowa 496, 71 N. W. 427; Dimick *v.* Downs, 82 Ill. 570; McCraw *v.* Old North State Ins. Co., 78 N. C. 149. See article "Expert and Opinion Evidence," Vol. V, p. 702.

2. McDonald *v.* Franchere, 102 Iowa 496, 71 N. W. 427; Sherrill *v.* Western Union Tel. Co., 117 N. C. 352, 23 S. E. 277.

4. McKee *v.* Nelson, 4 Cow. (N. Y.) 355, 15 Am. Dec. 384. But *compare* McVey *v.* Blair, 7 Ind. 590; Leckey *v.* Bloser, 24 Pa. St. 401. See article "Expert and Opinion Evidence," Vol. V, p. 704.

5. See article "Expert and Opinion Evidence," Vol. V, p. 703.

another. One person may testify to another's apparent anger or hate,[6] or fear,[7] or surprise.[8]

C. Physical States. — A non-expert witness who has had proper opportunity for observing another person may testify to his general state of health or bodily condition,[9] or to any apparent injury, sickness, weakness or suffering which is not out of the common course of observation, and which does not require the exercise of medical knowledge beyond that possessed by ordinary persons.[10] It has been held proper for a non-expert to testify that another person was, or appeared to be, sick or diseased,[11] or had a fever,[12] or was weak,[13]

6. See articles "Expert and Opinion Evidence," Vol. V, p. 701, and "Malice," this volume.

7. See articles "Expert and Opinion Evidence," Vol. V, p. 703, and "Homicide," Vol. VI, p. 761.

8. See article "Expert and Opinion Evidence," Vol. V, p. 705.

9. *Alabama.* — Bennett *v.* Fail, 26 Ala. 605.

California. — Robinson *v.* Exempt Fire Co., 103 Cal. 1, 36 Pac. 955, 42 Am. St. Rep. 93, 24 L. R. A. 715; People *v.* Barney, 114 Cal. 554, 47 Pac. 41.

District of Columbia. — District of Columbia *v.* Haller, 4 App. D. C. 405.

Georgia. — Brown *v.* Lester, Ga. Dec. 77, pt. 1.

Illinois. — Chicago City R. Co. *v.* Van Vleck, 143 Ill. 480, 32 N. E. 262; Ashley Wire Co. *v.* McFadden, 66 Ill. App. 26; Supreme Lodge Mystic Workers of the World *v.* Jones, 113 Ill. App. 241; Pioneer Reserve Ass'n *v.* Jones, 111 Ill. App. 156; Lake Erie & W. R. Co. *v.* Delong, 109 Ill. App. 241.

Indiana. — Cleveland, C. C. & St. L. R. Co. *v.* Gray, 148 Ind. 266, 46 N. E. 675.

Iowa. — Reininghaus *v.* Merchants L. Ass'n, 116 Iowa 364, 89 N. W. 1113.

Kansas. — Topeka *v.* Griffey, 6 Kan. App. 920, 51 Pac. 296.

Maryland. — Baltimore City Pass. R. Co. *v.* Nugent, 86 Md. 349, 38 Atl. 779; Baltimore & L. Tpke. Co. *v.* Cassell, 66 Md. 419, 7 Atl. 805.

New York. — Sherman *v.* Oneonta, 66 Hun 629, 21 N. Y. Supp. 137; Staring *v.* Western Union Tel. Co., 58 Hun 606, 11 N. Y. Supp. 817.

Ohio. — Myers *v.* Lucas, 16 Ohio Cir. Ct. 545, 8 O. C. D. 431.

Pennsylvania. — Thompson *v.* Stevens, 71 Pa. St. 161; Baldi *v.* Metropolitan Ins. Co., 18 Pa. Super. Ct. 599.

Tennessee. — Norton *v.* Moore, 3 Head 480.

Texas. — Morrison *v.* State, 40 Tex. Crim. 473, 51 S. W. 358; Galloway *v.* San Antonio & G. R. Co. (Tex. Civ. App.), 78 S. W. 32.

Vermont. — Billings *v.* Metropolitan L. Ins. Co., 70 Vt. 477, 41 Atl. 516.

Washington. — Peterson *v.* Seattle Trac. Co., 23 Wash. 615, 63 Pac. 539, 65 Pac. 543.

Wisconsin. — Keller *v.* Gilman, 93 Wis. 9, 66 N. W. 800.

But see Fallon *v.* Rapid City (S. D.), 97 N. W. 1009.

10. See article "Injuries to Person," Vol. VII, p. 396.

11. *Alabama.* — Fountain *v.* Brown, 38 Ala. 72; Stone *v.* Watson, 37 Ala. 279; Milton *v.* Rowland, 11 Ala. 732; Barker *v.* Coleman, 35 Ala. 221.

Illinois. — Shawneetown *v.* Mason, 82 Ill. 337, 25 Am. Rep. 321; Salem *v.* Webster, 95 Ill. App. 120, *affirmed* 192 Ill. 369, 61 N. E. 323; Chicago & E. I. R. Co. *v.* Randolph, 199 Ill. 126, 65 N. E. 142.

Massachusetts. — O'Neil *v.* Hanscom, 175 Mass. 313, 56 N. E. 587.

Minnesota. — Hall *v.* Austin, 73 Minn. 134, 75 N. W. 1121.

New York. — Farrell *v.* Metropolitan St. R. Co., 51 App. Div. 456, 64 N. Y. Supp. 709; Corbett *v.* Troy, 53 Hun 228, 6 N. Y. Supp. 381; Webb *v.* Yonkers R. Co., 51 App. Div. 194, 64 N. Y. Supp. 491.

12. Wilkinson *v.* Moseley, 30 Ala. 562.

13. Chicago City R. Co. *v.* Van Vleck, 143 Ill. 480, 32 N. E. 262; Chicago & E. I. R. Co. *v.* Randolph, 199 Ill. 126, 65 N. E. 142; Elliott *v.*

or suffering from pain[14] or nervousness,[15] or was unconscious,[16] or was lame, numb or paralyzed,[17] or was in need of attendance or assistance,[18] or was unable to work or attend to business,[19] or that his sight, hearing or speech was impaired.[20] A non-expert may testify to the general appearance of a physical injury.[21] He is com-

Van Buren, 33 Mich. 49; Shelby *v.* Clagett, 46 Ohio St. 549, 22 N. E. 407, 5 L. R. A. 606; Lake Shore & M. S. R. Co. *v.* Gaffney, 9 Ohio Cir. Ct. 32.

14. District of Columbia *v.* Haller, 4 App. D. C. 405; Girard Coal Co. *v.* Wiggins, 52 Ill. App. 69; Elliott *v.* Van Buren, 33 Mich. 49; Isherwood *v.* H. L. Jenkins Lumb. Co., 87 Minn. 388, 92 N. W. 230; McSwyny *v.* Broadway & S. A. R. Co., 54 Hun 637, 7 N. Y. Supp. 456; Lake Shore & M. S. R. Co. *v.* Gaffney, 9 Ohio Cir. Ct. 32; Werner *v.* Chicago & N. W. R. Co., 105 Wis. 300, 81 N. W. 416. But see St. Louis S. W. R. Co. *v.* Ball, 28 Tex. Civ. App. 287, 66 S. W. 879. See article "EXPERT AND OPINION EVIDENCE," Vol. V, p. 698.

15. Chicago City R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28; Chicago & E. I. R. Co. *v.* Randolph, 199 Ill. 126, 65 N. E. 142; O'Neil *v.* Hanscom, 175 Mass. 313, 56 N. E. 587; Webb *v.* Yonkers R. Co., 51 App. Div. 194, 64 N. Y. Supp. 491.

16. Chicago City R. Co. *v.* Van Vleck, 143 Ill. 480, 32 N. E. 262; Hyland *v.* Southern Bell. Tel. & Tel. Co., 70 S. C. 315, 49 S. E. 879.

17. *District of Columbia.* — District of Columbia *v.* Haller, 4 App. D. C. 405.

Illinois. — Chicago City R. Co. *v.* Van Vleck, 143 Ill. 480, 32 N. E. 262.

Maryland. — Baltimore & L. Tpke. Co. *v.* Cassell, 66 Md. 419, 7 Atl. 805; Baltimore City Pass. R. Co. *v.* Nugent, 86 Md. 349, 38 Atl. 779.

Michigan. — Will *v.* Mendon, 108 Mich. 251, 66 N. W. 58.

Texas. — St. Louis S. W. R. Co. *v.* Burke (Tex. Civ. App.), 81 S. W. 774; St. Louis S. W. R. Co. *v.* Brown, 30 Tex. Civ. App. 57, 69 S. W. 1010; Abee *v.* Bargas (Tex. Civ. App.), 65 S. W. 489; Chicago, R. I. & T. R. Co. *v.* Long, 26 Tex. Civ. App. 601, 65 S. W. 882.

Wisconsin. — Collins *v.* Janesville, 111 Wis. 348, 87 N. W. 241.

18. Salem *v.* Webster, 95 Ill. App. 120, *affirmed* 192 Ill. 369, 61 N. E. 323; Chicago, B. & Q. R. Co. *v.* George, 19 Ill. 510, 71 Am. Dec. 239; Shelby *v.* Clagett, 46 Ohio St. 549, 22 N. E. 407, 5 L. R. A. 606; Lake Shore and M. S. R. Co. *v.* Gaffney, 9 Ohio Cir. Ct. 32.

19. *Alabama.* — Barker *v.* Coleman, 35 Ala. 221.

Georgia. — Chattanooga, R. & C. R. Co. *v.* Huggins, 89 Ga. 494, 15 S. E. 848.

Illinois. — Ashley Wire Co. *v.* McFadden, 66 Ill. App. 26; Chicago & A. R. Co. *v.* Arnol, 46 Ill. App. 157, *affirmed* 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313.

Iowa. — Keyes *v.* Cedar Falls, 107 Iowa 509, 78 N. W. 227.

Massachusetts. — O'Neil *v.* Hanscom, 175 Mass. 313, 56 N. E. 587.

New York. — Staring *v.* Western Union Tel. Co., 58 Hun 606, 11 N. Y. Supp. 817; Farrell *v.* Metropolitan St. R. Co., 51 App. Div. 456, 64 N. Y. Supp. 709.

Texas. — St. Louis S. W. R. Co. *v.* Brown, 30 Tex. Civ. App. 456, 69 S. W. 1010.

Wisconsin. — Keller *v.* Gilman, 93 Wis. 9, 66 N. W. 800.

20. Chicago City R. Co. *v.* Van Vleck, 143 Ill. 480, 32 N. E. 262; Sampson *v.* Atchison, T. & S. F. R. Co., 57 Mo. App. 308; Staring *v.* Western Union Tel. Co., 58 Hun 606, 11 N. Y. Supp. 817; Doyle *v.* Manhattan R. Co., 59 Hun 625, 13 N. Y. Supp. 536; Abee *v.* Bargas (Tex. Civ. App.), 65 S. W. 489; Chicago, R. I. & T. R. Co. *v.* Long, 26 Tex. Civ. App. 601, 65 S. W. 882; Peterson *v.* Seattle Trac. Co., 23 Wash. 615, 63 Pac. 539, 65 Pac. 543.

21. People *v.* Barney, 114 Cal. 554, 47 Pac 41; Goshen *v.* England, 119 Ind. 368, 21 N. E. 977; Robinson *v.* Halley, 124 Iowa 443, 100 N. W. 328; Baltimore & L. Tpke. Co. *v.* Cassell, 66 Md. 419, 7 Atl. 805; Duntzy *v.* Van Buren, 5 Hun (N. Y.) 648 (rupture); James *v.* Ford, 16 Daly 126,

petent to say whether a sick or injured person appeared to be better or worse at a given time.[22] A non-expert was permitted to testify that a woman was pregnant.[23]

3. Expert Witnesses. — The cause, character, extent, effects, permanency and treatment of mental and physical disease are peculiarly subjects for expert testimony. The subject is treated in the articles "EXPERT AND OPINION EVIDENCE," "INJURIES TO PERSON" and "INSANITY."

9 N. Y. Supp. 504; Hyland *v.* Southern Bell Tel. & Tel. Co., 70 S. C. 315, 49 S. E. 879. But see St. Louis S. W. R. Co. *v.* Ball, 28 Tex. Civ. App. 287, 66 S. W. 879.

22. Salem *v.* Webster, 95 Ill. App. 120, 192 Ill. 369, 61 N. E. 323; Galloway *v.* San Antonio & G. R. Co. (Tex. Civ. App.), 78 S. W. 32; King *v.* Second Ave. R. Co., 75 Hun 17, 26 N. Y. Supp. 973. See article "EXPERT AND OPINION EVIDENCE," Vol. V. p. 697.

23. Wilkinson *v.* Moseley, 30 Ala. 562. *Contra*, Bois *v.* McAllister, 12 Me. 308.

In State *v.* Reinheimer, 109 Iowa 624, 80 N. W. 669, it was held that a non-expert witness might testify to the symptoms of the condition only.

MENTAL CAPACITY.— See **C**apacity; Competency Infants; Insanity; Wills.

MENTAL SUFFERING.— See Breach of Promise; Damages; Injuries to Person.

MERGER.— See Mortgages; Parol Evidence.

MINES AND MINERALS.

By Clark Ross Mahan.

CROSS-REFERENCES:

Public Lands;

Waters and Water Courses.

I. MINING RULES AND REGULATIONS.

1. Judicial Notice. — Whether or not a mining rule or regulation exists and is in force at a given time is a matter of which the courts will not take judicial notice; it is a question of fact to be established by the best evidence attainable.[1]

2. Presumptions. — A mining rule or regulation once shown to be in force will be presumed to continue in force until it is shown that it has been repealed, or has fallen into disuse, and a different rule or regulation has been generally adopted and acquiesced in.[2]

3. Mode of Proof. — A. In General. — Evidence of a mining custom is not to be rejected merely because of the recent adoption thereof.[3]

Statutes. — Where a statute expressly makes mining regulations evidence in actions concerning mining claims, proof thereof must be admitted, and, when not in conflict with local statutes, must govern.[4]

B. Best Evidence. — If the local rule or regulation in question is a matter of record in the district, that record is the best evidence and should be produced, or the usual foundation laid before secondary evidence can be resorted to.[5] Where the regulations are

1. *United States.* — Parley's Park Sil. Min. Co. *v.* Kerr, 130 U. S. 256; North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 6 Sawy. 299.

California. — Tabb Mt. Tunnel Co. *v.* Stranahan, 20 Cal. 198.

Colorado. — Sullivan *v.* Hense, 2 Colo. 424, where the court said: "No other course can be pursued, and no good reason is perceived for adopting a different rule. That it may work hardship, in cases where the proof is difficult or impossible to obtain, is readily understood, but as such proof lies at the foundation of the title it is impossible to dispense with it."

Montana. — King *v.* Edwards, 1 Mont. 235.

Nevada. — Golden Fleece Gold & Sil. Min. Co. *v.* Cable Consol. Gold & Sil. Min. Co., 12 Nev. 312; Poujade *v.* Ryan, 21 Nev. 449, 33 Pac. 659.

2. Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96; North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 6 Sawy. 299; Riborado *v.* Quang Pang Min. Co., 2 Idaho 131, 6 Pac. 125.

3. Beatty *v.* Gregory, 17 Iowa 109, 9 Morr. M. Rep. 234; Smith *v.* North American Min. Co., 1 Nev. 423.

It has been held that evidence of mining rules should not be received without preliminary proof of the organization of the mining district. McIntosh *v.* Price, 121 Fed. 716, *holding,* however, that under the circumstances of that case the admission of the evidence was not fatal error.

4. As in Idaho. Riborado *v.* Quang Pang Min. Co., 2 Idaho 131, 6 Pac. 125.

5. Campbell *v.* Rankin, 99 U. S. 261; English *v.* Johnson, 17 Cal. 107, 76 Am. Dec. 574.

In Sullivan *v.* Hense, 2 Colo. 424, it was proposed to show the rule or custom of a mining district as to the length of discovery claims by the record of claims in the district. The court, in holding that the evidence should have been admitted, said: "In the absence of the rule itself it may be doubted whether better evidence could have been found. If at and before the discovery and location of the [lode in question] the claims recorded in that district were uniformly of a certain number of feet, that circumstance would be evi-

printed in pamphlet form, copies of those pamphlets should be produced if attainable.[6] Where no record of the rules and regulations whatever remains, resort must necessarily be had to oral testimony, or to other competent evidence, to establish them.[7] But the local record of a mining community is not the best nor the only evidence of priority or extent of actual possession.[8]

C. Documentary Evidence. — When a local rule or regulation in writing is sought to be introduced it should be shown that the writing comes from the proper custodian.[9]

D. Parol Evidence. — When there is some doubt as to whether the rules and regulations were in force at the time in question, parol evidence may be received.[10]

II. CITIZENSHIP.

1. Presumptions and Burden of Proof. — It has been held that in the absence of evidence to the contrary the presumption is that the locator of a mining claim is a citizen of the United States.[11]

dence tending to prove that the rule of the district prescribed that length of claim. Such evidence would be far more satisfactory than that of a living witness, whose memory might be at fault, and therefore it should have been received."

6. Sullivan *v.* Hense, 2 Colo. 424.

7. In Pralus *v.* Pacific Gold & Sil. Min. Co., 35 Cal. 30, the Preemption Book of the county was offered to establish the fact that plaintiffs had caused a record to be made of the location of their quartz mining claim in the recorder's office of Yuba county, and to furnish evidence tending to show a custom of the district to record quartz claims at the county recorder's office. The court, in holding the admission of the book proper, said: "Plaintiffs were seeking to establish that at the time when their quartz claim was alleged to have been located it was the custom of the Brown's Valley quartz mining district for persons desiring to locate and appropriate a quartz claim to measure off and designate the boundaries of such claims by stakes on the ground, enter upon the same, and cause a record of such location to be made in the county recorder's office. Had the record been offered as evidence of the contents of a separate, independent, original notice, it would have been incompetent, whether the loss of such original had been established or not."

8. Campbell *v.* Rankin, 99 U. S. 261, where the court said: "Whatever may be the effect given to the record of mining claims under section 5 of the Act of Congress approved May 10, 1872 (17 Stat. 92), it certainly cannot be greater than that which is given to the registration laws of the states, and they have never been held to exclude parol proof of actual possession and the extent of that possession as *prima facie* evidence of title."

9. Roberts *v.* Wilson, 1 Utah 292.

An extract or single clause of a book containing the mining rules should not be received, but the whole book should be received where the book is in court in possession of the party offering it, and it is necessary to a fair understanding of any one part that the whole should be inspected. English *v.* Johnson, 17 Cal. 107, 76 Am. Dec. 574.

10. Colman *v.* Clements, 23 Cal. 245.

11. Garfield Min. & Mill. Co. *v.* Hammer, 6 Mont. 53, 8 Pac. 153, *affirmed* 130 U. S. 291; Jantzon *v.* Arizona Copper Co., 3 Ariz. 6, 20 Pac. 93. *Compare*, on this question, *infra*, "The Patent. — Adverse Suits." See article "Citizens and Aliens."

In an action to recover damages

2. Mode of Proof. — A. Statutory Provisions. — Under the federal mining statute, proof of citizenship may, in the case of an individual, consist of his own affidavit thereof.[12]

In the Case of an Unincorporated Association of persons, proof of citizenship may be made by the affidavit of their authorized agent, made upon his own knowledge, or upon information and belief.[13]

In the Case of a Corporation organized under the laws of the United States, or of any state or territory thereof, citizenship may be established by a certified copy of its charter or certificate of incorporation.[14]

for cutting and removing timber from a mining claim it is not necessary to prove citizenship; capacity to locate the claim will be presumed. McFeters *v.* Pierson, 15 Colo. 201, 24 Pac. 1076.

Evidence of Birth Within the United States satisfactorily establishes citizenship within the contemplation of the mining laws, at least in the absence of any evidence showing allegiance to a foreign power. Thompson *v.* Spray, 72 Cal. 528, 14 Pac. 182.

12. North Noonday Min. Co. *v.* Orient Min. Co., 1 Fed. 522, 6 Sawy. 299, 11 Fed. 125; O'Reilly *v.* Campbell, 116 U. S. 418; Stolp *v.* Treasury Gold Min. Co. (Wash.), 80 Pac. 817. *Compare* Wood *v.* Aspen Min. & Smelt. Co., 36 Fed. 25.

An Affidavit on Information and Belief as to the citizenship of the affiant may be received in evidence. North Noonday Min. Co. *v.* Orient Min. Co., 11 Fed. 125, 6 Sawy. 503, where the court, after referring to the federal mining statute, said: "This provision must of necessity contemplate an affidavit to some extent based on information and belief, for no man can, of his own personal knowledge, state where he was born. It is an event occurring before he has acquired a capacity to remember. It also substitutes an affidavit for the record in the case of one having been naturalized. It also contemplates an affidavit on information and belief, where the naturalization of persons other than the party making the affidavit are concerned, for the affidavit of the 'authorized agent' of associations not incorporated may be 'upon information and belief.' It might be utterly impracticable for a person whose father had been naturalized and moved to some distant territory, and died during his infancy, as is supposed to be the case in this instance, to ascertain in which one of the hundreds of courts in the United States having jurisdiction the father was naturalized. At all events, in view of the practical difficulties in making the proofs, or for some other reason, the statute has modified the rule of evidence in this instance and made such affidavits not only competent, but sufficient proof of citizenship; for it requires no other."

13. O'Reilly *v.* Campbell, 116 U. S. 418. See also Golden Fleece Gold & Sil. Min. Co. *v.* Cable Consol. Gold & Sil. Min. Co., 12 Nev. 312.

The Oath of One of the Locators, accompanying the recorded notice of location, as to the citizenship of the locators is *prima facie* evidence of that fact, and will be deemed sufficient until doubt arises. Hammer *v.* Garfield Min. & Mill. Co., 130 U. S. 29, *affirming* 6 Mont. 53, 8 Pac. 153. See also Stolp *v.* Treasury Gold Min. Co. (Wash.), 80 Pac. 817.

14. Doe *v.* Waterloo Min. Co., 70 Fed. 455, 17 C. C. A. 190.

In Hammer *v.* Garfield Min. Co., 130 U. S. 291, *affirming* 6 Mont. 53, 8 Pac. 153, where the plaintiff corporation had been incorporated in New York, the proof of incorporation consisted of certain records of a county in Montana, purporting to be a certificate of its incorporation in New York on the 11th day of October, 1881, duly acknowledged before a notary public of the city and county of New York, and authenticated by the certificate of the secretary of state of New York, under

Rule Applicable to All Mining Litigation. — Nor is the statutory provision in this respect to be construed as permitting an affidavit of citizenship to be received in evidence only in proceedings before the land office for the purpose of procuring a patent; but the rule applies to the litigation of all claims arising under the statute, whether in the department or in the ordinary courts of the country.[15]

B. STATUTORY MODE NOT EXCLUSIVE. — But this statutory mode of proving citizenship by affidavit is not exclusive of other modes of proof.[16]

his official seal, as being a correct copy of the duplicate original on file in his office, and also by a certificate under seal of a commissioner of the territory of Montana in New York as being found by him to be a correct copy after comparison of the same with the original. The introduction of these records was objected to on the ground that the papers were not properly acknowledged or authenticated. The court said: "The law of the territory in force at the time with reference to foreign corporations provided that before they proceeded to do business under their charter or certificate of incorporation in the territory they should 'file for record with the secretary of the territory, and also with the recorder of the county in which they are carrying on business, the charter or certificate of incorporation, duly authenticated, or a copy of said charter or certificate of incorporation.' The law does not specify in what way the copy filed shall be authenticated, and in the absence of any provision on that subject the certificate of the official custodian, under the seal of his office, must be deemed sufficient. It does not appear that a copy of the certificate of incorporation was filed with the secretary of the territory, but no objection to the introduction of the county records having been taken on that ground, it will be presumed that such filing existed, and, if required, it could have been readily shown. There was no error, therefore, in the ruling of the court admitting the records of the county showing the incorporation of the plaintiff in the state of New York."

Citizenship of Stockholders. — The citizenship of the stockholders of a corporation need not be proved otherwise than by the introduction of certified articles of incorporation. Doe *v.* Waterloo Min. Co., 70 Fed. 455, 17 C. C. A. 190. The court said: "It would have been a great hardship on a corporation to have had to prove that all of its stockholders were citizens of the United States. The practice in the land department of the United States under this statute should have great weight in construing it. Hahn *v.* U. S., 107 U. S. 402, 2 Sup. Ct. 494; U. S. *v.* Moore, 95 U. S. 760; Brown *v.* U. S., 113 U. S. 568, 5 Sup. Ct. 648. Considering the statute and the practice thereunder, I think the citizenship of the stockholders of the Waterloo mining company was sufficiently established."

15. North Noonday Min. Co. *v.* Orient Min. Co., 11 Fed. 125, 6 Sawy. 503. The court said: "Evidence which is competent and sufficient to establish a right to a patent to a mining claim as against the government — the actual owner of the land and mine — ought to be competent and sufficient to maintain the party complying with the statute in his possession and claim against a stranger trespassing upon his possession and claim, which would be otherwise recognized as valid by the statute as against the government. I do not think congress designed to establish one rule of evidence or right for the government and another for citizens, as to the same claim arising under the statute, and especially in favor of trespassers upon the possessions of others. I therefore hold the affidavit of Smith to be competent evidence, and properly admitted under the statute."

16. Thompson *v.* Spray, 72 Cal. 528, 14 Pac. 182, where a witness, who was one of the locators, and the

III. THE LOCATION AND ITS INCIDENTS.

1. Essentials of a Valid Location. — A. The Discovery. — a. *Presumptions and Burden of Proof.* — Since the discovery of mineral within the boundaries of the claim is essential to a valid location, one asserting the right of possession thereto must support his claim of a valid location by proof of a discovery prior to the location, or if subsequent thereto, prior to the initiation of an adverse location.[17]

b. *Mode of Proof.* — In making proof of the discovery it is not necessary that it should be established by witnesses to the physical fact; it may be established by circumstantial evidence, such as the certificate of location, the manifestations of workings done, the long tenure of the claim, the development of a vein on the claim by subsequent working, etc.[18]

father of his co-locators, testified as follows: "I and each of my co-locators were, at the time of location of said mining claim, citizens of the United States; my children were born in the state of California." The court said: "The testimony that all the locators were 'citizens' would, perhaps, have been excluded as being a conclusion of the witness if it had been objected to. But it having been allowed to go in without objection, we think it was of itself sufficient to prevent a non-suit upon this ground. With reference to the children, the matter was put beyond cavil by the statement that they were born in California." See also Lone Star Co. *v.* West Point Co., 5 Cal. 447.

The testimony of a locator who has sold his claim that he was not a citizen and had not declared his intention to become one is not binding against his grantee, and is not conclusive. Golden Fleece Gold. & Sil. Min. Co. *v.* Cable Consol. Gold & Sil. Min. Co., 12 Nev. 312, an adverse proceeding, where a witness for the defendant as to the location and recording of its claims stated on cross-examination that at the date of the location he was not a citizen and had never declared his intention of becoming one. The court thereupon decided that the location made by the witness and his associates was wholly void, and excluded all evidence in regard to it, including the deeds of conveyance from the witness and his associates to the defendant. This ruling was held to be erroneous. The court said that in the first place the witness' testimony that he was not a citizen when he made the location, even if it had been more positive than it was, was not conclusive against the defendant; that he had parted with all his interest in the premises, and his admissions were not binding on his grantees; that the question of his citizenship was one for the jury, and not for the court, to decide.

17. Erhardt *v.* Boaro, 8 Fed. 860 (ejectment); Ledoux *v.* Foresten, 94 Fed. 600 (adverse suit); Waterloo Min. Co. *v.* Doe, 56 Fed. 685; Zollars *v.* Evans, 5 Fed. 172.

The Fact That a Location Was Recorded and the boundaries properly marked will not, as against a subsequent valid location, warrant the presumption of a discovery by the prior locator; that fact must be established by other competent evidence. Smith *v.* Newell, 86 Fed. 56. *Compare* Cheesman *v.* Shreeve, 40 Fed. 787, where it was held that the production of certificates of location constitutes presumptive evidence of a discovery of a vein of mineral ore, and that the necessary work has been done and the law regulating such locations has been complied with; and after the lapse of many years every reasonable presumption should be indulged in support of the integrity of the location.

18. Cheesman *v.* Hart, 42 Fed. 98.

Evidence of the Results of Assays of rock taken from the claim, although long after the date of location, is admissible. Southern Cross, Gold & Sil. Min. Co. *v.* Europa Min. Co., 15 Nev. 383. The court said:

B. The Notice of Location. — In most of the mining states, by virtue of a statute, it is incumbent upon a mineral claimant, in order to establish a valid location, to show that a notice of location was properly posted.[19]

C. Marking the Boundaries of the Claim. — It will be presumed that the locator marked the boundaries of his mining claim as required by statute, where it appears that at or near the time he recorded a location notice or certificate reciting that fact.[20]

D. The Record of the Notice of Location. — a. *In General.* The record of the notice of location,[21] when required by law to be filed, is itself proof of its own performance as one of the steps, and in regular order the last step, in perfecting the location.[22] And the certificate when recorded is competent evidence of all which the statute requires it to contain, and which is therein sufficiently set forth.[23] Where the record of a mining claim contains such reference to a natural object or permanent monument as might under any

"We think the evidence had a distinct tendency to prove the fact at issue. It proved the existence of mineral-bearing rock in the claim at the date of the assays, and since veins do not grow and become mineral-bearing in a year it proved that the vein was there at the date of the location, and proof of the existence of the vein is an essential step in proving its discovery."

19. Erhardt *v.* Boaro, 8 Fed. 860. Where it appears that the locator recorded at or near the time a location notice reciting the fact of the posting of a notice, the presumption is that the notice of location was posted as recited. Jantzon *v.* Arizona Copper Co., 3 Ariz. 6, 20 Pac. 93.

Although the notice of location may sufficiently describe the claim so as to admit it in evidence, it is not conclusive; but it may be shown by other competent evidence that the description, when applied to the premises with reference to the permanent monuments, is misleading, unintelligible or impossible, or that the alleged permanent monuments are not such in fact. Dillon *v.* Bayliss, 11 Mont. 171, 27 Pac. 725.

20. Jantzon *v.* Arizona Copper Co., 3 Ariz. 6, 20 Pac. 93.

21. This document is variously designated by the different statutes — sometimes as the notice, sometimes as the certificate, and sometimes as the declaratory statement.

22. Cheesman *v.* Shreeve, 40 Fed. 787. See also Sullivan *v.* Hense, 2 Colo. 424 (an action of ejectment).

A District Record of a Mining Claim is irrelevant without proof of some regulation making a record obligatory or giving it some effect. Golden Fleece Gold & Sil. Min. Co. *v.* Cable Consol. Gold & Sil. Min. Co., 12 Nev. 312, where the court said: "The public law does not of itself create any such office as that of mining recorder. Neither does it make the recording of claims obligatory or give to a record any effect. This is a matter left to the miners of the respective districts. If they make no rules requiring a record, none is required; if they give no effect to a record, evidence of a record is irrelevant."

23. Strepey *v.* Stark, 7 Colo. 614, 5 Pac. 111.

In Bennett *v.* Harkrader, 158 U. S. 441, it was held that a location certificate, although imperfectly describing the claim located, was properly admitted in evidence to establish the time when possession was taken, and to identify the premises so far as it might.

Even when the certificate, for any of the reasons set forth in the statute, is deemed insufficient or void, it has been nevertheless held admissible in connection with a valid amended certificate correcting the defects of the original. Van Zandt *v.* Argentine Min. Co., 2 McCrary (U. S.) 159.

circumstances identify the claim, the record may be received in evidence, the sufficiency of the reference being a question of fact.[24]

b. *Certified Copy of Record.* — A certified copy of the record of a declaratory statement filed by the locator is made competent evidence by statute in some of the states without producing or accounting for the loss of the original.[25]

c. *Oath of Claimant. — Parol Evidence.* — A statute providing that the locator of a mining claim shall make and file for record a declaratory statement in writing on oath requires the oath to be part of the record, and that the oath was taken after location and before recording cannot be shown by evidence *aliunde* the statement.[26]

2. Assessment Work. — A. Burden of Proof. — Where it appears that work claimed to be the annual assessment had not been done within the surface boundaries of the claim, but upon other property, it is then incumbent upon the locator to show that the work was in fact intended as the annual assessment upon the claim, and was of such character as would inure to the benefit thereof.[27]

B. Mode of Proof. — a. *In General.* — The proof usually required to establish the fact that the requisite amount of labor for the annual assessment has been done is not uniform. Mere proof of the

The admissibility as evidence of such additional or amended certificate is not affected by the fact that it was filed subsequent to the commencement of the suit, since it is not evidence of any after-acquired right or interest, but merely evidence relating to a right of possession which must have been acquired prior to the filing of it, and prior to the acquisition of any given rights of the controverting party. Strepey *v.* Clark, 7 Colo. 614, 5 Pac. 111.

24. Permanent Objects or Monuments. — What were or what were not permanent objects or monuments such as are required to be referred to in the record of a notice of location in describing the claim and its boundaries is a fact which the court cannot determine for itself by merely inspecting the record; it should be established by competent evidence. Russell *v.* Chumasero, 4 Mont. 309, 1 Pac. 713.

In the absence of evidence upon the question, it will be presumed that the reference is sufficient for identification. Brady *v.* Husby, 21 Nev. 453, 33 Pac. 801.

25. As in Montana. McKinstry *v.* Clark, 4 Mont. 370, 1 Pac. 759.

26. In Metcalf *v.* Prescott, 10 Mont. 283, 25 Pac. 1037, the court said: "The statute [§ 1477 Comp. Stats.] requires that the locator shall 'make and file for record a declaratory statement in writing on oath.' It shall not only be made 'on oath,' but 'filed for record on oath.' We are of opinion that the statute intends that the oath shall be part of the record. Without directly so declaring, there seems to be a strong implication, from analogy to other recording laws, that one office of the oath is to entitle the instrument to record. We believe that any other view would open the door to abuses, mischiefs and errors. Suppose notices may be recorded with no affidavit or certificate of oath, although the oath may have been actually taken by the party. There would be no official evidence preserved of the act of the officer taking the oath, and titles to valuable mining property would be made to depend upon the doubtful memories of notaries public, and perhaps years after the event, or even after the death of the notary; and the temptation would be opened to such officers to remember or forget, as interests ulterior to their duties might sway them. We feel that it is utterly unsafe to sanction such a practice."

27. Hall *v.* Kearny, 18 Colo. 505, 33 Pac. 373.

expenditure of the amount fixed by the statute is not, of itself, sufficient,[28] but it furnishes an element tending strongly to establish the good faith of the claimant, and evidence thereof is generally regarded as admissible.[29]

b. *Res Gestae.* — Upon an issue as to the performance of the necessary assessment work, statements by the claimant while actually engaged upon the work may be received in evidence.[30]

c. *Affidavit of Claimant.* — In some of the mining states the affidavit of the claimant or owner stating the fact and nature of the labor and improvements, and filed as provided by statute, is made *prima facie* evidence of the facts recited, and is admissible in evidence.[31]

3. Forfeiture of Mining Claim. — Presumptions and Burden of Proof. — Where forfeiture of a mining claim for failure to do the

In the case of work or expenditures made upon one of a group of claims, it is not necessary that the owner, in order to have the work credited to the other claims, shall show the location and record title of the claim upon which the work was done where his title thereto is not in dispute; it is sufficient to prove actual possession and improvement of that claim. De Noon *v.* Morrison, 83 Cal. 163, 23 Pac. 374.

28. Stolp *v.* Treasury Gold Min. Co. (Wash.), 80 Pac. 817, where the court said: "While the rate of wages and the cost of the work are strong elements in establishing value, these elements are not conclusive of the value of the work done."

Probably the principal test in determining this question is not what was paid for it, or the contract price, but whether or not the labor, work and improvements were reasonably worth the required amount. McCulloch *v.* Murphy, 125 Fed. 147.

29. McCulloch *v.* Murphy, 125 Fed. 147; Whalen Consol. Copper Min. Co. *v.* Whalen, 127 Fed. 611; McCormick *v.* Parriott (Colo.), 80 Pac. 1044; Wright *v.* Killian, 132 Cal. 56, 64 Pac. 98. See also Haws *v.* Victoria Copper Min. Co., 160 U. S. 303; Wagner *v.* Dorris (Or.), 73 Pac. 318; McGrath *v.* Bassick, 11 Colo. 528, 19 Pac. 462.

30. Draper *v.* Douglass, 23 Cal. 347. In this case one of the witnesses testified that he saw the plaintiff at a certain time at work some fifty or a hundred feet below the tunnel which had been commenced by the original locators, digging up the rock toward the tunnel; and the plaintiff told him at the time that the object of the work was to drain the ravine to run a tunnel into the quartz lode. The statement of the plaintiff was objected to, and the action of the court in admitting it was assigned as error. The court said: "It was clearly admissible as part of the *res gestae*. The plaintiff was engaged in work at a distance from the lode, and he explained the object of the work; that it was to enable him to mine the lode, thus showing the connection between the work and the mine. It is often the case that miners commence their operations in sinking shafts and running tunnels at a distance from the lode sought to be worked, and their statements while thus engaged in the work, as to the object they are seeking to accomplish by it, are properly admissible as part of the *res gestae;* otherwise it might be claimed that they were doing no work on the mine, because of the distance from the lode. Verbal and written declarations are often said to be admissible as constituting a part of the *res gestae.*"

31. Coleman *v.* Curtis, 12 Mont. 301, 30 Pac. 266; Davidson *v.* Bordeaux, 15 Mont. 245, 38 Pac. 1075. In this case the affidavit was objected to as secondary evidence because the primary evidence was at hand. The court said, however, that what was called the primary evidence — namely, the testimony of the affiant — was introduced. "We are of

necessary annual labor is asserted the burden of proving it rests upon the party asserting it.[32] And the facts charged as the ground for the forfeiture must be established by clear and convincing proof.[33]

4. Abandonment. — A. Presumptions and Burden of Proof. Where it is claimed that a mining claim has been abandoned, and hence is open to relocation, the burden of proving the abandonment is upon the party asserting that fact.[34]

B. Mode of Proof. — a. *In General.* — Upon the question of abandonment a wide range should be allowed, and both parties should be permitted to prove any fact or circumstance from which any aid in solution of the question can be derived.[35]

b. *Direct Testimony of Claimant.* — The locator may testify directly that he did not intend to abandon the claim.[36]

IV. THE PATENT.

1. Proceedings in Land Office. — A. Posting Notice of Application and Plat. — Proof of the posting of notice of the application for patent and the plat must be filed with the first papers.[37]

B. Citizenship of Applicant. — The applicant must furnish evi-

opinion that the introduction of the affidavit was wholly immaterial. In the absence of a statute, it would, of course, not be evidence. But the statute expressly made it evidence. It was not necessary or material in the presence of the fact that the affiant was at the trial and testified orally. But the introduction of the affidavit could have done no possible injury to the appellants."

32. Goldberg *v.* Bruschi (Cal.), 81 Pac. 23; Hammer *v.* Garfield Min. & Mill. Co., 130 U. S. 291, *affirming* 6 Mont. 53, 8 Pac. 153; Whalen Consol. Copper Min. Co. *v.* Whalen, 127 Fed. 611; Johnson *v.* Young, 18 Colo. 625, 34 Pac. 173; Quigley *v.* Gillett, 101 Cal. 462, 35 Pac. 1040; Zerres *v.* Vanina, 134 Fed. 610; Cunningham *v.* Pirrung (Ariz.), 80 Pac. 329.

The burden of proving forfeiture is discharged *prima facie* by showing that no work during the year had been done upon the lode or upon the surface boundaries of the claim. Hall *v.* Kearny, 18 Colo. 505, 33 Pac. 373.

33. Justice Min. Co. *v.* Barclay, 82 Fed. 554; Hammer *v.* Garfield Min. & Mill. Co., 130 U. S. 291, *affirming* 6 Mont. 53, 8 Pac. 153; McCulloch *v.* Murphy, 125 Fed. 147; Goldberg *v.* Bruschi (Cal.), 81 Pac. 23; Emerson *v.* McWhirter, 133 Cal. 510, 65 Pac. 1036; Axiom Min. Co. *v.* White, 10 S. D. 198, 72 N. W. 462.

34. McCulloch *v.* Murphy, 125 Fed. 147; Cunningham *v.* Pirrung (Ariz.), 80 Pac. 329.

Where the tenant in common, or partner, goes away and remains absent from the premises, leaving his associates in possession, it creates no presumption of abandonment. Waring *v.* Crow, 11 Cal. 367.

35. Wilson *v.* Cleaveland, 30 Cal. 192; St. John *v.* Kidd, 26 Cal. 263; Bell *v.* Red Rock Tunnel & Min. Co., 36 Cal. 214.

In Richardson *v.* McNulty, 24 Cal. 339, it was held that a judgment roll in an action by plaintiff to recover the same ground against other parties was admissible upon the question of the intent with which he had left the ground, and tended to show that he had not left it with the intent not to return.

36. Omar *v.* Soper, 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246.

37. Tilden *v.* Intervenor Min. Co., 1 L. D. 572; Dean Richmond Lode, 1 L. D. 545.

dence of his citizenship, or that he has declared his intention to become a citizen.[38]

C. Performance of Annual Labor. — Proof that the annual labor has been performed must also be furnished.[39]

D. Character of the Land. — The absence of active mining operations will not be held to negative the allegation as to the mineral character of the land where the land is, at the time, involved in litigation.[40]

Burden of Proving Character of Land. — Where land has been returned as agricultural land, the burden of proof is upon the mineral claimant to show as a present fact that the land is mineral in character and more valuable for mining than for agricultural purposes.[41]

E. Known Lode Within Area of Placer Claim. — The burden of proving that a lode was known to exist within the limits of a placer claim when patent therefor was applied for is upon the party asserting that fact.[42]

2. Adverse Suits. — A. In General. — In an adverse proceeding under the federal mining statute to determine the right of possession of a mining claim, the rule is that each party must prove his claim to the premises in dispute, and that the better claim must prevail.[43] In order to entitle a party to a judgment in his favor it is incumbent upon him to show that he not only has the right of possession, but that he has made a valid location of the premises in controversy, and by virtue of a compliance with all the requirements of the statutes, state and federal, and miners' rules and regulations, if any there be, he is entitled to a patent from the government.[44] But it

38. Capricorn Placer, 10 L. D. 641; Wingate Placer, 22 L. D. 704; Sold Again Fraction Min. Lode, 20 L. D. 58; Baker Fraction Placer, 23 L. D. 112.

39. Gen. L. O. Cir., June 24, 1899, pars. 45-47.

40. Aspen Consol. Min. Co. *v.* Williams, 23 L. D. 34. In this case it was also held that the proceedings under a contest against an agricultural entry in which the mineral character of the land was alleged, the burden of proof was with the agricultural claimant, if the land was returned as mineral in the surveyor-general's report then in force.

41. Dobler *v.* Northern Pac. R. Co., 17 L. D. 103; Dughi *v.* Harkins, 2 L. D. 721.

The burden of proof rests with the protestant who attacks an agricultural entry on the ground of "known" mineral character of the land at the date of the entry, irrespective of the fact that the land may have been returned as mineral after the allowance of agricultural entry. Aspen Consol. Min. Co. *v.* Williams, 23 L. D. 34.

42. Cripple Creek Gold Min. Co. *v.* Mt. Rosa Min. Mill. & Land Co., 26 L. D. 622.

43. Bay State Sil. Min. Co. *v.* Brown, 21 Fed. 167.

The act of congress providing for the trial in the courts of such cases provides that, in case neither party establishes title to the premises in controversy, the jury shall so find and judgment shall be entered accordingly. Under this act it is clear that neither party is entitled to a verdict or judgment unless his title to the ground in controversy be established. Becker *v.* Pugh, 17 Colo. 243, 29 Pac. 173.

44. Gwillim *v.* Donnellan, 115 U. S. 45; Wolverton *v.* Nichols, 119 U. S. 485; Manning *v.* Strehlow, 11 Colo. 451, 18 Pac. 625. *Compare*

is not necessary for the contestant to prove the particulars of the defendant's claim and that it is invalid.[45] Nor is it necessary that the contestant show that he was in actual possession of the premises in controversy at the time the action was commenced; a right to the possession is all that it is essential for him to prove.[46]

B. Extent and Position of Claim and Vein. — The position of the vein with reference to the location is a fact upon which some proof must appear. Slight proof, however, will be sufficient to establish *prima facie* that the vein extends throughout the claim.[47]

C. Citizenship of Parties — In an adverse suit it is incumbent upon both parties to establish citizenship, or declaration to become citizens.[48]

D. Performance of Labor on Claim. — It has been held that in an adverse proceeding it is not necessary that the plaintiff show that he has performed sufficient work on the claim to entitle him to a patent.[49]

Harris *v.* Equator Min. & Smelt. Co., 8 Fed. 863.

Before either party can recover in an adverse suit he must show a compliance with the statutes, state and federal, and local miners' rules and regulations relating to the location of mining claims. Proof of occupancy merely is not sufficient. Becker *v.* Pugh, 9 Colo. 589, 13 Pac. 906.

An action to determine an adverse claim to a placer mining claim and to recover a designated portion thereof is not sustained by proof of a mere easement in the plaintiff over the premises in controversy. Rockwell *v.* Graham, 9 Colo. 36, 10 Pac. 284.

In Goldberg *v.* Bruschi (Cal.), 81 Pac. 23, it is held that proof by the plaintiff of his citizenship, a discovery by him of gold-bearing quartz in the land, and a location according to the requirements of the law, establishes a *prima facie* case; that it is not necessary for him to show that the land was unoccupied mineral land of the United States, it being shown to be public land, and the presumption being that all public land is unoccupied; and that it is then incumbent upon defendant to show that the location under which he claimed titled was prior in time and superior in right.

45. Golden Fleece Gold & Sil. Min. Co. *v.* Cable Consol. Gold & Sil. Min. Co., 12 Nev. 312; Scorpion Sil. Min. Co. *v.* Marsano, 10 Nev. 370, *overruling* Blasdel *v.* Williams, 9 Nev. 161.

46. Golden Fleece Gold & Sil. Min. Co. *v.* Cable Consol. Gold & Sil. Min. Co., 12 Nev. 312.

47. Armstrong *v.* Lower, 6 Colo. 581. *Compare* Patterson *v.* Hitchcock, 3 Colo. 533.

48. Manuel *v.* Wolff, 152 U. S. 505; O'Reilly *v.* Campbell, 116 U. S. 418; Schultz *v.* Allyn (Ariz.), 48 Pac. 960; Anthony *v.* Jillson, 83 Cal. 296, 23 Pac. 419; McFeters *v.* Pierson, 15 Colo. 201, 24 Pac. 1076; Keeler *v.* Trueman, 15 Colo. 143, 25 Pac. 311; Burke *v.* McDonald, 2 Idaho 646, 33 Pac. 49; Billings *v.* Aspen Min. & Smelt. Co., 52 Fed. 250. *Compare* Altoona Quartz Min. Co., *v.* Integral Quartz Min. Co., 114 Cal. 100, 45 Pac. 1047; McCarthy *v.* Speed, 11 S. D. 362, 77 N. W. 590.

As to the Mode of Proving Citizenship see *supra* this article "Citizenship."

49. Stolp *v.* Treasury Gold Min. Co. (Wash.), 80 Pac. 817, where the court said: "The object sought by this litigation is to defeat the application of appellants for a patent by showing that appellants are not in possession of the property, and are not entitled to possession thereof. The result of the trial, if successful, will defeat the claim of appellant to a patent. But further than that there is no benefit to the respondents. The

3. Effect of Issuance of Patent. — A. As Against Direct Attack. — The presumption that the patent was issued by the officers of the government charged with the alienation of public lands, upon sufficient evidence that the law had been complied with, can only be overcome by clear and convincing proof.[50]

B. As Against Collateral Attack. — a. *In General.* — The general rule is that issuance of a patent to a mining claim, valid on its face, furnishes in a collateral proceeding conclusive evidence that all steps antecedent to its issue were duly taken.[51]

b. *Regularity of Proceedings in Land Office.* — So, too, the issuance of a patent furnishes conclusive evidence of the adjudication by the land office in favor of the patentee of all matters within its jurisdiction, and of all matters of fact which should properly have come before it.[52]

c. *Jurisdiction of Land Office.* — This rule does not apply in regard to matters not within the jurisdiction of the land office. The patent may be shown to be void by any competent evidence establishing a want of authority for its issuance.[53]

respondents must still do the required work, make an independent application, and conform to the United States statutes and rules of the land department before they may acquire a patent to their claim. Clipper Min. Co. *v.* Eli Min. & Land Co., 194 U. S. 220. It was therefore unnecessary for the respondents to make the proof suggested by appellant."

50. United States *v.* Iron Sil. Min. Co., 128 U. S. 673. See also Colorado C. & I. Co. *v.* United States, 123 U. S. 307; United States *v.* King, 83 Fed. 188.

51. United States *v.* Marshall Sil. Min. Co., 129 U. S. 579; Creede & C. C. Min. & Mill. Co. *v.* Uinta Tunnel Min. & Transp. Co., 196 U. S. 337; Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 182 U. S. 499.

There can be no higher evidence of title than a patent from the United States government. In favor of the validity and integrity of such an instrument we must presume that all antecedent steps necessary to its issuance were duly taken. Iron Sil. Min. Co. *v.* Campbell, 17 Colo. 267, 29 Pac. 513.

Records of the Proceedings of the Land Department upon which a patent to a mining claim was issued are not admissible in evidence to impeach the patent or its validity. Smelting Co. *v.* Kemp, 104 U. S. 636.

52. United States *v.* Iron Sil. Min. Co., 128 U. S. 673; Hamilton *v.* Southern Nevada Gold & Sil Min. Co., 33 Fed. 562; Gwillim *v.* Donnellan, 115 U. S. 45; Dahl *v.* Raunheim, 132 U. S. 260; Seymour *v.* Fisher, 16 Colo. 188, 27 Pac. 240; Butte City Smoke House Lode Cases, 6 Mont. 397, 12 Pac. 858; Kahn *v.* Old Telegraph Min. Co., 2 Utah 174.

53. United States *v.* Minor, 114 U. S. 233; Smelting Co *v.* Kemp, 104 U. S. 636; Cullacott *v.* Cash Gold & Sil. Min. Co., 8 Colo. 179, 6 Pac. 211; Garrard *v.* Silver Peak Mines, 82 Fed. 578.

Statement of Rule. — "There is no question as to the principle that where the officers of the government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law as distinguished from suits in equity, subject, however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority, if the land which they purported to convey had never been within their control, or had been withdrawn from that

d. *Character of Land.* — The issuance of the patent is conclusive evidence of all matters concerning the mineral character of the land.[54]

e. *Citizenship of Patentee.* — So, too, the issuance of the patent is conclusive evidence of the citizenship of the patentee.[55]

f. *Conflicting Patents.* — Where each party has a patent, and the question is as to the superiority of title under those patents, if this depends upon extrinsic facts not shown by the patents themselves, it is competent to establish superiority of title by proof of those facts.[56]

g. *Date of Location.* — When a patent is issued for a mining claim it relates back to the time when a valid location was first made, if it has been regularly kept up, and the date of such location must be determined by proof independent of the patent, unless the patent itself fixes the date.[57]

control at the time they undertook to exercise such authority, then their act was void — void for want of power in them to act on the subject-matter of the patent — not merely voidable; in which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction, established by law, and it has often been asserted in this court that even a patent from the government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence if it be such evidence as by its nature is capable of showing a want of authority for its issue." Lakin *v.* Dolly, 53 Fed. 333.

54. Cowell *v.* Lammers, 21 Fed. 200; Johnston *v.* Morris, 72 Fed. 890; Smelting Co. *v.* Kemp, 104 U. S. 636; Irvine *v.* Tarbat, 105 Cal. 237, 38 Pac. 896; Dreyfus *v.* Badger, 108 Cal. 58, 41 Pac. 279; Carter *v.* Thompson, 65 Fed. 329; Davis *v.* Shepherd, 31 Colo. 141, 72 Pac. 57.

55. Billings *v.* Aspen Min. & Smelt. Co., 52 Fed. 250, 3 C. C. A. 69; Justice Min. Co. *v.* Lee, 21 Colo. 260, 40 Pac. 444.

56. *United States.* — Iron Sil. Min. Co. *v.* Reynolds, 124 U. S. 374; Iron Sil. Min. Co. *v.* Mike & Starr Gold & Sil. Min. Co., 143 U. S. 394; Sparks *v.* Pierce, 115 U. S. 408; Steel *v.* Smelting Co., 106 U. S. 447.

Arizona. — Kansas City Min. & Mill. Co. *v.* Clay, 3 Ariz. 326, 29 Pac. 9.

California. — McGarrahan *v.* New Idria Min. Co., 49 Cal. 331; Wedekind *v.* Craig, 56 Cal. 642.

Montana. — King *v.* Thomas, 6 Mont. 409, 12 Pac. 865.

"We do not believe that the government of the United States, having issued a patent, can, by the authority of its own officers, invalidate that patent by the issuing of a second one for the same property. If it be said that the question of the reservation of this vein as a known lode under the law on that subject makes a difference in this respect, and that the land office has a right to inquire whether such lode existed, and whether its existence was known to the patentee of the first patent, we answer that a patent issued under such circumstances to the claimant of the lode claim may possibly be such *prima facie* evidence of the facts named as will place the parties in a condition to contest the question in a court. But we are of opinion that it is always and ultimately a question of judicial cognizance." Iron Sil. Min. Co. *v.* Campbell, 135 U. S. 286.

57. It does not depend upon the question as to which party made the first application for a patent, or which obtained a patent first. It is true that the patent is conclusive of the fact that at the time the application therefor was made the applicant had

h. *Fact and Date of Discovery.* — As between a lode claimant and a tunnel site owner, the patent to the former, while conclusive evidence of the fact of discovery, is not conclusive evidence of the date of the discovery; but it may be shown that mineral had not been discovered prior to the location of the tunnel site.[58]

i. *Existence of Vein Within Limits of Placer Claim.* — Where a patent to a placer claim is issued and a subsequent patent is issued on a lode claim within the boundaries of the placer claim, in any conflict between the titles conferred by the two patents the holder of the placer patent has a right to require that the existence of the lode and his knowledge thereof when he obtained the patent shall be established.[59]

Knowledge of Existence of Vein Within Limits of Placer Claim. On a question as to whether or not the patentee of a placer claim had knowledge of the existence of a vein or lode within the limits of his claim at the time of his application for the patent, the evidence to establish the fact of knowledge must be clear and satisfactory.[60]

j. *Existence of Vein Within Limits of Townsite.* — In a controversy between an occupant under a townsite patent and a mineral claimant under a location made subsequent to the issuance of the townsite patent, the burden is upon the mineral claimant to prove that the vein was known to be valuable for mining purposes within the boundaries of the town lot in controversy at the date of the issuance of the patent.[61]

V. POSSESSION AS PROOF OF TITLE.

In a possessory action concerning a mining claim, while of course the burden of proof is upon the plaintiff, it is a generally recognized rule that proof of possession is *prima facie* evidence of title; it is presumptive of the ownership declared on, and unless overcome by

a valid location, and had, in all respects, fully complied with the requirements of the mining laws; but it does not fix the time when the location was made. In order to determine this question it is necessary to introduce evidence independent of the patent. Last Chance Min. Co. *v.* Tyler Min. Co., 61 Fed. 557.

58. Creede & C. C. Min. & Mill. Co. *v.* Uinta Tunnel Min. & Transp. Co., 196 U. S. 352.

59. It cannot be concluded, presumed and found from the face of the lode patent that the lode claim had been duly discovered, located, placed and owned by the patentee within the exterior boundaries of the placer claim before the time of the application for the latter. Iron Sil. Min. Co. *v.* Campbell, 135 U. S. 286.

60. Iron Sil. Min. Co. *v.* Reynolds, 124 U. S. 374.

It is not competent to prove that a lode or vein was known to exist within the limits of a placer claim by showing a common belief to the effect that a horizontal or blanket vein existed under the whole surrounding country. Such belief is mere matter of speculation, and is not the knowledge required by the statute. Sullivan *v.* Iron Sil. Min. Co., 143 U. S. 431.

61. The fact that the vein was once profitably worked prior to the issuance of the townsite patent will not warrant the presumption that it continued to be valuable down to the date of the patent, where it appears

evidence of a superior character is sufficient.[62] And the same rule is held to apply in an action to recover damages for trespass upon the mining claim.[63] But where the right of possession of a mining claim is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps therefor must, when contested, be established by competent evidence.[64]

that work on the vein had long before been abandoned. Richards *v.* Dower, 81 Cal. 44, 22 Pac. 304, 307.

62. Lebanon Min. Co. *v.* Consolidated Rep. Min. Co., 6 Colo. 371; Sears *v.* Taylor, 4 Colo. 38; Patchen *v.* Keeley, 19 Nev. 404, 14 Pac. 347; North Noonday Min. Co. *v.* Orient Min. Co., 11 Fed. 125.

The rule of law that a plaintiff in ejectment must recover on the strength of his own title does not apply to one in the possession of a mining claim who has been ousted therefrom by a naked trespasser or intruder, although the location by the possessor is defective; possession alone is sufficient title to support the action in such case. Meydenbauer *v.* Stevens, 78 Fed. 787.

A presumption is indulged that the location was regularly made in the first place, and the party in possession is allowed to remain so long as he shall comply with the conditions on which he holds the estate. Harris *v.* Equator Min. & Smelt. Co., 3 McCrary (U. S.) 14.

Where plaintiff claims, under purchase and location, a small tract of mineral land, with demarked limits, of which he is in possession, and there is no proof on the trial that the extent of his claim is opposed to the local rules, the presumption is that his possession is rightful. In such case the plaintiff need not show, in the first instance, that he was in possession in accordance with the local laws; but may (as a vendee under a deed may as to other land) make a *prima facie* case upon possession; and this is enough until the defendant shows that the possession is wrongful because in violation of rules which justify him in going upon the premises and working them. English *v.* Johnson, 17 Cal. 107, 76 Am. Dec. 574.

63. North Noonday Min. Co. *v.* Orient Min. Co., 11 Fed. 125.

In Campbell *v.* Rankin, 99 U. S. 261, an action for damages to a mining claim, decided in 1878, the court said: "In actions of ejectment or trespass *quare clausum fregit*, possession by the plaintiff at the time of eviction has always been held *prima facie* evidence of legal title, and, as against a mere trespasser, is sufficient. (2 Greenl. Ev., 311.) If this be the law when the right of recovery depends on the strict legal title in the plaintiff, how much more appropriate is it as evidence of the superior right of possession under the acts of congress which respect such possession among miners."

In Patchen *v.* Keeley, 19 Nev. 404, 14 Pac. 347, an action for trespass upon the plaintiff's mine, where the defendant in support of his action for non-suit claimed that there was no evidence before the court that the plaintiff had discovered any lode, ledge or deposit of ore within the boundaries of his claim prior to the date of his location, the court said: "It is enough to say that plaintiff was not obliged, as against defendants, to prove any better title than actual possession gave him. It was not necessary for him to prove the discovery of any lode within the boundaries of his claim prior to location. In a word, in order to make a *prima facie* case against defendants, having shown possession, plaintiff was not obliged to prove a valid location. Defendants were not in position to assail plaintiff's title. It was no answer to plaintiff's proof of possession to say that the title was in the government, or a third person, and not in plaintiff."

64. Cheesman *v.* Shreeve, 40 Fed. 787. See also Sullivan *v.* Hense, 2 Colo. 424 (an action of ejectment); Waterloo Min. Co. *v.* Doe, 82 Fed. 46.

In Bevis *v.* Markland, 130 Fed. 226, an action by a placer claimant against one in possession claiming as a locator of a vein or lode mining claim before the discovery of any vein of

VI. RIGHT OR TITLE TO ORE WITHIN SURFACE LINES EXTENDED DOWNWARD VERTICALLY.

1. In General. — The presumption is that the owner of the mine owns all valuable mineral deposits found within the surface lines of his claim extended downward vertically.[65]

2. Vein Having Apex Beyond Limits of Claim. — There is, however, some disagreement in the cases as to whether or not this presumption persists in the face of evidence that the ore in controversy belongs to a vein having its apex beyond the surface lines of the claim wherein it is found. On the one hand it is held that this presumption does so persist unless the opposite party, also claiming the ore in controversy, establishes his title to it by virtue of his right to follow his vein on its dip.[66] Other courts, however, hold that when there is evidence tending to show that the vein has its apex beyond the surface lines of the claim in question this will rebut the presumption of ownership, and that since the burden of proving ownership is, when denied, always upon the party alleging it, he must also meet and overcome this evidence or he will fail in establishing his title to the ore.[67]

mineral therein, it was held that the plaintiff was not only required to prove a strict compliance with the law under which he was proceeding, but that the burden was upon him to prove that there was in fact, within the disputed ground, no vein of metallic ore which would justify the location of a vein or lode claim.

65. Leadville Co. *v.* Fitzgerald, 15 Fed. Cas. No. 8158; Mining Co. *v.* Fitzgerald, 4 Morr. Min. Rep. 381.

66. Parrot Sil. & Copper Co. *v.* Heinze, 25 Mont. 139, 64 Pac. 326, 53 L. R. A. 491.

The presumption that an owner of the surface is also the owner of ores found beneath the surface is not overcome by the opinion of an engineer that, if a vein having its apex in ground owned by another continues to dip at the same angle as it dips where it is exposed in upper levels, it will reach the point where the owner of the surface is conducting operations. Heinze *v.* Boston & M. Consol. Copper & Sil. Min. Co. (Mont.), 77 Pac. 421.

67. *United States.* — Consolidated Wyoming Gold Min. Co. *v.* Champion Min. Co., 63 Fed. 540; Jupiter Min. Co. *v.* Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96; Cheesman *v.* Shreeve, 40 Fed. 787; Iron Sil. Min. Co. *v.* Cheesman, 8 Fed. 297; Doe *v.* Waterloo Min. Co., 54 Fed. 935; Carson City Gold & Sil. Min. Co. *v.* North Star Min. Co., 83 Fed. 662, 28 C. C. A. 333.

Colorado. — Iron Sil. Min. Co. *v.* Campbell, 17 Colo. 267, 29 Pac. 513.

Dakota. — Duggan *v.* Davey, 4 Dak. 110, 26 N. W. 887.

Montana. — Parrot Sil. & Copper Co. *v.* Heinze, 25 Mont. 139, 64 Pac. 326, 53 L. R. A. 491.

See also Jones *v.* Prospect Mountain Tunnel Co., 21 Nev. 339, 31 Pac. 642, where the court said: "Doubtless the production of a patent to the ground in which the ledge is found makes out a *prima facie* case for the plaintiffs; that is, in the absence of any evidence tending to prove that the ledge apexes outside of the exterior lines of the plaintiffs' patented ground it would be presumed to apex inside those lines. (Mining Co. *v.* Campbell, 17 Colo. 207; Cheesman *v.* Shreeve, 37 Fed. Rep. 36). But when evidence is produced tending to show that the ledge apexes outside those lines, this simply tends to prove that the plaintiffs, notwithstanding their patent, do not own that ledge, and they must now meet this evidence and overcome it or they will fail in estab-

VII. VEINS UNITING.

Upon an issue as to whether or not two veins unite on their dip, evidence may be given as to the condition and existence of the same lodes upon the surface, or in the underground workings of other portions of the same vein.[68]

VIII. INSPECTION, EXAMINATION AND SURVEY OF MINES.

1. The Right. — A. RULE IN EQUITY. — It has long been recognized as being within the inherent powers of a court of equity, irrespective of any statute, both in England and in the United States, to grant an order permitting the inspection, examination or survey of the workings of a mine;[69] and as ancillary to that power the

lishing their title. As the plaintiffs' ownership is denied, the burden of proving it is all along upon them. If the ownership depends upon whether the ledge apexes inside the exterior lines of the mine, then this fact, the same as any other fact upon which title depends, must be established by the party asserting it. The plaintiffs must recover upon the strength of their own title; if they do not own the ledge from which the ore was extracted it matters not who does own it. (Reynolds *v.* Mining Co., *supra.*) Evidence showing that the ledge apexes outside the plaintiffs' ground is not offered to establish a fact by way of confession and avoidance of the plaintiffs' case, as to which the burden would be upon the defendant, but to show that they never had any case, because they never owned that ledge. The burden of showing ownership being placed by the pleadings upon the plaintiffs, it never shifts to the defendant, except in the limited sense already spoken of."

In Bell *v.* Skillicorn, 6 N. M. 399, 28 Pac. 768, it appeared that defendants had entered into the land included within the side lines of the ground covered by plaintiff's patent and taken large quantities of ore therefrom, and their defense was that, as owners of an adjoining claim, they had followed a lode, on its dip, the apex of which was within their claim, within the side lines of plaintiff's claim extended downward vertically as they claimed, they were authorized in such case by act of congress, and it was held that, upon the introduction by the plaintiff of his patent, the burden of proof as to the existence of such facts as are contemplated by that act, and of their compliance with its provisions, shifted, and was upon them.

In Driscoll *v.* Dunwoody, 7 Mont. 394, 16 Pac. 726, it was held that to meet the *prima facie* proof of plaintiff the defendants were entitled to show that the apex of the vein was outside of the Lamb lode and within the boundaries of other located claims; not for the purpose of contesting the title of plaintiffs to their mining claim, but for the purpose of showing that the ore was taken from ground to which the plaintiffs did not assert title, and which did belong to others.

68. Consolidated Wyoming Gold Min. Co. *v.* Champion Min. Co., 63 Fed. 540.

Ex parte evidence used by one of the parties in obtaining his patent is not competent upon a trial of an issue of priority arising between the owner of such patented claim and the owner of an adjoining claim, upon which issue the right to the mineral below the junction depended. Champion Min. Co. *v.* Consolidated Wyoming Gold Min. Co., 75 Cal. 78, 16 Pac. 513

69. Earl of Lonsdale *v.* Curwen, 3 Bligh (O. S.) (Eng.) 168; Bennett *v.* Whitehouse, 28 Beav. (Eng.) 119; Stockbridge Iron Co. *v.* Cone Iron Wks., 102 Mass. 80; Thomas Iron Co. *v.* Allentown Min. Co., 28 N. J. Eq. 77.

In Lewis *v.* Marsh, 8 Hare (Eng.) 97, it was said: "I think the case

court has the further power to order the removal of obstructions to the inspection.[70]

B. STATUTES. — a. *In General.* — In some of the mining states, notably Montana, statutes have been enacted providing for the inspection, examination or survey of the workings of mines.[71] The statutes go no further than to declare the rule as it has existed for many years, except that by their terms they extend the rule to all courts, whether sitting as courts of law or equity,[72] and also to authorize inspection when no action is pending.[73]

b. *Constitutionality of Statute.* — The constitutionality of the Montana statute was vigorously assailed on various grounds, viz.,

is one in which there is a necessity that the party should be allowed what he asks in order to prove his case. That is the meaning of necessity. A party cannot get his rights without proving what his rights are; and it is inherent in the case that the plaintiffs should have an opportunity of ascertaining that the defendants do not work more coal than they are entitled to."

In Thornburgh *v.* Savage Min. Co., 7 Morr. Min. Rep. 667, the court said: "Ought a court of equity, in a mining case, when it has been convinced of the importance thereof for the purposes of the trial, to compel an inspection and survey of the works of the parties, and admittance thereto by means of the appliances in use at the mine? All the analogies of equity jurisprudence favor the affirmative of this proposition. The very great powers with which a court of chancery is clothed were given it to enable it to carry out the administration of nicer and more perfect justice than is attainable in a court of law. That a court of equity, having jurisdiction of the subject-matter of the action, has the power to enforce an order of this kind will not be denied. And the propriety of exercising that power would seem to be clear, indeed, in a case where, without it, the trial would be a silly farce. Take, as an illustration, the case at bar. It is notorious that the facts by which this controversy must be determined cannot be discovered except by an inspection of works in the possession of the defendant, accessible only by means of a deep shaft and machinery operated by it. It would be a denial of justice, and utterly subversive of the objects for which courts were created, for them to refuse to exert their power for the elucidation of the very truth — the issue between the parties. Can a court justly decide a cause without knowing the facts? And can it refuse to learn the facts?"

70. Walker *v.* Fletcher, 3 Bligh (O. S.) (Eng.) 172.

In Bennett *v.* Griffiths, 30 L. J. Q. B. 98, where leave was asked not merely for an inspection, but for making a driftway through a wall for the purpose of determining what workings had been done behind it, the court, by Cockburn, C. J., said: "We are of opinion that the judge had jurisdiction to make the order in question. The power to order an inspection of real or personal property has long existed in the courts of equity, and we find that as ancillary to that power the courts of equity have ordered the removal, where necessary, of obstructions to the inspection."

71. Code Civ. Proc. (Idaho), § 3383.

Code Civ. Proc. (Mont.), §§ 1314, 1315, 1317.

Injunction Issued in Case. — The fact that an injunction has been issued in the case is no reason for refusing to grant an order of inspection; the statute makes no distinction as to the character of relief sought in the particular action. Heinze *v.* District Court, 26 Mont. 416, 68 Pac. 794.

72. See Anaconda Copper Min. Co. *v.* District Court, 25 Mont. 504, 65 Pac. 1020.

73. See *infra* this section, "When the Order May Be Granted."

that the law may be made an instrument of oppression and injustice;[74] that the quality of the interest of the petitioner is not defined;[75] that no bond to secure the payment of possible damages is required, and that no appeal is allowed from the granting of the

74. In holding the statute as not being obnoxious on this ground, the court, in Montana Co. *v.* St. Louis Min. & Mill. Co., 152 U. S. 160, *affirming* 9 Mont. 288, 23 Pac. 510, said: "While not decisive of the question, the frequency with which these orders of inspection have of late years been made, and the fact that the right to make them has never been denied by the courts, is suggestive that there is no inherent vice in them. And if the courts of equity, by virtue of their general powers, may rightfully order such an inspection in a case pending before them, surely it is within the power of a state by statute to provide the manner and conditions of such an inspection in advance of the suit. To 'establish justice' is one of the objects of all social organizations, as well as one of the declared purposes of the federal constitution, and if, to determine the exact measure of the rights of parties, it is necessary that a temporary invasion of the possession of either for purposes of inspection be had, surely the lesser evil of a temporary invasion of one's possession should yield to the higher good of establishing justice." The state supreme court had said on this point: "The section of the code under review does not empower any court or judge to grant an order that is fruitful of injustice or oppression. Whenever this is done, such action will exceed the authority that has been bestowed, and can be rightfully set aside. The bare fact that the St. Louis Mining and Milling Company of Montana petitions for an inspection and survey of the mining property referred to before its complaint has been filed is immaterial. The same object is to be attained at all times, regardless of the commencement of the suit, and that is the best evidence for the trial."

In Anaconda Copper Min. Co. *v.* District Court, 25 Mont. 504, 65 Pac. 1020, the court said: "The language of the statute is 'for good cause,' and . . . whenever the order is made without good cause it must follow that it is an infringement on the rights of the party in possession, and may be set aside as unauthorized; otherwise the power of the court could be exercised without restraint, and to the great injury and oppression of the party in possession."

75. In answering this contention, the court, in Montana Co. *v.* St. Louis Min. & Mill. Co., 152 U. S. 160, *affirming* 9 Mont. 288, 23 Pac. 510, said: "Does the amount of a party's interest determine the question of the constitutionality of a statute passed to enable an accurate determination thereof? Suppose it be true that a petitioner has but a limited interest in a mine, has not that petitioner a legal right to the protection of that interest equal to that of the other owners? Has he not the same constitutional right to any means of ascertaining and enforcing that interest that belongs to any other party interested in the mine? Indeed, it may be said to be generally true that the weaker a party and the smaller his interest, the greater the need of the strong hand of the court to ascertain and protect his rights. It is true, the quality of the right or interest is not defined, but it must, in order to come within the statute, be a 'right to or interest in' the mining claim. The language is general and comprehensive, because the intent is to include within its purview every actual right, every real interest. While it is possible that in any particular case a court may err in determining the existence of a right or interest, the same possibility attaches to all litigation. If it be the duty of the state to protect the rights of its citizens, it certainly cannot be a violation of that duty to provide a uniform rule for the admeasurement of all rights of a similar character, large or small."

order;[76] and that under the law innocent owners of mining property may be injured without "due process of law."[77] But, as will be seen by the notes hereto, none of the grounds were recognized as sufficient to invalidate the statute. Nor does such a statute violate the constitutional prohibition against taking or damaging private property without due compensation.[78]

c. *"Right to or Interest in Premises."*—Under the Montana statute providing for inspection when no action is pending, the interest of the petitioner in the premises of which inspection is sought, or through which entry is necessary to inspect other property, must be such an interest as is the subject of a conveyance — such as an interest by tenancy in common, leasehold, reversion or other interest

76. On this point the court, in the case just cited, said: "The failure to require a bond, or in terms to allow an appeal, is not fatal to the constitutionality of the act. It is familiar knowledge that the circuit courts of the United States are not compelled in granting preliminary injunctions to take from the plaintiff a bond of indemnity to the defendant, and frequently they do not take any. As in such cases the matter of a bond is within the discretion of the judge, so whether a bond shall be required as preliminary to an inspection is a matter within the discretion of the state. The right to an inspection does not depend upon a bond, and the order for an inspection does not cease to be due process of law because a bond is not required. No inspection is ordered by the court or judge until there has been a hearing and an adjudication of the petitioner's right; and while further testimony in the future litigation between the parties may show that such adjudication was erroneous, and that there is, in fact, no right on the part of the petitioner, yet that is a result common to all litigation, and does not gainsay the statement that the inspection is based upon a right established by judicial determination. Nor can the withholding, if it be withheld, of an appeal affect the question of due process. An appeal simply means a second hearing; and if one hearing is not due process of law, doubling it cannot make it so." The state supreme court has said on this point: "There is not an assertion or suggestion by any jurist that rights of property are impaired or transgressed by the making of the orders for an inspection and survey. For this reason, a bond to indemnify the persons whose property may be inspected is not asked for or required."

77. Finally summing up the court said: "In conclusion, it may be observed that courts of equity have, in the exercise of their inherent powers, been in the habit of ordering inspections of property, as of requiring the production of books and papers; that this power on the part of such courts has never been denied, and if it exists, *a fortiori*, the state has power to provide a statutory proceeding to accomplish the same result; that the proceeding provided by this statute requires notice to the defendant, a hearing and an adjudication before the court or judge; that it permits no removal or appropriation of any property, nor any permanent dispossession of its use, but is limited to such temporary and partial occupation as is necessary for a mere inspection; that there is a necessity for such proceeding in order that justice may be exactly administered; that this statute provides all reasonable protection to the party against whom the inspection is ordered; that the failure to require a bond, or to provide an appeal, or to have the question of title settled before a jury, is not the omission of matters essential to due process of law. It follows, therefore, that there is no conflict between this statute and the fourteenth amendment of the constitution of the United States." See also Parrot Sil. & Copper Co. *v.* District Court, 28 Mont. 528, 73 Pac. 230.

78. "Such temporary invasion is

of like character.[79] And where no such right or interest is asserted the order should not be granted.[80] As to whether or not this right or interest must be an undisputed one is not clear.[81]

2. Purpose of the Proceeding. — The purpose of the proceeding, whether under the statute or in equity, is to enable the parties to present the facts of the case to the court, so that it may intelligently adjudicate the rights involved.[82]

3. When Order May Be Granted. — All the cases cited as supporting the power of a court of equity to grant inspection show that inspection is granted only when an action is pending. But the statutes not only provide for such inspection;[83] they also expressly authorize the granting of the order before the issues are framed.[84]

not the taking or damaging of property within the purview of the constitutional provision. Every citizen has the right to the exclusive enjoyment of his property, without interruption or invasion; yet this general rule of right must, under the circumstances of the case, yield to the higher right of public necessity, that equal justice may be administered upon conflicting rights of different citizens. Every citizen holds his property subject to this burden, and when the necessity arises his private right must give way to this higher law." Parrot Sil. & Copper Co. *v.* District Court, 28 Mont. 528, 73 Pac. 230.

79. Anaconda Copper Min. Co. *v.* District Court, 26 Mont. 396, 68 Pac. 570, where the basis of the asserted right to enter the workings of the adverse party's property was the supposed existence of extralateral rights upon a vein, the apex of which was within the boundaries of the petitioner's claim, and it was held that the exhibition of this right was not sufficient to authorize making the order.

80. Geyman *v.* District Court, 26 Mont. 433, 68 Pac. 797; Anaconda Copper Min. Co. *v.* District Court, 26 Mont. 412, 68 Pac. 1134.

81. Anaconda Copper Min. Co. *v.* District Court, 26 Mont. 396, 68 Pac. 570. The court said: "We would not undertake to go further at this time than to say that under the first clause of the statute the petitioner must exhibit at least a substantial *prima facie* interest, which it is necessary for him to protect or enforce. Under the second clause the necessity to show an interest both in the premises to be inspected and in the property to be protected would be measured by the same rule."

82. Anaconda Copper Min. Co. *v.* District Court, 25 Mont. 504, 65 Pac. 1020; Heinze *v.* District Court, 26 Mont. 416, 68 Pac. 794; Parrot Sil. & Copper Co. *v.* District Court, 28 Mont. 528, 73 Pac. 230.

In St. Louis Min. & Mill. Co. *v.* Montana Co., 9 Mont. 288, 23 Pac. 510, *affirmed* 152 U. S. 160, the court characterized the proceeding as the proper mode of securing the "best evidence of which the case in its nature is susceptible."

In Anaconda Copper Min. Co. *v.* District Court, 26 Mont. 396, 68 Pac. 570, the court, in speaking of the Montana statute, said: "The purpose of the inspection is two-fold, namely: (1.) To ascertain whether the right or interest of the petitioner in the property in possession of the adverse party is being injured; and (2) to ascertain by inspection of such premises whether the right or interest of the petitioner in other premises is being injured."

83. See *supra* this section where the Montana statute is set out.

84. Heinze *v.* District Court, 26 Mont. 416, 68 Pac. 794, where the court said: "It is often necessary that the parties should be in possession of the facts at an early stage of the action, so that they may be able to frame intelligently the issues to be tried. Issues properly framed are as essential to a just and fair trial of the rights of the parties as are the facts necessary to support them. The petition alleged, among other

It would seem, however, that in the absence of statutory authority a court of equity is without power to grant such an order of inspection when no action is pending between the parties.[85]

4. Scope of the Order. — A. In General.— The order granting the inspection should limit it to the necessities of the case;[86] that is, it should be limited to those workings of the mine a knowledge of which will avail the party asking for the inspection.[87] Nor should the order grant an inspection of, or permission to enter upon, property not mentioned in the petition.[88]

things, that the order was necessary to enable the defendant to ascertain its rights in the premises, and the court, as it should, allowed it to produce its evidence to support this allegation, evidently upon the theory that it required other facts than those already in its possession to enable it to frame its defenses." See also Parrot Sil. & Copper Co. *v.* District Court, 28 Mont. 528, 73 Pac. 230.

In speaking of the last section of this statute, the court, in Anaconda Copper Min. Co. *v.* District Court, 25 Mont. 504, 65 Pac. 1020, said that, by its terms, the section seemed to apply to cases where no action is pending, but contemplated only.

85. Anaconda Copper Min. Co. *v.* District Court (Mont.), 68 Pac. 570. The court said: "There are many cases reported in which inspection orders have been made, but in none of them do we find the courts assuming the power to make them except in aid of the rights of the parties, which were being adjudicated in the ordinary way. Even in such cases the power is used with caution, and only when it is is apparent that its exercise is necessary to serve the ends of justice. . . . Courts do not assume to adjudicate the rights of parties in a summary proceeding without express statutory authority; and in no case do they authorize entry upon the property of parties over whom they have acquired jurisdiction, except when the necessity of the case demands it in the interest of justice."

86. Where it appears that developments were in progress, and that the initial points from which surveys of underground workings were made had shifted their position, and that in order that a complete survey might be had it was necessary to review the former surveys, so as accurately to determine the relative positions of the new openings made, the order for the inspection and survey is not improper on the ground that no necessity therefor existed. Heinze *v.* District Court (Mont.), 74 Pac. 132.

87. Heinze *v.* District Court, 26 Mont. 416, 68 Pac. 794; Parrot Sil. & Copper Co. *v.* District Court, 28 Mont. 528, 73 Pac. 230; State *v.* District Court (Mont.), 76 Pac. 206.

"The order should be limited to the necessity of the case, and explicitly direct the extent to which the inspection and survey should go." Anaconda Copper Min. Co. *v.* District Court, 26 Mont. 396, 68 Pac. 570.

Upon a controversy as to extra-lateral rights, inspection need not be restricted to openings made on the lode itself, and to the ascertainment of the physical and geological facts to be found there; it is proper to grant such a survey of the surrounding tunnels, shafts and drifts as will disclose all the facts with reference to the location. Parrot Sil. & Copper Co. *v.* District Court, 28 Mont. 528, 73 Pac. 230.

An order granting an inspection will not be disturbed as covering matters not in dispute merely because the vein in question was described by plaintiff's witnesses as passing out of his claim on its dip at a certain level, and the workings below that level were on veins not in controversy; the defendant should be permitted to examine the workings and determine for itself whether or not such conditions existed. Heinze *v.* District Court (Mont.), 74 Pac. 132.

88. Anaconda Copper Min. Co. *v.* District Court, 26 Mont. 396, 68 Pac. 570.

B. Provisions Making Authority Effective. — The authority to grant the order in a particular case necessarily carries with it the further authority to make the authority effective, such as the use by the persons making the inspection of all appliances in use to facilitate ingress and egress.[89] But where it appears that most of the workings of defendant's claims could be inspected and reached through plaintiff's shaft, the court should not require defendant to allow plaintiff access to defendant's workings exclusively through defendant's shafts and to use the latter's appliances.[90]

5. Number of Inspections. — It is proper for the order to provide for inspections from time to time as operations progress during the pendency of the action; it need not necessarily provide for but one inspection.[91]

6. Cost of Inspection. — Under the Montana statute, at least in the case of inspection when no action is pending, the petitioner is required to pay all the costs incident thereto,[92] and the order granting the inspection must provide therefor.[93]

89. Anaconda Copper Min. Co. *v.* District Court, 26 Mont. 396, 68 Pac. 570; Heinze *v.* District Court (Mont.), 74 Pac. 132.

An order requiring the other party to use his appliances to lower and raise the applicant's agents in making the inspection, and to fix the amount to be paid therefor, does not violate the constitutional prohibition against the taking or damaging of private property without just compensation being made to the owner thereof. "It would be idle to hold that the district court may make the orders of inspection, and then, by giving to the constitutional prohibition the construction contended for by the defendants, say that it is powerless to carry them into effect. The power to make such orders implies the power necessary to make them effective, and the mere temporary, though enforced, use of appliances in case of adverse parties, without which access to the property must be impossible, is not a violation of the constitutional guarantee referred to." State *v.* District Court (Mont.), 76 Pac. 206.

If courts of equity have inherent power to make such an order, and for the purpose of making it effective require the party whose property is affected to furnish to his adversary the appliances necessary to gain access to the property, surely it is within the power of the legislature to provide by statute for the making of the order, and, either expressly or by implication, to authorize the court to make its order effective. Parrot Sil. & Copper Co. *v.* District Court, 28 Mont. 528, 73 Pac. 230.

90. Parrot Sil. & Copper Co. *v.* District Court, 28 Mont. 528, 73 Pac. 230.

91. Heinze *v.* District Court, 26 Mont. 416, 68 Pac. 794.

92. The expenses incident to the use of the appliances in use upon the premises inspected must be borne by the party at whose instance the inspection is made. Anaconda Copper Min. Co. *v.* District Court, 26 Mont. 396, 68 Pac. 570.

93. Heinze *v.* District Court (Mont.), 74 Pac. 132; Parrot Sil. & Copper Co. *v.* District Court, 28 Mont. 528, 73 Pac. 230.

MISCARRIAGE.—See Abortion.

MISREPRESENTATION.—See False Pretenses.

MIXTURE.—See Confusion of Goods.

MOBS.—See Affray; Disturbing of Public Assemblages.

MODELS.—See Demonstrative Evidence; Experiments; Patents.

MONEY COUNTS.

I. MONEY LENT.

1. Burden of Proof. — Presumptions. — A. Must Prove Loan of Money. — In an action for money lent, the plaintiff must prove that the transaction upon which he bases his claim was substantially a loan of money.[1]

B. Presumption of Joint Obligation. — Where two persons borrow money jointly, the law presumes from that fact a joint promise to repay it, in the absence of facts or circumstances to the contrary.[2]

C. Presumption From Delivery of Money. — General Rule. The mere fact that one person delivers money to another raises a presumption that such money was delivered to pay a debt, or as a gift, and not that it was a loan.[3] But where a husband receives

1. Plaintiff must prove that the defendant borrowed the money claimed to have been loaned. Jones *v.* Durham, 94 Mo. App. 51, 67 S. W. 976. The evidence must relate to coin, bank bills or other well-known circulating medium popularly known and designated as money. Waterman *v.* Waterman, 34 Mich. 490. But see Fravell *v.* Nett, 46 Minn. 31, 48 N. W. 446, where, under peculiar circumstances, proof that the promissory note of a third person was turned over to the defendant by the plaintiff, instead of money, was held to be no variance, and admissible to support an action for money lent.

2. Underhill *v.* Crawford, 29 Barb. (N. Y.) 664, 18 How. Pr. 112.

3. St. Louis Trust Co. *v.* Rudolph, 136 Mo. 169, 37 S. W. 519; Gerding *v.* Walter, 29 Mo. 426. After a mother's death her son filed a claim against her estate for money loaned. It appeared that the son had made his home with the mother as a member of the family, and had applied a considerable portion of his earnings to the support of the family, and had delivered to his mother various sums of money aggregating about $200, but there was not proof of any express agreement by the mother to repay the money. *Held*, that the law did not imply a promise on the mother's part to repay the money. *In re* Delaney's Estate, 27 Misc. 398, 58 N. Y. Supp. 924.

from his wife money belonging to the principal of her separate estate for purposes legally beneficial to him alone, it raises the presumption of a loan from the wife to the husband.[4]

D. Presumption From Exchange of Checks. — Where two persons exchange checks, and one check is paid and the other is dishonored, the law presumes a loan from the person who holds the dishonored check to the one who receives the money.[5]

2. Documentary Evidence. — A. Promissory Notes. — A negotiable promissory note is admissible to prove the loan of money by the payee of the note to the maker.[6] A non-negotiable note is admissible for a like purpose;[7] but in an action for money lent by an indorsee of a promissory note against the maker the instrument is not competent evidence.[8]

B. Due-Bill and I. O. U.—In an action for money lent, a due-bill signed by the defendant is admissible in evidence.[9] An I. O. U. signed by the defendant is admissible to prove money loaned.[10]

C. Checks as Evidence. — A check given by the borrower of money, with the understanding that it is to be held by the lender as evidence of the loan, and not presented for payment to the drawee, but returned to the maker upon repayment of the money,

4. Brady *v.* Brady (N. J. Eq.), 58 Atl. 931; Adoue *v.* Spencer, 62 N. J. Eq. 782, 49 Atl. 10, 90 Am. St. Rep. 484, 56 L. R. A. 817. In Cox *v.* Cox, 72 N. H. 561, 58 Atl. 504, there was evidence that in 1898 plaintiff received from her sister's estate $525; that defendant had previously purchased a farm for a home which was subject to a mortgage; that there was due on the mortgage about $1300; that at defendant's request the plaintiff let him have the $525 received from her sister's estate, for the purpose of making a payment on the mortgage debt; that she understood it was a loan, expected the money would be repaid, and did not know how the defendant could understand it in any other way. *Held*, sufficient to warrant the jury in finding that the transaction was a loan and returning a verdict for the plaintiff, and that a motion for a nonsuit was properly denied.

5. Beal *v.* American Diamond Rock Boring Co., 16 Misc. 540, 38 N. Y. Supp. 743.

6. Weeks *v.* Elliott, 93 Me. 286, 45 Atl. 29; Wild *v.* Fisher, 4 Pick. (Mass.) 421.

7. Dean *v.* Mann, 28 Conn. 352; Pierce *v.* Crafts, 12 Johns. (N. Y.) 90. In Brown *v.* Woodward, 75 Conn. 254, 53 Atl. 112, the plaintiff claimed to have proved that Flora H. Woodward, acting as the agent of defendant Charles E. Woodward, her husband, through one McIntosh, a broker, procured from plaintiff $475 by indorsing and delivering to him a non-negotiable note for $500, payable to herself, and signed by her husband. The wife did not defend. Defendant Charles E. Woodward denied that he signed the note, or authorized his wife to obtain the money from plaintiff, or that he knew of her having procured it until a short time before the suit, or that he received any of it. *Held*, that there was no error in admitting proof that Woodward signed the note, as one of the circumstances connecting him with the transaction of obtaining the money, nor, such proof having been received, in admitting in evidence as a part of the transaction of obtaining the money, the note by the transfer of which the money was procured from the plaintiff.

8. Rockfeller *v.* Robinson, 17 Wend. (N. Y.) 206.

9. Weeks *v.* Elliott, 93 Me. 286, 45 Atl. 29; Hay *v.* Hide, 1 Chip. (Vt.) 214.

10. Fisher *v.* Leslie, 1 Esp. (Eng.) 426.

is admissible to prove the loan.[11] And it has been held that without such conditions a check is admissible against the maker for money lent.[12] But the mere receipt of a check is not even *prima facie* evidence of money loaned, unless it appears from other evidence that it was not given in payment of a debt due to the receiver of it from the maker.[13]

D. Records, Receipts and Other Instruments. — Under some circumstances the record of a judgment may be competent evidence in an action for money lent.[14]

A Mere Receipt for Money is not of itself evidence of money lent.[15] But an instrument acknowledging the receipt of money and showing a sale of property, which sale is to be void upon the repayment of the money, is competent evidence of a loan.[16] And it has been

11. Currier *v.* Davis, 111 Mass. 480.

12. Dean *v.* Mann, 28 Conn. 352. Union Trust Co. *v.* Whiton, 9 Hun (N. Y.) 657. This was an action to recover money lent. The plaintiff offered in evidence a paid check, dated June 16th, 1871, made by it on the Manhattan company, payable to the defendant, by which the company was requested to pay defendant $75,000 in current funds. It was indorsed by the defendant. In connection with the check was offered an envelope on which was indorsed the following, viz., "Date, June 16, 1871. A. S. Whiton, 19 Broad St. Four months loan from Union Trust company. Amt. $75,000. Interest seven per cent. Securities, Georgia seven per cent. gold bonds, number —" to which were added the numbers of four hundred bonds valued at $92,000, and name A. S. Whiton, in his handwriting. *Held,* that the check and envelope were admissible, and that they raised the presumption that the money was loaned.

13. Mills *v.* McMullen, 74 N. Y. St. 165, 38 N. Y. Supp. 705.

Mere Receipt of Check Not Evidence. — The mere receipt of a check is not even *prima facie* evidence of money loaned to the one who receives it; but if there be no previous debt due to such person from the one who gives the check, in payment of which the check was given, then the production of the check is presumptive evidence of a loan, but not conclusive. Waterbury Brass Co. *v.* Pritchard, 34 Conn. 417; White *v.* Ambler, 8 N. Y. 170; Flemming *v.* McClain, 13 Pa. St. 177.

Failure To Pay Draft Not Admissible. — Evidence that defendant failed to pay a draft drawn upon him is not admissible in an action for money lent. Groneweg *v.* Kusworm, 75 Iowa 237, 39 N. W. 288.

14. In the case of Atwood *v.* Scott, 99 Mass. 177, the record of a judgment against the defendant for possession of a house on account of the non-payment of rent, was held competent in an action for money lent, where it was claimed that the loan was made to pay such rent, and defendant testified that she always paid her rent promptly.

15. An instrument of writing merely stating that the defendant received from the plaintiff a sum of money does not import an admission of indebtedness, and will not, without other evidence, support an action for money lent. McFarland *v.* Shipp, 17 Ark. 41.

16. In the case of Coor *v.* Grace, 10 Smed. & M. (Miss.) 434, Grace sued the administrators for money loaned to their intestate. Grace introduced in evidence a writing signed by the intestate in which he acknowledged the receipt of $500, in consideration of which he sold a slave to Grace, the sale to be void upon the repayment of the money to Grace. *Held,* competent evidence to show the fact of a loan of money, and sufficient to make a *prima facie* case for the plaintiff, the instrument proving the loan, and an undertaking to secure its repayment.

held that an instrument of writing which contains neither promise nor the name of the promisee, and which, without the aid of proof *aliunde*, would not sustain a recovery for money lent, is nevertheless admissible.[17]

E. Books and Registers. — In an action for money lent, the plaintiff's own books of account are not competent evidence for him.[18] Loan and collection registers are not admissible in evidence to prove the loan of money.[19]

3. Indirect and Circumstantial Evidence. — A. Money Paid for Another. — In order to sustain an action for money lent, it is not necessary to prove that the money was given directly to the defendant; it is sufficient if it appears that the money was paid to other persons for the defendant upon his express order or request.[20] But evidence that money was paid out for the defendant under such circumstances as do not constitute a loan is not admissible.[21]

B. Conduct and Language of Parties. — The conduct and language of the parties at the time when money is alleged to have been loaned may be given in evidence if such conduct and language constitute part of the *res gestae*.[22]

17. The case of Peniston *v.* Wall, 3 J. J. Marsh. (Ky.) 37, was an action for money lent by the intestate to plaintiff. The administratrix offered in evidence an instrument in writing as follows, viz., "January 21, 1823. Sent Robert P. Peniston fifty-six dollars. I say received by me. Robert P. Peniston." This writing was found among the intestate's papers after his death, and was in the handwriting of plaintiff. *Held*, admissible as a circumstance to be considered with other circumstances.

18. Case *v.* Potter, 8 Johns. (N. Y.) 211; White *v.* Ambler, 8 N. Y. 170; Mills *v.* McMullen, 74 N. Y. St. 165, 38 N. Y. Supp 705.

19. Security Co. *v.* Graybeal, 85 Iowa 543, 52 N. W. 497; Labaree *v.* Klosterman, 33 Neb. 150, 49 N. W. 1102.

20. Clarkson *v.* Kennett, 17 Mont. 563, 44 Pac. 88.

Commission Broker Advancing Margins. — Dodge *v.* McMahan, 61 Minn. 175, 63 N. W. 487, was an action brought for money loaned to and paid out for the use and benefit of the defendant. The plaintiffs offered evidence tending to prove that the defendant employed them as commission men to buy for him 5000 bushels of wheat for future delivery, on a margin of five cents per bushel, and at the same time requested them, in case this margin should be exhausted by a decline in the market price of wheat, not to allow him to be sold out, but to put up additional margins for him, and then advise him, or draw on him for the amount, and that the money sued for was advanced in pursuance of this request. *Held*, competent evidence, and not a fatal variance.

21. Cummings *v.* Long, 25 Minn. 337.

22. Mayes *v.* Powers, 79 Ga. 631, 4 S. E. 681. In deciding this case the judge said: "This is a somewhat peculiar case. The administrator of Powers sued Mayes for $500 money loaned. Upon the trial of the case it was shown that Mayes came to the Chattahoochie river, and called to Powers, who was on the other side of the river; that Powers went across to him, and that they held some conversation; that Powers returned, went into his house, and got his wife to count him out $500, stating at the time that he was going to lend it to Mayes; that he took the money with him, and immediately went back across the river, where he was seen to hand something to Mayes; that he came back and stated

C. Defendant's Need of Money. — Plaintiff may show as a circumstance in his favor that at the time the alleged loan was made the defendant was in need of money.[23]

4. Matters in Defense. — A. Facts Disproving Loan. — In an action for money lent, the defendant may, under a general denial, prove any agreement under which the money was received, or any fact or circumstance connected therewith, which tends to show that it was not a loan, or that the defendant was not the borrower.[24]

B. Financial Condition of Borrower. — As to whether a defendant may, in an action to recover borrowed money, introduce evidence showing that his financial condition was such that he did not need the money at the time the loan is alleged to have been made, there is but little authority and that is in conflict. Such evidence has been held admissible in Illinois and Pennsylvania,[25] and not admissible in Massachusetts and Michigan.[26]

C. Financial Condition of Lender. — It may be shown by the defendant that at the time when the loan is alleged to have been

to his wife and daughters, 'All of you recollect that Mace A. Mayes has got $500,' and added, 'Get the book, and I will charge it.' We think that what Powers said at the time was admissible as part of the *res gestae*, and these statements of Powers, coupled with the fact that he was seen to return across the river and hand something to Mayes, were sufficient to authorize the jury to conclude that he let Mayes have the money."

In an action for money lent, the plaintiff introduced evidence that on the day following that on which the money was alleged to have been loaned for a certain purpose, the defendant borrowed money from a third person to make up the amount necessary to carry out the purpose. *Held*, not material, but not prejudicial error. Bacome *v.* Black, 137 Cal. XIX, 70 Pac. 620.

23. In the case of Aetna Indemnity Co. *v.* Ladd, 135 Fed. 636, the defendants in error brought the action for money advanced to plaintiff in error for the purpose of completing two shipbuilding contracts of another company, for which the plaintiff in error had become responsible. In connection with the alleged advances the plaintiff in error gave a bond for the repayment of the same, and reciting among other things that money was necessary to complete said contracts, and that the defendants in error were furnishing the same. *Held*, that the bond was admissible in evidence for the defendant in error for the purpose of showing what the real transaction was, since that instrument represented in its recitals that the Aetna Indemnity company was assuming to complete the contracts; that it needed money, and was about to obtain the same from defendant in error.

In an action for money loaned, the plaintiff, after giving evidence tending to show the amount due and owing, together with an acknowledgment of the indebtedness by the defendant, attempted to prove by his father that he also had loaned the defendant money from time to time, and had to bring an action to recover it. *Held*, clearly incompetent and improper, as tending to prejudice the jury. Davis *v.* Reflex Camera Co., 93 N. Y. Supp. 844.

24. Bond *v.* Corbett, 2 Minn. 209; Thompkins *v.* Thompkins, 60 N. Y. St. 260, 28 N. Y. Supp. 903.

25. Sager *v.* St. John, 109 Ill. App. 358; Glessner *v.* Patterson, 164 Pa. St. 224, 30 Atl. 355.

26. Atwood *v.* Scott, 99 Mass. 177; Burke *v.* Kaley, 138 Mass. 464; Ford *v.* McLane, 131 Mich. 371, 91 N. W. 617.

made the plaintiff was not in such financial condition that he could have made it.[27]

D. Relations of Parties. — The relations of the parties to each other, and circumstances connected therewith, tending to disprove a loan of money, may be given in evidence.[28]

II. MONEY PAID.

1. Burden of Proof. — A. On the Plaintiff. — In an action for money paid, it devolves upon the plaintiff to prove that he made a payment of money, or its equivalent, at the express or implied request of the defendant.[29]

B. Money or Its Equivalent. — a. *Generally.* — Originally it was necessary to show that *money* had been paid, the only exception being in cases where payment had been made in negotiable paper;[30] but now proof of some consideration other than the actual payment of money will support the action.

b. *Release of a Debt.* — Proof that a debt owing to plaintiff from

27. Dowling *v.* Dowling, 10 Ir. C. L. 236; Bliss *v.* Johnson, 162 Mass. 323, 38 N. E. 446; Vogt *v.* Butler, 105 Mo. 479, 16 S. W. 512; Glessner *v.* Patterson, 164 Pa. St. 224, 30 Atl. 355.

Where a defendant attempts to show that the plaintiff could not have made the loan, because not of sufficient pecuniary ability, the plaintiff may show that he did have means sufficient. Waterman *v.* Waterman, 34 Mich. 490.

28. Glessner *v.* Patterson, 164 Pa. St. 224, 30 Atl. 355. In this case plaintiff sued the administrators to recover money alleged to have been loaned at various times to the decedent. The defendants offered to prove that during the whole period covering the time of the alleged loans the plaintiff was without means or property, except such as she received from the decedent; that neither her bank account nor his showed the possession by her, nor the receipt by him, of any such sums of money as she claimed to have loaned; that he purchased provisions and clothing, and had them secretly sent to her house, which he visited at all times of day and night, and entered without summoning any one, opening the door himself, and passing upstairs to her bedroom. Testimony was offered not only as to a general course of conduct, but of specific acts tending to establish the fact of illicit intimacy. Defendants also offered to show that the statements made by plaintiff of the manner in which the money had been paid by her, and the use to which it had been put by decedent, was incorrect. *Held*, that the testimony should have been admitted.

29. **Payment by Request.** — To sustain an action for money paid it is essential that the plaintiff should prove that he paid the money for the defendant, and that such payment was made at the defendant's request. Proof of a mere voluntary payment will not support the action. Mansfield *v.* Edwards, 136 Mass. 15; Whiting *v.* Aldrich, 117 Mass. 582; Cook *v.* Linn, 19 N. J. L. 11. But, payment by a surety before the maturity of the debt is not necessarily a voluntary payment. Craig *v.* Craig, 5 Rawle (Pa.) 91.

Plaintiff must not only show that the money actually was paid for the defendant's use and benefit, but that it was paid upon the express or implied request of the defendant. Hathaway *v.* Delaware Co. (App. Div.), 93 N. Y. Supp. 436.

30. Witherby *v.* Mann, 11 Johns. (N. Y.) 517; Tobey *v.* Barber, 5 Johns. (N. Y.) 68; Johnson *v.* Weed, 9 Johns. (N. Y.) 310; Craig *v.* Craig, 5 Rawle (Pa.) 91; Doebler *v.* Fisher, 14 Serg. & R. (Pa.) 179.

a third person was released at the request of the defendant will support the action.[31]

c. *Credit to Third Person.* — Proof that credit was given by plaintiff to a third person at the request of the defendant will support the action.[32]

d. *Payment by Delivery of Another Note.* — Plaintiff may show that as surety he discharged a debt of the defendant by delivering another note to the creditor and taking up the note on which he was surety.[33]

e. *Payment by Conveyance of Land or Other Property.* — In support of an action for money paid by a surety or indorser, plaintiff may show that he paid the debt by the conveyance of land or other property, which was received by the creditor as payment.[34]

C. Money Paid for Plaintiff's Use and Benefit. — It has been held that proof of money paid by the plaintiff for his own use and benefit, at the defendant's request, will support an action for money paid.[35]

D. Giving Security for Debt. — Proof that plaintiff gave security for a debt of the defendant will not support an action for money paid.[36] But proof that plaintiff guaranteed a debt of the defendant and paid it is admissible.[37]

31. The case of McNerney *v.* Barnes. 77 Conn. 155, 58 Atl. 714, was an action for money paid. It was proved that an attorney owed the plaintiff $50, and that the defendant, through the plaintiff, engaged the services of the attorney and requested plaintiff to pay the attorney $50 therefor, which the plaintiff did by giving the attorney a receipt for the sum and a release in full of the attorney's indebtedness to the plaintiff, all of which was known by the defendant. *Held,* competent to support the action and not a fatal variance.

32. A count for money paid by B to A at the request of and to the use of C is supported by proof of the sale of a bond by A to B, and that B credited C with the amount. Jones *v.* Cooke, 14 N. C. 112.

33. In the case of Hommell *v.* Gamewell, 5 Blackf. (Ind.) 5, Gamewell was indebted to one Watson for $375, for which he gave his note with Hommell as surety. The note not being paid at maturity, Watson demanded payment of Hommell. Watson then held for collection a note for $400 in favor of Hommell. Hommell transferred this note to Watson in payment of the $375 note, and took it up indorsed with satisfaction in full. The note not being then due, a small discount was made. More than a year afterward, suit was brought by Hommell against Gamewell for money paid. The evidence was all parol, the notes not being produced on the trial. *Held,* that the evidence was competent to sustain the action — that the relation in which Hommell stood to Gamewell as his surety implied Gamewell's request to pay the money, provided he did not do it himself at the maturity of the note.

34. Ainslie *v.* Wilson, 7 Cow. (N. Y.) 662, 17 Am. Dec. 532; Bonney *v.* Seely, 2 Wend. (N. Y.) 481.

35. Evidence that plaintiff took a trip to Europe and paid his own expenses at the instance and request of the defendant, who promised to repay him, was held admissible and competent to sustain an action for money paid. Devecmon *v.* Shaw, 69 Md. 199, 14 Atl. 464.

36. Taylor *v.* Higgins, 3 East (Eng.) 169; Nightingal *v.* Devisme, 5 Burr (Eng.) 2592; Jones *v.* Brinley, 1 East (Eng.) 1.

37. An action for money paid is sustained by proof that plaintiff guaranteed the debt of the defendant to a third person, and paid it. Has-

E. Damage Items Not Admissible. — An action for money paid cannot be sustained by proof of a tort done by the defendant to the plaintiff.[38]

F. Request of Defendant Must Be Established. — In an action for money paid, the fact that the defendant requested its payment must be established either directly or presumptively by proof of circumstances from which a request can be implied.[39]

G. Ratification Equivalent to Previous Request. — Where money is paid for another it is not necessary to prove a previous request if it be proved that the defendant afterward agreed to the payment.[40]

2. Presumptions. — A. Of Request From Promise. — Where money is paid for a third person, and the latter promises to repay it, the law presumes a previous request from such promise.[41]

B. Of Payment From Possession of Written Obligations After Maturity. — When a note or bill is found after maturity in the possession of a party who was bound to pay it, the law presumes that it has been paid, and that it was paid by the party who has possession of it.[42]

3. Documentary Evidence. — A. Defendant's Deed. — In an action to recover back money paid for a consideration which has failed, the plaintiff may give in evidence the defendant's deed to prove the payment and the amount of the consideration.[43]

B. Promissory Notes. — In an action for money paid, the plaintiff may introduce in evidence a promissory note of the defendant paid by the plaintiff as surety.[44] A note and mortgage given by the defendant, and paid by the plaintiff, are admissible in evidence.[45]

singer *v.* Solms, 5 Serg. & R. (Pa.) 4.

38. In an action for money paid it is error to admit proof of items which are purely elements of damage for breaches of an invalid contract, and which constitute losses sustained by the plaintiff, instead of money actually paid. Fox *v.* Easter, 10 Okla. 527, 62 Pac. 283.

39. Stephens *v.* Brodnax, 5 Ala. 258; Moulton *v.* Loux, 52 Cal. 81; McGlew *v.* McDade (Cal.), 80 Pac. 695; Curtis *v.* Parks, 55 Cal. 106; McGee *v.* San Jose, 68 Cal. 91; Huddleston *v.* Washington, 136 Cal. 514, 69 Pac. 146; Briscoe *v.* Power, 64 Ill. 72; North *v.* North, 63 Ill. App. 129; Chapman *v.* Frank, 12 Daly (N. Y.) 402.

40. Doty *v.* Wilson, 14 Johns. (N. Y.) 378; Taylor *v.* Cotten, 28 N. C. 69.

41. Stephens *v.* Brodnax, 5 Ala. 258; North *v.* North, 63 Ill. App. 129; Hassinger *v.* Solms, 5 Serg. & R. (Pa.) 4. Request is always presumed where the payment is subsequently recognized by the person for whom it was made. Taylor *v.* Cotten, 28 N. C. 69.

42. Baring *v.* Clark, 19 Pick. (Mass.) 220; McGee *v.* Prouty, 9 Metc. (Mass.) 547. In the case of Chandler *v.* Davis, 47 N. H. 462, the plaintiff's intestate and the defendant had given their two joint and several promissory notes for equal amounts. The suit was by the administrator for money paid by the intestate in the discharge of the notes. The production of the notes by the administrator was held *prima facie* evidence that the intestate had paid both notes.

43. Dutrich *v.* Melchor, 1 Esp. (Eng.) 264.

44. McFerran *v.* Chambers, 64 Ill. 118.

45. In the case of Brown *v.* McHugh, 35 Mich. 50, Brown purchased a pair of horses from McHugh and

But where the plaintiff has paid out money to discharge debts of the defendant which are evidenced by written instruments not negotiable, the mere production of such instruments on the trial is competent, but not alone sufficient, to prove that plaintiff paid such debts.[46]

C. Bills of Exchange. — In an action by the drawee of a bill of exchange against the maker for money paid, acceptance and payment of the bill by the drawee are not of themselves evidence of money paid by him to the use of the maker.[47]

D. Receipts. — Where it is claimed that money has been paid by one person for the use of another, a receipt is competent evidence against the person who signed it, but may be explained, or even contradicted, by parol testimony.[48]

E. Books of Account. — The decisions are practically unanimous in holding that books of account are not admissible for the party who kept them, upon the principle that they are in the nature of declarations of a party in his own favor and cannot be used to prove cash transactions.[49]

F. Sheriff's Return. — A sheriff's return on a writ is competent evidence to show the fact of payment.[50]

4. Parol Evidence. — A. Money Paid on Bill of Exchange. Where money is paid on a bill of exchange the real nature of the transaction may be proved by parol evidence.[51]

paid for them. Later it appeared that the horses had been mortgaged by McHugh previous to said sale to secure a promissory note. The holder of the note threatened to take the horses to satisfy it, and thereupon Brown paid the amount and took an assignment of the note and mortgage, and sued McHugh for money paid. *Held,* that the note and mortgage were admissible in evidence.

46. Cook *v.* Linn, 19 N. J. L. 11.

47. Chittenden *v.* Hurlburt 2 Aik. (Vt.) 133.

48. In an action for balance of an account stated the defendant denied the indebtedness, and that an account was ever stated, and alleged that plaintiff was indebted to him. Defendant offered two receipts in evidence, one of which was a receipt from a third person acknowledging the payment to him by the defendant of a promissory note of the plaintiff held by said third person. The court said: "It is well settled that a receipt, although evidence of the highest character, is not conclusive, but is merely *prima facie* evidence of the facts recited by it and that it may be explained or contradicted by parol." Devencenzi *v.* Cassinella (Nev.), 81 Pac. 41.

49. Veiths *v.* Hagge, 8 Iowa 163; Harrold *v.* Smith, 107 Ga. 849, 33 S. E. 640; Smith *v.* Rentz, 131 N. Y. 169, 30 N. E. 54; Hauser *v.* Leviness, 62 N. J. L. 518, 41 Atl. 724; Baird *v.* Fletcher, 50 Vt. 603; Wells *v.* Ayers, 84 Va. 341, 5 S. E. 21.

50. A bidder at a sheriff's sale of real estate bought property and did not pay for it, but requested the sheriff to pay, which he did. Suit was brought by the sheriff against the bidder to recover the amount. He offered in evidence the execution under which the property was sold, with his return thereon, showing it was satisfied. *Held,* to be competent, because when return is made on such a writ, and the writ returned to the office whence it originated as required by law, it becomes a record. Nichol *v.* Ridley, 13 Tenn. 63, 26 Am. Dec. 254.

51. Batson *v.* King, H. & N (Eng. Exch.) 739.

B. Money Paid on Written Obligations. — Generally. Where money is paid by one of several persons bound by a written obligation, the real nature of the transaction and the true relations of the parties may be proved by parol evidence, no matter how their obligations may have been expressed in the written instrument.[52]

C. Circumstantial Evidence. — Parol evidence of circumstances which tend to sustain plaintiff's claim for money paid is admissible.[53]

III. MONEY RECEIVED.

1. Burden of Proof. — A. On Plaintiff. — In an action for money had and received, the burden is upon the plaintiff to prove that the defendant received and wrongfully withholds money, or something equivalent to money, which *et aequo* belongs to the plaintiff.[54] These facts, as well as the fact that it is without plaintiff's

52. In the case of Mansfield *v.* Edwards, 136 Mass. 15, the court said: "In an action for indemnity or contribution for money paid, parol evidence is admissible to show the true relations of the parties, no matter in what form their obligations may have been expressed in the instrument which they signed. Thus it has been held that such evidence is competent in such an action by a first indorser against a subsequent indorser. Weston *v.* Chamberlin, 7 Cush. (Mass.) 404. By an indorser against principal and sureties. Sweet *v.* McAllister, 4 Allen (Mass.) 353. By one joint promisor against other joint promisors. Clapp *v.* Rice, 13 Gray (Mass.) 403; Carpenter *v.* King, 9 Metc. (Mass.) 511. By one who was apparently a principal against a surety. McGee *v.* Prouty, 9 Metc. (Mass.) 547. By the acceptor against the drawer. Hawley *v.* Beverly, 6 M. & G. 22. Or against the indorser. Griffith *v.* Reed, 21 Wend. (N. Y.) 505. By maker of note against payee, same case. By a surety against an accommodation indorser. Harshman *v.* Armstrong, 43 Ind. 126. By principal on note against surety. Robison *v.* Lyle, 10 Barb. (N. Y.) 512. By one surety against another. Apgar *v.* Hiler, 4 Zabr. 812; Crosby *v.* Wyatt, 23 Me. 156." For same general doctrine, see also Sauer *v.* Brinker, 77 Mo. 289; Allyn *v.* Boorman, 30 Wis. 684; Hammond *v.* Rice, 18 Vt. 353; Baum *v.* Parkhurst, 26 Ill. App. 128.

53. In the case of Priest *v.* Hale, 155 Mass. 102, 29 N. E. 197, the plaintiff was president of a baseball company and asked the defendant to subscribe for a share of stock. Defendant assented, and directed plaintiff to have a certificate of the share issued to him and delivered to his attorney, which was done, and the plaintiff paid the company the price of the share, which defendant promised to repay. Plaintiff sued defendant for the amount, and on the trial introduced evidence that the defendant, after this transaction, availed himself of the privileges of a stockholder in the company at various times by occupying a seat among those which were reserved exclusively for stockholders, for invited guests and for representatives of the press. In view of defendant's denial that he attended the games, or ever became a stockholder, or that plaintiff advanced money for him, the court held the evidence competent as having some legitimate tendency, if unexplained, to support plaintiff's claim.

54. The burden is on the plaintiff to show that he is legally entitled to the money sued for, and it is not enough to show that the defendant has no right to it. Hungerford *v.* Moore, 65 Ala. 232; Nelson *v.* First Nat. Bank of Montgomery, 139 Ala. 578, 36 So. 707; Morris *v.* Jamieson, 99 Ill. App. 32; White River School Twp. *v.* Caxton Co. (Ind. App.), 72 N. E. 185.

To sustain an action for money had

consent, must be established by a preponderance of evidence.[55]

B. Certain Amount. — The plaintiff must show some certain amount to which he is entitled.[56]

2. Presumptions. — The law presumes that a person who has in his possession money which in equity and good conscience belongs to another person has promised to pay it over to such person.[57]

3. Money or Its Equivalent. — In an action for money had and received it is generally necessary to prove that the defendant received money for the use of the plaintiff, but if it be proved that the defendant received something which the parties treated as money it will sustain the action.[58]

and received, the plaintiff must prove that the defendant received either money or something which was really or presumptively converted into money, or received as money and instead of it, before suit brought, and which he cannot rightfully withhold from the plaintiff. Hatten *v.* Robinson, 4 Blackf. (Ind.) 479; Helvey *v.* Board of Co. Com'rs., 6 Blackf. (Ind.) 317.

The plaintiff cannot recover in an action for money had and received unless the evidence shows that the money belongs to him. Richolson *v.* Moloney, 96 Ill. App. 254; Woodbury *v.* Jones, 3 Gray (Mass.) 261.

55. Morgan Brokerage Co. *v.* Shemwell, 16 Colo. App. 185, 64 Pac. 379, which was an action to recover money paid to the defendant by plaintiff's husband on brokerage contracts. The court held it to be in reality a suit for money had and received, and that to sustain it the plaintiff must prove that the money in question was hers, and that it was secured by the defendant without her consent, and without giving her any valid consideration therefor — that she must show these fundamental and essential facts by a preponderance of evidence.

56. Tankersley *v.* Childers, 23 Ala. 781. But if the evidence furnishes certain *data* from which by an arithmetical calculation the jury may ascertain the amount to which he is entitled, it is sufficient.

57. Pease *v.* Bamford, 96 Me. 23, 51 Atl. 234.

"In order to support an action for money had and received there need not be privity of contract between the parties, except that which results from one man having another's money, which he has no right to keep. In such cases the law implies a promise that he will pay it over." Leete *v.* Pacific Mill & Min. Co., 88 Fed. 957; Deal *v.* Mississippi Co. Bank, 79 Mo. App. 262; Johnson-Brinkman Com. Co. *v.* Central Bank, 116 Mo. 558, 22 S. W. 813; Baltimore & O. R. Co. Burke, 102 Va. 643, 47 S. E. 824.

58. Stewart *v.* Conner, 9 Ala. 803; Allen *v.* Brown, 51 Barb. (N. Y.) 86; Denton *v.* Livingston, 9 Johns. (N. Y.) 96; Beardsley *v.* Root, 11 Johns. (N. Y.) 464.

Evidence that the defendant received something belonging to the plaintiff, which, under the circumstances of the case, ought, as between the parties, to be regarded as money, is admissible. Mathewson *v.* Eureka Powder Wks., 44 N. H. 289; Willie *v.* Green, 2 N. H. 333; Wheat *v.* Norris, 13 N. H. 178.

In an action for money had and received, the receipt of money may be proved in various ways. A bond, promissory note, due bill and accountable receipt are all evidence of indebtedness to the amounts specified therein. Burnham *v.* Ayer, 36 N. H. 182; Shanks *v.* Dent, 8 Gill (Md.) 120; Baltimore & S. R. Co. *v.* Faunce, 6 Gill (Md.) 68; Lincoln *v.* Butler, 14 Gray (Mass.) 129; Douglas *v.* Holme, 12 Ad. & El. (Eng.) 641. Evidence of an account stated is admissible. Morse *v.* Allen, 44 N. H. 33.

Evidence that the defendant has wrongfully converted the goods of the plaintiff into money, and has received the money, will sustain an action for money had and received. Green *v.* Lepley, 88 Ill. App. 543.

4. Nature and Sufficiency of Evidence. — A. GENERALLY. — A count for money had and received may be proved by any evidence showing that the defendant has possession of money of the plaintiff, which in equity and good conscience he ought to pay over to him.[59]

B. MONEY WRONGFULLY OBTAINED. — Proof that the defendant has obtained money belonging to the plaintiff by fraud, duress and extortion will sustain an action for money had and received.[60]

C. MONEY OBTAINED ON ABANDONED CONTRACT. — Proof that the defendant received and withholds money upon a contract which has been rescinded or abandoned will sustain an action for money had and received.[61]

D. RENTS OF REAL ESTATE. — In an action by the owner of the equitable title of real estate for rent money received by the defendant, who held a legal title, the plaintiff may give evidence of the rental value of the property to show the amount of rents and profits

Proof that defendant received bank notes or property as money will sustain the action. Gordon *v.* Camp, 2 Fla. 422; Hill *v.* Kennedy, 32 Ala. 523; Green *v.* Sizer, 40 Miss. 530; Bank of Missouri *v.* Benoist, 10 Mo. 520.

It was formerly held in Kentucky that the plaintiff could not introduce evidence that defendant had received the notes of a bank. Wickliffe *v.* Davis, 2 J. J. Marsh. (Ky.) 69. But it was afterward held in that state that such evidence was admissible where it appeared that the defendant received the notes expressly as money. Murray *v.* Pate, 6 Dana (Ky.) 335.

59. Proof that the money of one man has without consideration got into the pocket of another will sustain an action for money had and received. Law *v.* Uhrlaub, 104 Ill. App. 263. In this case the plaintiff rented a building for three months for $300 per month in advance. On the fifth day of the last month he surrendered it to his landlord, the defendant, who then obtained judgment against him for the last month's rent. On the 16th day of that month the defendant rented the building to another party for the balance of the month for $133 and received the money. *Held*, that proof of the facts stated sustained the action. To same doctrine see also Bishop *v.* Taylor, 41 Fla. 77, 25 So. 287; United States Exp. Co. *v.* Jenkins, 73 Wis. 471, 41 N. W. 957.

60. Hudson *v.* Robinson, 4 M. & S. (Eng.) 475; Prichard *v.* Sweeney, 109 Ala. 651, 19 So. 730; Sturgeon *v.* Birkey, 86 Ill. App. 489.

Proof that the money was paid to the defendant under protest for the purpose of recovering a chattel illegally detained by him under a claim for storage charges will sustain an action for money had and received. Whitlock Mach. Co. *v.* Holway, 92 Me. 414, 42 Atl. 799.

Secret Profit of Agent. — Several parties combined and employed the defendant to buy a mine for them. In the purchase of the mine he made a secret profit, and suit was brought for it as money had and received. *Held*, that proof of the facts stated sustained the action. Humbird *v.* Davis, 210 Pa. St. 311, 59 Atl. 1082.

Folloni *v.* Vesella (R. I.), 61 Atl. 143, where a certain firm allowed to the defendant, in settlement of an account, a sum of money to be returned to the plaintiff for steamship tickets which he had bought and did not use.

Proof that the defendant obtained money from the plaintiff by means of fraud in an oil land speculation was held sufficient. Grannis *v.* Hooker, 29 Wis. 65; Johnson *v.* Cate (Vt.), 59 Atl. 830.

61. Wheelock *v.* Wright, 4 Stew. & P. (Ala.) 163; Wheeler *v.* Board, 12 Johns. (N. Y.) 363; Murray *v.* Clay, 9 Ark. 39. In Silver *v.* Krellman, 89 App. Div. 363, 85 N. Y. Supp. 945, plaintiff had deposited a

and the use and occupation of the property by the defendant.[62] And where money has been intrusted to the defendant to pay plaintiff's rent or for other purposes, and the defendant fails to so apply the money and keeps it, proof of these facts will sustain the action for money had and received.[63]

E. Money Collected. — In an action to recover money collected on claims belonging to the plaintiff he must prove that the defendant actually collected the money, or at least offer some proof from which such an inference would arise.[64]

F. Conversion of Property. — Where it appears that the defendant has sold property belonging to the plaintiff and failed to turn over the proceeds, the plaintiff may introduce evidence showing the value of the property.[65]

G. Loan of Money. — Evidence that the plaintiff loaned money to the defendant is not competent.[66]

H. Proof of Loss or Damage Not Sufficient. — Evidence which merely shows that by reason of the wrongful conduct of the defendant the plaintiff has been obliged to pay out money to others, or to suffer loss or damage, is not sufficient.[67]

5. Documentary Evidence. — A. Promissory Notes. — In an action for money had and received, a promissory note is competent evidence against a maker or indorser.[68]

check with the defendant to secure the payment of rent for premises which the defendant agreed to lease to the plaintiff; the defendant refused to execute the lease, and retained the proceeds of the check. *Held*, sufficient to sustain the action.

62. Hill *v.* Cooper, 10 Or. 153.

63. Clark *v.* Jenness, 188 Mass. ———, 74 N. E. 343; Crosby *v.* Clark, 62 N. Y. St. 56, 30 N. Y. Supp. 329.

64. Baskin *v.* Sample, 6 Ala. 255.

Proof that plaintiff loaned money to a third person at the request of the defendant, who promised to be responsible for its repayment, and who afterward collected part of the debt and paid plaintiff a portion, but not all, of the part collected, is sufficient to sustain a verdict for plaintiff. Glettner *v.* Blaunder, 85 N. Y. Supp. 374.

But evidence that the defendant, in the matter of collecting a note for the plaintiff, was so negligent that part of the amount represented by the note was not collected does not sustain the action. Johnson *v.* Kendall, 20 N. H. 304.

65. Hyatt *v.* Pollard (Md.), 1 Atl. 873.

66. Scarborough *v.* Blackman, 108 Ala. 656, 18 So. 735; Bank of Missouri *v.* Scott, 1 Mo. 744.

67. Evidence showing that the defendant sold land to the plaintiff and received a part of the purchase money, and that the plaintiff while in possession of the land made improvements thereon, and then abandoned the premises from fear of personal violence on the part of the defendant, was held insufficient to sustain an action for money had and received. Cole *v.* Alexander, 113 Ga. 1154, 39 S. E. 477; Le Clair Co. *v.* Rogers-Ruger Co. (Wis.), 102 N. W. 346.

68. A promissory note may be received as evidence of money had and received, against a maker, but is not evidence against a surety who had no connection with the consideration. Hatten *v.* Robinson, 4 Blackf. (Ind.) 479. A note bearing defendant's name on the back is admissible under the general issue. Sturtevant *v.* Randall, 53 Me. 149.

In the case of Carver *v.* Hayes, 47 Me. 257, the plaintiff offered in evidence a writing as follows: "Rockland, Sept. 6, 1855. Due L.

B. Rescinded or Violated Contracts. — In an action to recover money had and received, upon a written contract which has been rescinded or violated, the written instrument is admissible.[69]

C. Receipts. — Receipts are admissible against the givers of them to prove money had and received.[70]

D. Deeds. — A defective deed has been held admissible in an action to recover the purchase price of real estate.[71] And, under peculiar circumstances, a deed of land has been admitted on rebuttal to refute the testimony of the defendant.[72]

6. Evidence in Defense. — A. Generally. — Upon the general issue in an action for money had and received, the defendant may introduce any evidence tending to show that the plaintiff *ex aequo et bono* is not, and never was, entitled to the whole of his demand or any part of it,[73] or any evidence which tends to contradict, explain or avoid the facts proved by the plaintiff on the trial.[74]

B. Burden of Special Defense. — In an action for money had

D. Carver or order twenty dollars and 50-100 on demand," which was signed by the defendant, and indorsed by the payee to the plaintiff. *Held*, to be a note, and admissible in evidence. So in Cummings *v.* Gassett, 19 Vt. 308, and Lincoln *v.* Butler, 14 Gray (Mass.) 129.

69. In an action to recover money paid on a written contract which was afterward rescinded, it was held that the plaintiff might introduce the written contract, although it was under seal and not signed by him to show the amount of money paid by the plaintiff, and the consideration therefor. Buena Vista Co. *v.* McCandlish, 92 Va. 297, 23 S. E. 781.

The case of Pierce *v.* Wood, 23 N. H. 519, was an action for money had and received because of fraud committed by the defendant in a compromise of his debts to the plaintiff. The contract of compromise was in writing, and remitted a portion of the debt, and among other things bound the defendant to pay the balance remitted in case any fraud should be committed by him. The written contract of compromise was held admissible as tending to show fraud.

70. Talladega Ins. Co. *v.* Lauders, 43 Ala. 115; Guthrie *v.* Hyatt, 1 Har. (Del.) 447; Witherup *v.* Hill, 9 Serg. & R. (Pa.) 11.

71. Plaintiff bought a tract of land from the defendant, but upon inquiry no land of the description contained in defendant's deed could be found, and suit was brought to recover the purchase price, as money had and received. On the trial, defendant's deed was given in evidence to prove the fact of payment, and the amount thereof. *Held* competent, on the ground that the deed was not the foundation of the action, but only led to it. D'Utricht *v.* Melchor, 1 Dall. (U. S.) 428.

72. In Copeland *v.* Koontz, 125 Ind. 126, 25 N. E. 174, the defendant admitted receiving the money, but claimed it was a gift from the deceased, except as to such sum as would be necessary to pay her funeral expenses. To refute this claim, plaintiff was permitted to offer in evidence a deed of conveyance executed by John Copeland and Sarah Copeland to the defendant and other children of John Copeland, which deed secured by reservation a support for the grantors during their lives, and at their death a decent burial.

73. Moser *v.* McFarlan, 2 Burr (Eng.) 1005; Peck Colo. Co. *v.* Stratton, 95 Fed. 741; Harris *v.* Pearce, 5 Ill. App. 622.

74. Fort Dearborn Nat. Bank *v.* Security Bank, 87 Minn. 81, 91 N. W. 257.

and received the burden of proof is on the defendant to show any defense other than denials of plaintiff's allegations.[75]

C. Financial Condition of Plaintiff. — It has been held that the financial condition of the plaintiff may be shown on behalf of the defendant in an action for money had and received.[76]

75. Money was intrusted by plaintiff to the defendants, who were attorneys, for the purpose of securing bail for a person in custody, to be returned when the person should be surrendered and the bail exonerated. Defendants admitted receiving the money, but made defense that plaintiff employed them as attorneys to defend the person, and that they retained the money as compensation for their services. *Held*, that the burden was on defendants to establish such defense. Logan *v.* Freerks (N. D.), 103 N. W. 426.

In an action for money had and received, the burden is upon the defendant to prove any payment he claims to have made. Andrews *v.* Moller, 37 Hun (N. Y.) 480.

In an action against an agent for money received by him on a note which he collected for the plaintiff, he may show what sums had been properly paid by him for legal services in collecting the note, and deduct that amount from the amount collected. Dennis *v.* Graf, 31 Wis. 105.

76. In a suit against the surviving partner of a firm for money had and received by it, which money was charged to have been overpaid to the firm by mistake, it was held that evidence tending to show plaintiff's inability to make the overpayment was competent and for this purpose an unsatisfied mortgage previously executed by him was admissible as a circumstance, the weight to be determined by the jury. Rutherford *v.* McIvor, 21 Ala. 750.

MONUMENTS.—See Boundaries; Documentary Evidence; Highways; Mines and Minerals; Pedigree; Private Writings.

MORBID DELUSIONS.—See Insanity.

MORTALITY TABLES.

I. RULES AS TO COMPETENCY OF MORTALITY TABLES.

1. In General. — Mortality tables, or tables of life expectancy, as they are also called, consist of summarized statistical information on a matter of general interest. They are considered impartial and disinterested, and so nearly in the nature of exact science or mathematical demonstration as to be credible and valuable; and hence the uniform practice of the courts is to receive them in evidence whenever the probable duration of a particular life is a fact to be determined.[1] Thus in controversies involving the present worth

1. Atchison, T. & S. F. R. Co. *v.* Ryan, 62 Kan. 682, 64 Pac. 603; Camden & A. R. Co. *v.* Williams, 61 N. J. L. 646, 40 Atl. 634.

of estates dependent upon the probable duration of the life of the owner or tenant, mortality tables are resorted to.[2] The most accurate method of proving the value of the wife's inchoate or contingent right of dower in her husband's lands is by a calculation based on mortality and annuity tables.[3]

Personal Injuries. — The tables are admissible to show expectancy of life of an injured person in an action by him to recover damages.[4]

Wrongful Death. — In an action to recover for wrongful death, mortality tables are admissible to show the probable duration of the life of deceased.[5]

2. Henderson *v.* Harness, 184 Ill. 520, 56 N. E. 786, *holding* further that it was competent to introduce in evidence computations of experts based upon such tables, in connection with other evidence as to the age and health of the life tenant. See also Joliet *v.* Blower, 155 Ill. 414, 40 N. E. 619, *affirming* 49 Ill. App. 464; Hoffman *v.* Rice, 38 Md. 284; Abercrombie *v.* Riddle, 3 Md. Ch. 290.

In Mills *v.* Catlin, 22 Vt. 98, where the plaintiff had proved an outstanding life estate as a breach of the covenant of seisin, and had given evidence as to the age and general state of health of the life tenant and the annual value of the premises, it was held proper to permit Dr. Wigglesworth's tables for estimating life estates to be used by the jury in computing the damages, under proper instructions from the court in regard to the use to be made of them.

In Eastabrook *v.* Hapgood, 10 Mass. 313, the court, referring to the assessment of the damages in this case, observed that the value of the dowager's life estate was to be calculated from the late Dr. Wigglesworth's tables, published in the memoirs of the American Academy of Arts and Sciences, which he said had been adopted by that court as a rule in estimating the value of life estates since its publication.

Action for Breach of Contract for Support for Life. — Tables Competent. — Schell *v.* Plumb, 55 N. Y. 592; Banta *v.* Banta, 84 App. Div. 138, 82 N. Y. Supp. 113 (holding it error to exclude the Northampton Tables); Shover *v.* Myrick, 4 Ind. App. 7, 30 N. E. 207.

The Damages to Which the Policy Holders of a Life Insurance Company are, upon its dissolution, entitled as creditors are liquidated and are measured by the equitable or surrender value of the policies, calculated on the basis of the American Tables of Mortality. McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 5 So. 120.

3. Gordon *v.* Tweedy, 71 Ala. 202; McHenry *v.* Yokum, 27 Ill. 160; Williams' Case, 3 Bland (Md.) 186; Andrews *v.* Broughton, 84 Mo. App. 640; Jackson *v.* Edwards, 7 Paige (N. Y.) 386, 408. See also O'Donnell *v.* O'Donnell, 3 Bush (Ky.) 216.

4. *Alabama.* — Louisville & N. R. Co. *v.* Hurt, 101 Ala. 34, 13 So. 130; Richmond & D. R. Co. *v.* Hissong, 97 Ala. 187, 13 So. 209.

Georgia. — Macon D. & S. R. Co. *v.* Moore, 99 Ga. 229, 25 S. E. 460; Powell *v.* Augusta & S. R. Co., 77 Ga. 192.

Indiana. — Louisville, N. A. & C. R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343; Indianapolis *v.* Marold, 25 Ind. App. 428, 58 N. E. 512.

Iowa. — Keyes *v.* Cedar Falls, 107 Iowa 509, 78 N. W. 227; McDonald *v.* Chicago & N. W. R. Co., 26 Iowa 124, 96 Am. Dec. 114.

See further on this question the article "INJURIES TO PERSON," Vol. VII.

It is not necessary that the death of the person in question shall have resulted from the injury. Knapp *v.* Sioux City & P. R. Co., 71 Iowa 41, 32 N. W. 18, *overruling* Nelson *v.* Chicago, R. I. & P. R. Co., 38 Iowa 564. See also Simonson *v.* Chicago, R. I. & P. R. Co., 49 Iowa 87; Greer *v.* Louisville & N. R. Co., 94 Ky. 169, 21 S. W. 649, 42 Am. St. Rep. 345; Kraut *v.* Frankford & S. P. P. R., 160 Pa. St. 327, 28 Atl. 783.

5. Denver, S. P. & P. R. Co. *v.* Woodward, 4 Colo. 1; Kansas P. R.

Refreshing Recollection. — Sometimes such tables have been used for the purpose of refreshing the memory of a witness.[6]

2. Necessity of Proof of Age. — Before mortality tables can be received in evidence there must be proof of the age of the person in question, or evidence from which his age can be inferred or approximately ascertained by the jury.[7]

3. Physical Condition of Person in Question. — In some jurisdictions it is held that the competency of mortality tables in a case otherwise proper for their admission is not affected by the fact that the person's condition and health are below the average and he is not an insurable risk.[8] Other courts, however, hold that it should be shown that the person in question was in good health.[9]

Co. *v.* Lundin, 3 Colo. 94; Sweet *v.* Providence & S. R. Co., 20 R. I. 785, 40 Atl. 237.

The fact that the next of kin supported themselves during the life of the deceased, and that none of his earnings and profits were devoted to their support, does not render the tables incompetent. Friend *v.* Burleigh, 53 Neb. 674, 74 N. W. 50.

6. As, for example, in Shover *v.* Myrick, 4 Ind. App. 7, 30 N. E. 207, where a witness who had duly qualified as an expert upon the subject of life insurance was permitted to so use the American tables when testifying to the probable expectancy of life of a person eighty-one years of age.

7. Atlanta Consol. St. R. Co. *v.* Beauchamp, 93 Ga. 6, 19 S. E. 24. See also Macon, D. & S. R. Co. *v.* Moore, 99 Ga. 229, 25 S. E. 460. *Compare* Missouri, K. & T. R. Co. *v.* Hines (Tex. Civ. App.), 40 S. W. 152.

The precise age need not be shown. Pearl *v.* Omaha & St. L. R. Co., 115 Iowa 535, 88 N. W. 1078.

8. Arkansas M. R. Co. *v.* Griffith, 63 Ark. 491, 39 S. W. 550, so holding if the jury are instructed to consider the tables in connection with the evidence in question. The court said: "This is an element of uncertainty that must necessarily be found in the case of one of feeble health, and not insurable, in all cases, whether we call to our aid the mortality tables or not. When we do so, however, when, by reason of enfeebled physical condition, the standard tables are not strictly applicable on that account, yet they are more or less efficient aids in arriving at an approximation of the truth, and that is the best that can be hoped for after all." See also Smiser *v.* State *ex rel.* King, 17 Ind. App. 519, 47 N. E. 229. And see *infra*, "Conclusiveness of Tables."

The "Carlisle Tables of Mortality" may be assumed to be a standard table, and is evidential, irrespective of the condition of health of the person whose expectancy of life is the subject of inquiry; but that condition must be taken into account in determining the probable duration of such person's life. Camden & A. R. Co. *v.* Williams, 61 N. J. L. 646, 40 Atl. 634.

9. Lincoln *v.* Smith, 28 Neb. 762, 45 N. W. 41; Roose *v.* Perkins, 9 Neb. 304, 2 N. W. 715. See also King *v.* Bell, 13 Neb. 409, 14 N. W. 141.

Vicksburg Railroad, Power & Mfg. Co. *v.* White, 82 Miss. 468, 34 So. 331, where the court said: "When one relies upon the mortality tables to show life expectancy it then becomes necessary to show that the party belongs to the class. The mortality tables are made from arbitrary rules, and the class is an arbitrary one, out of the general run of mankind, and one relying upon them must show that the parties come within the class of persons contemplated." And see Illinois C. R. Co. *v.* Crudup, 63 Miss. 291.

"The admissibility of the table should, it seems to us, depend — to some, if not to a great, extent — upon what facts enter into it as a table, as its constituent elements or parts, or, in other words, upon what facts, or upon the lives of what class of persons, were the calculations

4. Person Engaged in Hazardous Employment. — The fact that the person the duration of whose life is in question was engaged in a more hazardous employment than persons with reference to whom the tables were made up is no reason for excluding the tables in an otherwise proper case.[10]

II. TABLES PROPER TO BE RESORTED TO.

1. English Tables. — Probably the first tables of mortality to be used were the Northampton Tables, prepared by Dr. Richard Price of England between the years 1755 and 1780 from bills of mortality kept in the parish of All Saints, a town in the north of England, and these tables have been in constant use ever since.[11] About the same time the Carlisle Tables were framed for the town of Carlisle, also a town in the north of England, and these tables likewise have been constantly resorted to.[12] In addition to these there are the

based or made, and were they correctly and accurately made? If the calculations which resulted in the Carlisle Table were predicated upon a particular or selected class of lives, or of healthy persons alone, then it cannot be introduced in any case except where the same kind of a life is involved in the controversy; but if based upon the general or average of all lives, then it can be introduced, or is competent, in any proper case in which the expectancy of the life of a party enters as an element of inquiry." City of Friend *v.* Ingersoll, 39 Neb. 717, 58 N. W. 281.

In Wilkins *v.* Flint, 128 Mich. 262, 87 N. W. 195, where mortality tables were introduced upon proof of the permanency of the injuries, it was claimed that as the plaintiff was not a woman of average health at the time of the injuries the tables should not have been received, and the court held that had the fact that she was not an ordinarily healthy person been admitted or undisputed the tables would have had no bearing, but as that fact was disputed they were admissible to be used or not by the jury according to their conclusion upon the question of fact.

10. That fact is merely a circumstance to be taken by the jury as tending to show that the person's expectancy of life is less than the tables would indicate for one of his age. Birmingham M. R. Co. *v.* Wilmer, 97 Ala. 165, 11 So. 886; Coates *v.* Burlington, C. R. & N. R. Co., 62 Iowa 486, 17 N. W. 760. See also Galveston, H. & S. A. R. Co. *v.* Johnson, 24 Tex. Civ. App. 180, 58 S. W. 622; San Antonio & A. P. R. Co. *v.* Engelhorn, 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68.

11. Henderson *v.* Harness, 184 Ill. 520, 56 N. E. 786; Joliet *v.* Blower, 155 Ill. 414, 40 N. E. 619; Peyton *v.* Ayres, 2 Md. Ch. 64; Sauter *v.* New York C. & H. R. R. Co., 66 N. Y. 50, *affirming* 6 Hun 446; Schell *v.* Plumb, 55 N. Y. 592; The D. S. Gregory *v.* St. George Washington, 2 Bened. 226, 7 Fed. Cas. No. 4100.

"**The Northampton Tables Are Notoriously an Accurate** and comprehensive compilation of facts as to the probabilities of life, acted upon by courts and insurance companies for many years, and they have acquired as stable and sure a reputation as it is possible for such a compilation to do. They stand like an almanac, and we think may properly go to a jury, like any other work or book of known reputation, to establish a scientific proposition." Georgia R. & Bkg. Co. *v.* Oaks, 52 Ga. 410.

12. *Colorado.* — Denver, S. P. & P. R. Co. *v.* Woodward, 4 Colo. 1; Kansas Pac. R. Co. *v.* Lundin, 3 Colo. 94.

Georgia. — Western & A. R. Co. *v.* Cox, 115 Ga. 715, 42 S. E. 74; At-

Equitable Tables, prepared by the Equitable insurance company of London;[13] the Finlaison Tables, made by John Finlaison under the direction of the British government;[14] the Portsmouth Tables;[15] the London Tables, prepared by Alexander McKean,[16] and others.

2. American Tables. — While the English tables previously noted are frequently resorted to by the courts of this country, the American tables are usually used,[17] and indeed, in some cases, the courts have

lanta R. & P. Co. *v.* Monk, 118 Ga. 449, 45 S. E. 494.

Indiana. — Louisville, N. A. & C. R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343.

Iowa. — Allen *v.* Ames & C. R. Co., 106 Iowa 602, 76 N. W. 848; Blair *v.* Madison Co., 81 Iowa 313, 46 N. W. 1093; Knapp *v.* Sioux City & P. R. Co., 71 Iowa 41, 32 N. W. 18; McDonald *v.* Chicago & N. W. R. Co., 26 Iowa 124, 96 Am. Dec. 114; Walters *v.* Chicago, R. I. & P. R. Co., 41 Iowa 71; Donaldson *v.* Mississippi & M. R. Co., 18 Iowa 280, 87 Am. Dec. 391.

Minnesota. — Scheffler *v.* Minneapolis & St. L. R. Co., 32 Minn. 518, 21 N. W. 711.

Nebraska. — King *v.* Bell, 13 Neb. 409, 14 N. W. 141; Lincoln *v.* Smith, 28 Neb. 762, 45 N. W. 41.

Rhode Island. — Sweet *v.* Providence & P. R. Co., 20 R. I. 785, 40 Atl. 237.

The Carlisle Tables, being based upon general population and not upon selected or insurable lives, are admissible as some evidence competent to be considered in determining what was the actual expectancy of life of a person. Steinbruner *v.* Pittsburgh & W. R. Co., 146 Pa. St. 504, 23 Atl. 239.

13. Joliet *v.* Blower, 155 Ill. 414, 40 N. E. 619.

14. See Shover *v.* Myrick, 4 Ind. App. 7, 30 N. E. 207.

15. Henderson *v.* Harness, 184 Ill. 520, 56 N. E. 786.

16. Joliet *v.* Blower, 155 Ill. 414, 40 N. E. 619.

17. Louisville & N. R. Co. *v.* Hurt, 101 Ala. 34, 13 So. 130; Richmond & D. R. Co. *v.* Hissong, 97 Ala. 187, 13 So. 209; Green *v.* Louisville & N. R. Co., 94 Ky. 169, 21 S. W. 649, 42 Am. St. Rep. 345; Louisville, C. & L. R. Co. *v.* Mahony, 7 Bush (Ky.) 235; Boettger *v.* Scherpe & K. Arch. Iron Co., 136 Mo. 531, 38 S. W. 298; Abell *v.* Penn Mut. L. Ins. Co., 18 W. Va. 400.

"Courts, as matter of law and legal criterion, have adopted the American life annuity tables, and, by consulting those, determine the present value of life estates when the person upon whose life the estate depends is of ordinary health and vigor for one of that age; subject, however, to be varied on account of unusual vigor or frailty of constitution and health, which may either lengthen or shorten the probable duration of the life estate." Alexander *v.* Bradley, 3 Bush (Ky.) 667.

In the statistical reports of the United States census office, upon the taking of every census, there are published by the government certain tabulated statements of mortality among different groups of the population of the United States, including tables showing the expectation of lives at all ages, and among various classes of population. These statements are based upon the experience and observation of scientific men, and form a portion of the vital statistics as well as of the current history of the country. They are known as the "Mortality Tables of the United States," or as "American Mortality Tables." Shover *v.* Myrick, 4 Ind. App. 7, 30 N. E. 207.

The American Tables of Mortality Are Now the Orthodox Standard throughout the United States and Canada. McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 5 So. 120.

Dr. Wigglesworth's Tables Are Standard. — Henderson *v.* Harness, 184 Ill. 520, 56 N. E. 786; Joliet *v.* Blower, 155 Ill. 414, 40 N. E. 619.

Tables Prepared by the American Legion of Honor, showing estimates of probable duration of lives of men at different ages, were used in San

held that they are to be used in preference to the English tables.[18]

Antonio & A. P. R. Co. *v.* Bennett, 76 Tex. 151, 13 S. W. 319.

"**The Tables of Dr. Halley,** founded upon observations at an earlier period, as to the duration of human life, and which were adopted by the chancellor in the case of Dorsey *v.* Smith, reported in 7 H. & J. 345, were repudiated by the court of appeals in that case." Peyton *v.* Ayres, 2 Md. Ch. 64.

In Missouri, K. & T. R. Co. *v.* Ransom, 15 Tex. Civ. App. 689, 41 S. W. 826, it was held that proof that the Flatchcraft Insurance Manual with the mortuary tables therein was published in the United States and used by nearly all insurance men and considered reliable and standard authority among them, and that it is the American experience table showing the expectancy of life, was sufficient predicate for the admission of the manual.

18. In Carnes *v.* Polk, 5 Heisk. (Tenn.) 244, it was held that while on the question of the value of a life estate the Carlisle Tables may be referred to, they are based on conditions of life and values and rentals very different from those which exist in this country, and hence afford no satisfactory criterion of values.

In Gordon *v.* Tweedy, 74 Ala. 232, the court, in speaking of such tables, said: "More than forty years ago the courts were accustomed to resort to the 'Northampton' and the 'Carlisle' Tables of observation, showing the probabilities of human life by actual observation in the towns of Northampton and Carlisle, England. These deaths, however, were not taken from selected lives, but from the population generally. The field was so circumscribed that they have never been deemed entirely reliable. We judicially know that the business of life insurance has made rapid advancement in modern times, especially within the past twenty years. New fields of observation have been explored, based upon the combined and actual experience of American life insurance companies. This has led to the tabulation of results in what is now known as the 'American Table of Mortality,' which is now regarded as the orthodox standard throughout the United States and the Canadas. This table is based on the lives of insurable, or healthy, persons, and is known to be now in use generally by modern life insurance companies for the arithmetrical estimate of valuations. We are of opinion that, for these reasons, our courts should resort to the 'American Table of Mortality' as a basis for the calculation of annuities dependent on the probabilities of human life in this country."

In Shippen *v.* Robbins, 80 Pa. St. 391, it was held that the Carlisle Tables were not authoritative in determining the value of a life estate. The court, in speaking of the tables, said: "They answer well their proper purpose to ascertain the average duration of life so as to protect life insurers against ultimate loss upon a large number of policies, and thereby to make a profit to the shareholders. But an individual case depends on its own circumstances, and the relative rights of the life tenant and the remainderman are to be ascertained accordingly. A consumptive or diseased man does not stand on the same plane as one of the same age in vigorous health. Their expectations of life differ in point of fact."

In Peterson *v.* Oleson, 47 Wis. 122, 2 N. W. 94, an action to foreclose a mortgage given to secure the performance of a contract granting an annuity, it was held that in computing the present value of the annuity it was proper to use the Northampton Tables in the absence of any statute or rule of court on the subject, although the court suggests that perhaps life tables prepared at a later date might give the average probable duration of life in this country with more accuracy than it is given in the Northampton Tables. See also Berrinkott *v.* Traphagen, 39 Wis. 219.

In Cooper *v.* Lake Shore & M. S. R. Co., 66 Mich. 261, 33 N. W. 306, a personal injury action, Dr. Farrs Tables were introduced in evidence. These tables, compiled from the official records of the registrar-general for England and Wales, and known

III. PRODUCTION OF TABLES.

1. Necessity. — Judicial Notice. — Some of the courts hold that they will take judicial notice of the probable duration of life at a given age as shown by the mortality tables.[19] But the introduction in evidence of such tables is not an error of which either party can complain.[20]

2. Tables Embraced in Books. — Mortality tables, in order properly to be produced as evidence, need not necessarily be in a publication containing only the tables.[21] But it is always considered proper to receive in evidence books of general acceptance and authority containing such tables.[22] Thus, encyclopaedias,[23] statutes, and

as the English Tables, differed from those based upon the American experience as shown by the tables published in the Michigan statutes, but it was held that since the probable duration of life as shown by the former tables was less than that shown by the latter tables the error, if any, in admitting the English Tables was one of which the defendant could not complain.

19. *Alabama.* — Kansas City, M. & B. R. Co. *v.* Phillips, 98 Ala. 159, 13 So. 65; Louisville & N. R. Co. *v.* Mothershed, 97 Ala. 261, 12 So. 714; McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 5 So. 120; Gordon *v.* Tweedy, 74 Ala. 232.

Connecticut. — Nelson *v.* Branford Light & W. Co., 75 Conn. 548, 54 Atl. 303.

Indiana. — Myrick *v.* Shover, 4 Ind. App. 7, 30 N. E. 207.

Kansas. — Atchison T. & S. F. R. Co. *v.* Ryan, 62 Kan. 682, 64 Pac. 603.

New York. — Johnson *v.* Hudson River R. Co., 6 Duer 633, 648.

West Virginia. — Abell *v.* Penn Mut. L. Ins. Co., 18 W. Va. 400.

And accordingly, in a personal injury action it is not error for the court to refuse to charge the jury that although there are tables showing the present value of annuities at eight per cent. interest on a single life at the plaintiff's age, yet the court cannot take judicial notice of what those tables show; and that, there being no tables introduced, the jury cannot award damages for further inability to work and earn money, even if they find there is such future inability. Kansas City, M. & B. R. Co. *v.* Phillips, 98 Ala. 159, 13 So. 65.

"If the courts judicially know the standard tables of life expectancy when presented to their observation they may assure their knowledge by reference to publications containing them." Atchison, T. & S. F. R. Co. *v.* Ryan, 62 Kan. 682, 64 Pac. 603. Judicial notice will be taken of the Northampton Tables referred to in a rule of court. Davis *v.* Standish, 26 Hun (N. Y.) 608. See also Wager *v.* Schuyler, 1 Wend. (N. Y.) 553.

20. Louisville & N. R. Co. *v.* Mothershed, 97 Ala. 261, 12 So. 714; Davis *v.* Standish, 26 Hun (N. Y.) 608.

21. Worden *v.* Humeston, 76 Iowa 310, 41 N. W. 26.

22. Such as McCarty's "Statistician and Economist," containing Farrs Tables. Keast *v.* Santa Ysabel Gold Min. Co., 136 Cal. 256, 68 Pac. 771.

Tables Contained in Reese's Manual were used in Atlanta & W. P. R. Co. *v.* Johnson, 66 Ga. 259.

23. Scagel *v.* Chicago, M. & St. P. R. Co., 83 Iowa 380, 49 N. W. 990; Gorman *v.* Minneapolis & St. L. R. Co., 78 Iowa 509, 43 N. W. 303; Worden *v.* Humeston & S. R. Co., 76 Iowa 310, 41 N. W. 26; Pearl *v.* Omaha & St. L. R. Co., 115 Iowa 535, 88 N. W. 1078; Louisville, N. A. & C. R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343.

"The only easily accessible authentic publication of such tables is to be found in the standard encyclopedias, like the Brittanica. The courts recognize such publications as being authentic and in general use, and therefore may receive them in evidence as to matters contained

reports of decisions and other accepted law books,[24] and books used by reputable insurance companies,[25] may be received.

3. Secondary Evidence of Contents. — As in the case of other writings or publications, the best evidence of their contents is the tables themselves, and secondary evidence will not be received.[26]

therein of which judicial knowledge is possessed." Atchison T. & S. F. R. Co. *v.* Ryan, 62 Kan. 682, 64 Pac. 603.

Johnson's New Universal Encyclopedia, containing the Northampton and American life tables, being a standard work upon matters of science and art, is properly admitted in evidence for the purpose of showing the expectation of life of an individual. Scagel *v.* Chicago, M. & St. P. R. Co., 83 Iowa 380, 49 N. W. 990. See also Gorman *v.* Minneapolis & St. L. R. Co., 78 Iowa 509, 43 N. W. 303.

24. Atlanta & W. P. R. Co. *v.* Johnson, 66 Ga. 259. As, for example, the Carlisle Tables as published in Maxwell's "Pleading and Practice." Chicago, R. I. & P. R. Co. *v.* Hambel (Neb.), 89 N. W. 643; Sellars *v.* Foster, 27 Neb. 118, 42 N. W. 907.

In Louisville & N. R. Co. *v.* Kelly, 100 Ky. 421, 38 S. W. 852, 19 Ky. L. Rep. 69, 40 S. W. 452, Wigglesworth's Life Tables as published in 3 Bush (Ky.) 12, were received in evidence. See also Alexander *v.* Bradley, 3 Bush (Ky.) 667.

In Nelson *v.* Lake Shore & M. S. R. Co., 104 Mich. 582, 62 N. W. 993, tables found in How. Mich. Stat., § 4245, were introduced in evidence. See also Hunn *v.* Michigan C. R. Co., 78 Mich. 513, 44 N. W. 502.

In Louisville, N. A. & C. R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343, complaint was made of the action of the court in allowing appellee's counsel to read in the hearing of the jury the same tables found in a case in 118 U. S. 500. But that came about in this way: Counsel for appellant, in support of their objection to the introduction of the life tables, read parts of the case just mentioned in the hearing of the jury. Appellee's counsel in response thereto read, over appellant's objection, from another part of the same case, the matter already mentioned. It was held that if there was error in this action of the trial court it was first invited by the appellant.

In Attorney-General *v.* North America L. Ins. Co., 82 N. Y. 172, a proceeding to wind up a life insurance company, it was held proper for the referee in computing the values of annuity bonds to take as his basis the American Experience Table of Mortality annexed to the New York Insurance Act, ch. 623, Laws of 1868, p. 1317, this being the table used by the company in selling annuities.

In Crouse *v.* Chicago & N. W. R. Co., 102 Wis. 196, 78 N. W. 446, 778, the tables found in the Wisconsin Revised Statutes were used.

25. Mississippi & T. R. Co. *v.* Ayres, 16 Lea (Tenn.) 725; Mary Lee C. & R. Co. *v.* Chambliss, 97 Ala. 171, 11 So. 897; Kreuger *v.* Sylvester, 100 Iowa 647, 69 N. W. 1059; Gulf, C. & S. F. R. Co. *v.* Johnson, 10 Tex. Civ. App. 254, 31 S. W. 255.

In Pearl *v.* Omaha & St. L. R. Co., 115 Iowa 535, 88 N. W. 1078, a life insurance manual containing the American Experience Tables by A. J. Flitcraft was received. The evidence showed the tables as contained therein to be in general use by insurance men throughout the state, and accepted as authorities; and it was held that this was enough although the witness had no knowledge of the manner in which the calculations were arrived at, or the class of persons included in the estimate.

The Agents' Road Book of the Mutual Life Insurance Company of New York, showing the expectancy of life according to the American Tables of Mortality, was introduced in Huntington *v.* Burke, 21 Ind. App. 655, 52 N. E. 415.

An Annual Report of the New York Life Insurance Company containing the Carlisle Tables may be admitted. Donaldson *v.* Mississippi & M. R. Co., 18 Iowa 280, 87 Am. Dec. 391.

26. Erb *v.* Popritz, 59 Kan. 264,

IV. AUTHENTICATION OF TABLES.

1. Necessity. — It has been held that mortality tables are admissible only after proper preliminary proof of their authenticity and standard quality.[27] But the great weight of authority is to the contrary, and permits the introduction of such tables as are satisfactory to the court.[28] The court may or may not require such preliminary proof, depending upon whether of its own knowledge it is satisfied, or whether it desires evidence to satisfy itself of the authenticity of the tables.[29] Nor is it necessary to the admissibility of mortality tables that there be proof of the universal adoption of the tables in question as authority for life expectancy.[30] It would seem, however,

52 Pac. 871, where it was held that the statements of a witness who has no knowledge upon the subject except such as he may have gained from consulting the tables in connection with the insurance business should not be received. See also Scheffler *v.* Minneapolis & St. L. R. Co., 32 Minn. 518, 21 N. W. 711.

27. Central R. & Bkg. Co. *v.* Richards, 62 Ga. 306.

In Richmond & D. R. Co. *v.* Hissong, 97 Ala. 187, 13 So. 209, it was held that objection to testimony in identification of the American Tables of Mortality, which were introduced, was without merit; but the court did not say such identification was or was not necessary. See also Mary Lee C. & R. Co. *v.* Chambliss, 97 Ala. 171, 11 So. 897.

28. *Alabama.* — Louisville & N. R. Co. *v.* Mothershed, 97 Ala. 261, 12 So. 714. *Compare* Richmond & D. R. Co. *v.* Hissong, 97 Ala. 187, 13 So. 209.

California. — Keast *v.* Santa Ysabel Gold Min. Co., 136 Cal. 256, 68 Pac. 771.

Connecticut. — Nelson *v.* Branford L. & W. Co., 75 Conn. 548, 54 Atl. 303.

Georgia. — Atlanta R. & P. Co. *v.* Monk, 118 Ga. 449, 45 S. E. 494; Western & A. R. Co. *v.* Cox, 115 Ga. 715, 42 S. E. 74.

Minnesota. — Scheffler *v.* Minneapolis & St. L. R. Co., 32 Minn. 518, 21 N. W. 711.

See article "Judicial Notice."

"It is proper, therefore, to admit this standard table in evidence without proof of its repute; that may be assumed." Camden & A. R. Co. *v.* Williams, 61 N. J. L. 646, 40 Atl. 364.

The Carlisle Mortality and Annuity Tables, as contained in 70 Ga. 845, are admissible without proof of their correctness. Atlanta R. & P. Co. *v.* Monk, 118 Ga. 449, 45 S. E. 494; Western & A. R. Co. *v.* Cox, 115 Ga. 715, 42 S. E. 74; Richmond & D. R. Co. *v.* Garner, 91 Ga. 27, 16 S. E. 110.

The Carlisle Tables contained in the Encyclopedia Brittanica are admissible without preliminary proof. Pearl *v.* Omaha & St. L. R. Co., 115 Iowa 535, 88 N. W. 1078; Haden *v.* Sioux City & P. R. Co., 99 Iowa 735, 48 N. W. 733; Worden *v.* Humeston & S. R. Co., 76 Iowa 310, 41 N. W. 26; Atchison, T. & S. F. R. Co. *v.* Ryan, 62 Kan. 682, 64 Pac. 603.

It is not a good objection to the admission in evidence of the Carlisle Mortality Tables and the tables showing the value of annuities according thereto that the accuracy and correctness of such tables have not been shown. These, being standard tables, are admissible in evidence, not as conclusive proof of the expectancy of life of a certain person and the present value of an annuity, but as *data* which may be considered by the jury in determining such questions. Western & A. R. Co. *v.* Cox, 115 Ga. 715, 42 S. E. 74.

29. Keast *v.* Santa Ysabel Gold Min. Co., 136 Cal. 256, 68 Pac. 771.

30. Mississippi & T. R. Co. *v.* Ayres, 16 Lea (Tenn.) 725, where the court said: "The expectancy of life is ascertained by the average mortality of large numbers, and for convenience these averages are gathered into tables. There are several such tables, English and American, and any of them shown

that when the tables are contained in a book not recognized as a standard work authentication is necessary.[31]

2. Sufficiency. — When necessary, tables proved to have been used by life insurance companies by one who has been in the business for years, although not claiming to be an expert as to the tables, may be received.[32]

V. CONCLUSIVENESS OF TABLES.

Mortality tables do not furnish absolute or conclusive rules for the guidance of either court or jury, but are to be considered with all the circumstances in proof, and weighed accordingly.[33] The physical

to be used by reputable insurance companies, with such other proof as the parties may offer, either as to the condition of the individual or the general mortality of the community, would be admissible."

31. Camden & A. R. Co. *v.* Williams, 61 N. J. L. 646, 40 Atl. 634.

In Galveston & S. A. R. Co. *v.* Arispe, 81 Tex. 517, 17 S. W. 47, error was charged upon the part of the court in permitting the introduction in evidence of a table of life expectancy contained in a book entitled "A Million of Facts; Conkling's Handy Manual of Useful Information and Atlas of the World; All for Twenty-five Cents," on the ground that the book was no authority and of no higher character than any cheap book sold on railways, and that there was no evidence offered to show the correctness of the table. The court, in holding the introduction of the book error, said: "This book, however flattering may be its title or alluring its price, is not one of those standard works of which the courts take judicial notice and recognize as authority, and consequently it should have been excluded in the absence of any proof of its correctness."

32. Central R. & Bkg. Co. *v.* Richards, 62 Ga. 306; Mary Lee C. & R. Co. *v.* Chambliss, 97 Ala. 171, 11 So. 897.

Proof that the tables offered in evidence are those generally used and relied upon in the life insurance business is sufficient to admit the tables, although the witnesses, who are life insurance agents, have no personal knowledge of the correctness of the tables. Gulf, C. & S. F. R. Co. *v.* Johnson, 10 Tex. Civ. App. 254, 31 S. W. 255. See also Gulf, C. & S. F. R. Co. *v.* Smith (Tex. Civ. App.), 26 S. W. 644.

In San Antonio & A. P. R. Co. *v.* Morgan (Tex. Civ. App.), 46 S. W. 672, it was shown that the table in question was used by a majority of the life insurance companies of America, and it was held that the fact that the particular table introduced in evidence was prepared for the private use of the agents of a certain company did not render it improper evidence.

33. *United States.* — Vicksburg & M. R. Co. *v.* Putnam, 118 U. S. 545.

Alabama. — Mary Lee C. & R. Co. *v.* Chambliss, 97 Ala. 171, 11 So. 897; Birmingham Min. R. Co. *v.* Wilmer, 97 Ala. 165, 11 So. 886.

Georgia. — Atlanta R. & P. Co. *v.* Monk, 118 Ga. 449, 45 S. E. 494; Western & A. R. Co. *v.* Cox, 115 Ga. 715, 42 S. E. 74; Central R. Co. *v.* Crosby, 74 Ga. 737, 58 Am. Rep. 463.

Illinois. — Joliet *v.* Blower, 155 Ill. 414, 40 N. E. 619, *affirming* 49 Ill. App. 464.

Indiana. — Shover *v.* Myrick, 4 Ind. App. 7, 30 N. E. 207.

Iowa. — Pearl *v.* Omaha & St. L. R. Co., 115 Iowa 535, 88 N. W. 1078.

Michigan. — Jones *v.* McMillan, 129 Mich. 86, 88 N. W. 206; Hunn *v.* Michigan C. R. Co., 78 Mich. 513, 44 N. W. 502.

Minnesota. — Scheffler *v.* Minneapolis & St. L. R. Co., 32 Minn. 518, 21 N. W. 711.

Nebraska. — Friend *v.* Ingersoll, 39 Neb. 717, 58 N. W. 281.

New York. — Sternfels *v.* Metropolitan St. R. Co., 73 App. Div. 494, 77 N. Y. Supp. 309, *affirmed* 174 N. Y. 512, 66 N. E. 1117; Banta *v.*

condition of the person in question, his general health, his avocation in life with respect to danger, his habits and other facts, properly enter into the question, and are to be weighed in connection with the tables.[34] In the absence of other evidence to show that the probability of life of the person in question was greater or less than that shown by the tables, it is held that they are controlling.[35]

Banta, 84 App. Div. 138, 82 N. Y. Supp. 113.

Pennsylvania. — Rummell *v.* Allegheny Heating Co., 16 Atl. 78; Campbell *v.* York, 172 Pa. St. 205, 33 Atl. 879.

Wisconsin. — Crouse *v.* Chicago & N. W. R. Co., 102 Wis. 196, 78 N. W. 446, 778; McKeigue *v.* Janesville, 68 Wis. 50, 31 N. W. 298.

"Life Tables Are Not Taken as Fixing the Expectancy of Life of a particular person, or as forming a legal basis for a calculation, but are accepted as furnishing some evidence to be considered by the jury in connection with all the other pertinent evidence in ascertaining the probable duration of the life in question." Smiser *v.* State, *ex rel.* King, 17 Ind. App. 519, 47 N. E. 229; Galveston, H. & S. A. R. Co. *v.* Johnson, 24 Tex. Civ. App. 180, 58 S. W. 622.

"Life Tables Are Not the Most Satisfactory Evidence. — The average expectancy of life is proper, however, for consideration, as tending, in some degree at least, to indicate the probable continuance of the life of a particular individual." Henderson *v.* Harness, 184 Ill. 520, 56 N. E. 786.

"The law merely permits jurors to use the tables; it does not require them to do so." Savannah, A. & M. R. Co. *v.* McLeod, 94 Ga. 530, 20 S. E. 434.

"The table offered and received was competent evidence, not conclusive, but subject to be varied, or modified, or entirely contradicted as to the expectancy of life of plaintiff by any other competent evidence introduced on the same subject, such as proof that she was unhealthy or diseased at the time of the injury, which would certainly tend to weaken and, if strong enough, to destroy the force of the rule for determining such expectancy given in the table." Friend *v.* Ingersoll, 39 Neb. 717, 58 N. W. 281.

In Kerrigan *v.* Pennsylvania R. Co., 194 Pa. St. 98, 44 Atl. 1069, it was held that in submitting the Carlisle Tables to the jury in a personal injury case the court should carefully instruct the jury that the tables are not conclusive of the plaintiff's expectancy of life and are not entitled to serious weight, unless by precedent proof the plaintiff has brought himself clearly within the class of selected lives tabulated.

34. Mary Lee C. & R. Co. *v.* Chambliss, 97 Ala. 171, 11 So. 897; Steinbrunner *v.* Pittsburgh & W. R. Co., 146 Pa. St. 504, 23 Atl. 239; McCue *v.* Knoxville Borough, 146 Pa. St. 580, 23 Atl. 439.

35. Jones *v.* McMillan, 129 Mich. 86, 88 N. W. 206; Nelson *v.* Lake Shore & M. S. R. Co., 104 Mich. 582, 62 N. W. 993.

MORTGAGES.

By Glenda Burke Slaymaker, LL. B.

PART I. — CHATTEL MORTGAGES.

PART II. — REAL ESTATE MORTGAGES.

CROSS-REFERENCES:

Dower;

Fraudulent Conveyances;

Homesteads and Exemptions;

Payments; Pledges.

PART I.— CHATTEL MORTGAGES.

I. INTRODUCTORY.

A mortgage of personal property is so different in numerous respects from a mortgage of real estate that it is advisable to separate matters of evidence as they apply to the two classes of mortgages, and this plan will be pursued in this article.

II. NATURE OF INSTRUMENT OR TRANSACTION.

1. Admissibility of Parol. — A. In General. — a. *In Equity and Under Modern Statutes.* — In equity and in actions, legal or equitable, under the code, parol or other extrinsic evidence is admissible to show that an instrument, in form an absolute bill of sale, was intended only as a mortgage of the chattel as security for a debt.[1]

b. *At Law.* — In some cases parol has been held admissible at

1. Parol Admissible To Show a Bill of Sale To Be a Mortgage.

Alabama. — English *v.* Lane, 1 Port. 328; Bishop *v.* Bishop, 13 Ala. 475; Parish *v.* Gates, 29 Ala. 254; Todd *v.* Hardie, 5 Ala. 698; Hudson *v.* Isbell, 5 Stew. & P. 67.

Arkansas. — Johnson *v.* Clark, 5 Ark. 321; Scott *v.* Henry, 13 Ark. 112; Nattin *v.* Riley, 54 Ark. 30, 14 S. W. 1100; Rogers *v.* Vaughan, 31 Ark. 62.

California. — Rothschild *v.* Swope, 116 Cal. 670, 48 Pac. 911.

Georgia. — Denton *v.* Shields, 120 Ga. 1076, 48 S. E. 423; Stokes *v.* Hollis, 43 Ga. 262.

Illinois. — Moore *v.* Foster, 97 Ill. App. 233; Whittemore *v.* Fisher, 132 N. E. 243, 24 N. E. 636; National Ins. Co. *v.* Webster, 83 Ill. 470.

Indian Territory. — Rogers *v.* Nidiffer, 82 S. W. 673.

Indiana. — Seavey *v.* Walker, 108 Ind. 78, 9 N. E. 347.

Iowa. — Votaw *v.* Diehl, 62 Iowa 676, 13 N. W. 757, 18 N. W. 305.

Kansas. — Butts *v.* Privett, 36 Kan. 711, 14 Pac. 247.

Kentucky. — Blanchard *v.* Kenton, 4 Bibb 451; Baldwin *v.* Crow, 86 Ky. 679, 7 S. W. 146.

Louisiana. — Watson *v.* James, 15 La. Ann. 386.

Maine. — Reed *v.* Jewett, 5 Me. 97.

Maryland. — Cochrane *v.* Price, 8 Atl. 361; Booth *v.* Robinson, 55 Md. 419; Farrell *v.* Bean, 10 Md. 217; Brogden *v.* Walker, 2 Har. & J. 285; Laeber *v.* Langhor, 45 Md. 477.

Massachusetts. — Hawes *v.* Weeden, 180 Mass. 106, 61 N. E. 802; Newton *v.* Fay, 10 Allen 505; Raphael *v.* Mullen, 171 Mass. 111, 50 N. E. 515; New England M. Ins. Co. *v.* Chandler, 16 Mass. 275; Caswell *v.* Keith, 12 Gray 351; Parks *v.* Hall, 2 Pick. 206.

Michigan. — Wetmore *v.* Moloney, 127 Mich. 372, 86 N. W. 808; Seligman *v.* Ten Eyck, 74 Mich. 525, 42 N. W. 134; Fuller *v.* Parrish, 3 Mich. 211; Cooper *v.* Brock, 41 Mich. 488, 2 N. W. 660; Weed *v.* Mirick, 62 Mich. 414, 29 N. W. 78; Picard *v.* McCormick, 11 Mich. 68.

Minnesota. — Jones *v.* Rahilly, 16 Minn. 320.

Mississippi. — Carter *v.* Burris, 10 Smed. & M. 527; Humphries *v.* Bartel, 10 Smed. & M. 282.

Missouri. — Quick *v.* Turner, 26 Mo. App. 29; Newell *v.* Keeler, 13 Mo. App. 189; King *v.* Greaves, 51 Mo. App. 534; Johnson *v.* Huston, 17 Mo. 58; Foster *v.* Reynolds, 38 Mo. 553.

New Jersey. — Cake *v.* Shull, 45 N. J. Eq. 208, 16 Atl. 434.

New York. — Barry *v.* Colville, 129 N. Y. 302, 29 N. E. 307; Despard *v.* Walbridge, 15 N. Y. 374; Donnelly *v.* McArdle, 86 App. Div. 33, 83 N. Y. Supp. 193; Tyler *v.* Strang, 21 Barb. 198; Hodges *v.* Tennessee M. & F. Ins. Co., 8 N. Y. 416; Keller

v. Paine, 107 N. Y. 83, 13 N. E. 635.

Ohio. — Mullenkops *v.* Baumgardner, 21 Ohio Civ. Ct. 591, 11 O. C. D. 655.

Oklahoma. — Miller *v.* Campbell Com. Co., 13 Okla. 75, 74 Pac. 507.

Oregon. — Bartel *v.* Lope, 6 Or. 321; Nicklin *v.* Betts Spring Co., 11 Or. 406, 5 Pac. 51, 50 Am. Rep. 477.

Tennessee. — Hickman *v.* Cantrell, 9 Yerg. 172, 30 Am. Dec. 396; Wilson *v.* Carver, 4 Hayw. 90.

Texas. — Watson *v.* Boswell, 25 Tex. Civ. App. 379, 61 S. W. 407; Anglin *v.* Barlow (Tex. Civ. App.), 45 S. W. 827; Lessing *v.* Grimland, 74 Tex. 239, 11 S. W. 1095.

Washington. — Voorhies *v.* Hennessy, 7 Wash. 243, 34 Pac. 931.

Wisconsin. — Winner *v.* Hoyt, 66 Wis. 227, 28 N. W. 380, 57 Am. Rep. 257; Rockwell *v.* Humphrey, 57 Wis. 410, 15 N. W. 394; Manufacturers Bank of Milwaukee *v.* Rugee, 59 Wis. 221, 18 N. W. 251; Lamson *v.* Moffat, 61 Wis. 153, 21 N. W. 62; First Nat. Bank *v.* Damm, 63 Wis. 249, 23 N. W. 497.

Contemporaneous Parol Defeasance. — The making of a parol agreement for defeasance contemporaneously with the execution of the bill of sale may be proved to give the transaction the character of a mortgage. Omaha Book Co. *v.* Sutherland, 10 Neb. 334, 6 N. W. 367; Muchmore *v.* Budd, 53 N. J. L. 369, 22 Atl. 518; Preston *v.* Southwick, 42 Hun (N. Y.) 291; Gifford *v.* Ford, 5 Vt. 532; Overton *v.* Bigelow, 3 Yerg. (Tenn.) 513. But in Pennock *v.* McCormick, 120 Mass. 275, the court held that proof of a contemporaneous parol defeasance could not be received as between the parties.

Extrinsic evidence is not to be admitted in all cases to show a bill of sale to be a mortgage, but each case depends on its own circumstances. Ross *v.* Norvell, 1 Wash. (Va.) 14, 1 Am. Dec. 422.

Assignment for Benefit of Creditors. — Parol is admissible to show that an instrument, on its face purporting to be an assignment for the benefit of creditors, was intended only as a chattel mortgage. Grove *v.* Rentch, 26 Md. 367; Appollos *v.* Staniforth, 3 Tex. Civ. App. 502, 22 S. W. 1060 (considering law of Arkansas).

Parol Defeasance or Intent To Execute Mortgage Only. — No Distinction. — It is competent to show, not only that there was a parol defeasance, but that the bill of sale was not intended as such, and that it was not contemplated that title should be transferred. In a case in which a distinction of this nature was attempted to be enforced the Michigan court said: "That a bill of sale may be shown in a court of law to have been given for security is established by several cases cited by counsel. Counsel argue that, conceding this, 'the cases have never gone further than to hold that a defeasance in such case may rest in parol; that no case holds that such proof may be introduced to show that the bill was not intended as a bill of sale — that the title was not conveyed thereby.' We think this an overnice distinction. Our understanding of the rule is that a bill of sale, absolute upon its face, may be shown by parol to have been given under circumstances that indicate that it was intended as security for a debt, and not a sale of the chattels; and we know of no case that holds that such an instrument is an exception to the rule that title does not pass under a mortgage." Pinch *v.* Willard, 108 Mich. 204, 66 N. W. 42.

Statute Relating to Express Trusts. — Parol is admissible to show that the entire property of a corporation, largely personalty, was taken by another as security only for a debt, not as the absolute property of such other, and to such a case the statute prohibiting the admission of parol testimony to establish an express trust has no application. Merritt-Allen Co. *v.* Torrence (Iowa), 102 N. W. 154.

The defense that an assignment absolute in form was intended only as a security is an equitable defense, and, under the code, parol is admissible in a legal action to establish such as a defense. Despard *v.* Walbridge, 15 N. Y. 374.

Statute Forbidding Parol Where Possession Surrendered Does Not Apply to Intangible Property. The statute forbidding parol proof that an instrument absolute on its

common law, in a common-law action, to show the actual and unexpressed intention of the parties to an absolute bill of sale to have been to execute a mortgage,[2] though the opposing rule seems to have greater support among the decisions.[3]

c. *As to Third Parties.* — Third parties are not, of course, concluded by the writing, and this, as to them, is a ground for admitting parol in their behalf to vary the form of the instrument.[4] But while parol may be admissible as between the parties or in favor of third parties, it is not competent against innocent third parties whose rights would be affected thereby.[5]

face was intended as a security for a debt where possession of the property is surrendered, except where fraud is alleged, has application only to transactions relating to tangible property, and does not apply to transfers of life insurance policies during the life of the assured. In transactions relating to the latter classes of property parol is admissible. Armstrong *v.* Owen, 83 Miss. 10, 35 So. 320.

2. Parol Admissible at Law. Hayworth *v.* Worthington, 5 Blackf. (Ind.) 361, 35 Am. Dec. 126; McAnnulty *v.* Seick, 59 Iowa 586, 13 N. W. 743; Fuller *v.* Parrish, 3 Mich. 211; Mullenkops *v.* Baumgardner, 21 Ohio Cir. Ct. 591, 11 O. C. D. 655.

In Reed *v.* Jewett, 5 Me. 96, parol was received in an action at law, both parties concurring in its being so received.

3. Parol Inadmissible at Law. Hartshorn *v.* Williams, 31 Ala. 149; Bragg *v.* Massie, 38 Ala. 89, 79 Am. Dec. 82; Thompson *v.* Patton, 5 Litt. (Ky.) 74, 15 Am. Dec. 44; Marshall *v.* Cox, 7 J. J. Marsh. (Ky.) 133; Bryant *v.* Crosby, 36 Me. 562, 58 Am. Dec. 767.

To Show Fraudulent Transaction. "As between the parties to the absolute, formal bill of sale, it could not be shown, by proof of a parol defeasance, that the conveyance was a mortgage, and the court correctly so ruled. Harper *v.* Ross, 10 Allen 332. Evidence of a secret agreement between the parties and conduct by them inconsistent with such a sale was competent for the purpose of showing that the bill of sale was a pretense and a fraud, intended merely to deceive creditors or those who might deal with the parties as to the goods, and not to express a real transaction." Pennock *v.* McCormick, 120 Mass. 275.

Admissible Where the Question Arises Collaterally. — Howard *v.* Odell, 1 Allen (Mass.) 85.

Bill of Parcels. — The rule forbidding the admission of parol at law to show the real nature of a formal bill of sale does not apply to a mere bill of parcels. Hazard *v.* Loring, 10 Cush. (Mass.) 267; Caswell *v.* Keith, 12 Gray (Mass.) 351; Picard *v.* McCormick, 11 Mich. 68. Before the adoption of the code it was only in an equitable action that a bill of sale could be shown to be a mortgage. Montany *v.* Rock, 10 Mo. 506; Quick *v.* Turner, 26 Mo. App. 29, 36; Hogel *v.* Lindell, 10 Mo. 483.

4. Parol Admissible in Favor of Third Parties. — Hartshorn *v.* Williams, 31 Ala. 149; Hawes *v.* Weeden, 180 Mass. 106, 61 N. E. 802; Caswell *v.* Keith, 12 Gray (Mass.) 351; Manufacturers Bank of Milwaukee *v.* Rugee, 59 Wis. 221, 18 N. W. 251.

Assignment of Contract as a Security. — Parol evidence is admissible in favor of the creditors of the assignor to show that an absolute assignment of a contract was intended to operate only as a mortgage. Tyler *v.* Strang, 21 Barb. (N. Y.) 198.

5. Inadmissible as Against Innocent Third Parties. — Morgan *v.* Shinn, 15 Wall. (U. S.) 105; State *v.* Bell, 2 Mo. App. 102.

Parol is not admissible as between the mortgagor and an attaching creditor to show that an absolute bill of sale in form was given as security for a debt to such third party. This rule was stated where the seller of-

B. Fraud, Accident or Mistake. — While, of course, parol should be received where fraud, accident or mistake is an issue,[6] this is not the sole ground upon which parol is received to show a bill of sale to have been intended as a mortgage,[7] though some early decisions put its admissibility upon this ground alone.[8]

C. To Transform a Mortgage Into a Sale. — It is incompetent for the parties to show that what is in form or substance a mortgage was really intended by them to operate as a sale.[9]

2. Particular Matters Admissible. — Where the whole agreement of the parties to the transaction is not fully and entirely expressed in the instrument, to ascertain the intention evidence of the circumstances preceding, attending and following the transaction is admissible.[10] It is not competent for one of the parties, however, to

fered to show for the purpose of claiming statutory exemption, that the transaction was not a sale, but a mortgage only. Nieman *v.* Koch, 40 Mo. App. 635.

An absolute bill of sale cannot, as against creditors of the apparent vendor, be shown to be a mortgage by reason of a secret understanding between the parties thereto. Link *v.* Harrington, 41 Mo. App. 635. Nor may the purchaser under an absolute bill of sale show, as against a stranger, that the instrument was intended to be a mortgage only. Henderson *v.* Mayhew, 2 Gill (Md.) 393, 41 Am. Dec. 434.

6. See articles "Fraud," Vol. VI; "Fraudulent Conveyances," Vol. VI; "Parol Evidence."

7. Johnson *v.* Clark, 5 Ark. 321; Tyler *v.* Strang, 21 Barb. (N. Y.) 198; Barry *v.* Colville, 129 N. Y. 302, 29 N. E. 307; Mollenkipf *v.* Baumgardner, 21 Ohio Cir. Ct. 591, 11 O. C. D. 665; Ross *v.* Norvell, 1 Wash. (Va.) 14, 1 Am. Dec. 422; Lessing *v.* Grimland, 74 Tex. 239, 11 S. W. 1095. And see cases cited *supra*.

8. **Doctrine of Early Decisions.** Sewell *v.* Price, 32 Ala. 97; McKinstry *v.* Conly, 12 Ala. 678; Marshall *v.* Cox, 7 J. J. Marsh. (Ky.) 133; Whitfield *v.* Cates, 59 N. C. 136; Farrell *v.* Bean, 10 Md. 217. See also Green *v.* Caldwell, 14 Ga. 207, 58 Am. Dec. 553.

9. **Mortgage May Not Be Shown To Be an Absolute Sale.** — Where an instrument is on its face called a "mortgage" and is registered as such, parol is not admissible to show it to be a bill of sale. Willer *v.* Kray, 73 Tex. 533, 11 S. W. 540.

Rule Not Restricted to Formal Instruments. — It is not essential that the instrument be a formal mortgage if it is such as must be construed to be in effect a mortgage. Thus parol is inadmissible to show that a written instrument transferring personal property, to be retransferred on the payment of a certain sum within a specified time, was an absolute sale, as such a transaction is presumed to have been intended as a mortgage. Proctor *v.* Cole, 66 Ind. 576.

10. Circumstances in General To Be Considered. — Oldham *v.* Halley, 2 J. J. Marsh. (Ky.) 114; Thompson *v.* Davenport, 1 Wash. (Va.) 125; Williams *v.* Chadwick, 74 Conn. 252, 50 Atl. 720; Scott *v.* Henry, 13 Ark. 112; Perkins *v.* Drye, 3 Dana (Ky.) 170; Cooper *v.* Brock, 41 Mich. 488, 2 N. W. 660; Desloge *v.* Ranger, 7 Mo. 327; Carter *v.* Burris, 10 Smed. & M. (Miss.) 527.

Evidence of the conduct and language of the parties before and after the execution of a bill of sale is admissible to show the same to be a conditional security only. Rothschild *v.* Swope, 116 Cal. 670, 48 Pac. 911.

Transaction Following Negotiations for a Loan. — It is a fact of considerable importance that the instrument executed followed negotiations for a loan, though the fact that parties had negotiated for a loan is not conclusive evidence that the transaction culminated in a loan.

testify that the parties had intended the instrument to be a particular thing.[11] Nor is it permissible to show that the seller in a formal bill of sale had at various times given notes to other parties and secured them by giving bills of sale.[12] The value of the property in controversy is also a material, though not a decisive, circumstance.[13] So, too, it may be shown that the purchaser procured his

Quirk *v.* Rodman, 5 Duer (N. Y.) 285; Moss *v.* Green, 10 Leigh (Va.) 251.

As to Relation of Debtor and Creditor. — If the relation of debtor and creditor existed prior to the controverted transaction and continues undisturbed after the transaction, though not conclusive of its character, the courts will incline strongly to the decision that the transaction was not one of sale, but of mortgage only. Rapier *v.* Gulf City Paper Co., 77 Ala. 126; Folsom *v.* Fowler, 15 Ark. 280; Peters Saddlery & Harness Co. *v.* Schoelkopf, 71 Tex 418, 9 S. W. 336; Rockwell *v.* Humphrey, 57 Wis. 410, 15 N. W. 394; Dabney *v* Green, 4 Hen. & M. (Va.) 101, 4 Am. Dec. 503.

Where the Relation of Debtor and Creditor Terminated by the Transaction. — If the previous relation of debtor and creditor is terminated by the transaction, then the evidence will tend as strongly, though not conclusively, to show a sale. McKinstry *v.* Conly, 12 Ala. 678; Sewall *v.* Henry, 9 Ala. 24; Peeples *v.* Stolla, 57 Ala. 53; Locke *v.* Palmer, 26 Ala. 312; Pierce *v.* Scott, 37 Ark. 308; Magee *v.* Catching, 33 Miss. 672; Poindexter *v.* McCannon, 16 N. C. 377, 18 Am. Dec. 591; Peters Saddlery & Harness Co. *v.* Schoelkopf, 71 Tex. 418, 9 S. W. 336.

The Vendee's Possession. — The vendee's possession of the mortgaged property may be explained and possession may be shown to have been acquired under such circumstances as to make that fact entitled to no consideration at all. Hudson *v.* Isbell, 5 Stew. & P. (Ala.) 67.

Circumstances Occurring Subsequent to Transaction. — Thus the jury may take into consideration the facts that, though there was an agreement that the purchaser should pay the seller, who retained possession of the property, for keeping the property, nothing was in fact paid; that the purchaser never at any time till the seller's death exercised any acts of ownership over the property; that he never saw it; that the seller continued to exercise acts of ownership over it; and that he used what he wished of it. Anglin *v.* Barlow (Tex. Civ. App.), 45 S. W. 827.

The circumstances and relations of the parties may be considered. Smith *v.* Pearson, 24 Ala. 355.

11. The testimony of the purchaser in a formal bill of sale that the parties intended it to be a bill of sale and not a mortgage transaction is inadmissible, such being the very issue for the jury to determine. Anglin *v.* Barlow (Tex. Civ. App.), 45 S. W. 827.

"Whether or not the parties intended a particular transfer of property to be a mortgage is to be determined by the character and language of the instruments intentionally executed by them, and by the surrounding facts, rather than by the belief of the parties as to the effect of their acts. 'If the instrument is in its essence a mortgage, the parties cannot by stipulations, however express and positive, render it anything but a mortgage, or deprive it of the essential attributes belonging to a mortgage.'" Williams *v.* Chadwick, 74 Conn. 252, 50 Atl. 720.

12. Other Transactions. — Anglin *v.* Barlow (Tex. Civ. App.), 45 S. W. 827.

13. Value of Property Mortgaged and Consideration Paid Therefor a Material Circumstance.

Alabama. — Hudson *v.* Isbell, 5 Stew. & P. 67; Rapier *v.* Gulf City Paper Co., 77 Ala. 126; Todd *v.* Hardie, 5 Ala. 698.

Kentucky. — Knox *v.* Black, 1 A. K. Marsh. 298.

Louisiana. — Leblanc *v.* Bouchereau, 16 La. Ann. 11.

Michigan. — Cooper *v.* Brock, 41 Mich. 488, 2 N. W. 660

bill of sale to be filed and recorded in the chattel mortgage records [14]

3. Presumptions and Burden of Proof. — The party asserting a bill of sale to have been intended as a mortgage or security has the burden of proving the fact which he asserts.[15] Clear and satisfactory

New York. — Quirk *v.* Rodman, 5 Duer 285.

North Carolina. — Weston *v.* Western, 57 N. C. 349.

South Carolina. — Fountain *v.* Bryce, 12 Rich. Eq. 234.

Tennessee. — Wilson *v.* Carver, 4 Hayw. 90.

Texas. — Anglin *v.* Barlow (Tex. Civ. App.), 45 S. W. 827.

Partnership Interest. — Corroborative. — Where a bill of sale absolute of one's interest in a partnership is asserted to be a security only for a partnership debt, evidence of the solvency of the partnership and that its assets exceeded its liabilities is admissible in corroboration of the claim that the instrument was intended only as a security. Donnelly *v.* McArdle, 86 App. Div. 33, 83 N. Y. Supp. 193.

14. Recording Bill of Sale as a Mortgage. — Effect. — "The act of the party in filing a bill of sale had some significance upon the question as to whether it was an absolute transfer or only a security. If, as plaintiff contends, the bill of sale evidenced an absolute transfer of the property to him as purchaser, yet he is not estopped from so asserting, notwithstanding he filed the bill of sale in the clerk's office. The attorney of the defendants was informed, when the instrument was placed upon record, that the plaintiff claimed he had possession of the goods; that he had the key in his pocket of the room in which they were stored; so that, so far as the defendants were concerned, the filing was not such an equivocal act as would estop him from asserting that the instrument was a bill of sale absolute, and not intended for security." Wessels *v.* Beeman, 87 Mich. 481, 49 N. W. 483.

15. *Alabama.* — Freeman *v.* Baldwin, 13 Ala. 246; Harris *v.* Miller, 30 Ala. 221; Chapman *v.* Hughes, 14 Ala. 218.

Arkansas. — Williams *v.* Cheatham, 19 Ark. 278.

Maryland. — Watkins *v.* Stockett, 6 Har. & J. 435.

New Jersey. — Cake *v.* Shull, 45 N. J. Eq. 208, 16 Atl. 434.

North Carolina. — Calvard *v.* Waugh, 56 N. C. 335.

Oklahoma. — Miller *v.* Campbell Commission Co., 13 Okla. 75, 74 Pac. 507.

Wisconsin. — Mackey *v.* Stafford, 43 Wis. 653.

Concurring Intention of Parties. Instruction Held Erroneous. — In Perkins *v.* Eckert, 55 Cal. 400, the trial court instructed the jury that the party alleging a formal bill of sale to be a mortgage had the burden to prove it by a preponderance of the evidence, "and that both parties so understood it" to have been intended as a security. In holding this instruction erroneous the supreme court said: "This instruction was erroneous. There was evidence on the one hand that it was given as security for an existing indebtedness. The fact, then, to be determined by the jury was whether the bill of sale represented an absolute sale of the wheat or was executed as security. This issue, like all issues in civil cases, was to be determined by the jury from a preponderance of the evidence. (Code Civ. Proc., sec. 2061, Subd. 5.) A direction to this effect would have been correct, but the last clause in the instruction in effect was a direction to the jury that whether the bill of sale was taken as a security was not to be determined upon a preponderance of the evidence unless 'both parties so understood it.' By this direction, if the jury came to the conclusion that the plaintiffs understood it to be taken as a security and the defendant did not understand it, they were directed to find it to be an absolute sale. Such instructions withdrew from the jury the full consideration of the evidence upon the issue on which they were to pass, and, in our judgment, cannot be upheld."

evidence is required to change the character of the transaction from that of an absolute sale appearing on the face of the writing into a mortgage, and on an issue so joined doubts will be resolved in favor of the form of the instrument.[16] Where, however, the transaction is such as to create a doubt whether only a conditional sale or a mortgage was intended it will in such latter case be presumed to be a mortgage.[17] So where a bill of sale provides for redemption, the property to remain in the vendor until the time for redemption expires, the transaction will be presumed to be a mortgage, and the vendee has the burden of proving the contrary.[18] A bill of sale absolute in its terms, and a defeasance relating to the same property, executed contemporaneously, are presumed to constitute a single transaction, and hence a mortgage.[19]

4. Sufficiency of Evidence. — The mere declarations of the parties

16. Proof Must Be Clear and Satisfactory. — *Alabama.* — Sewell *v.* Price, 32 Ala. 97; McKinstry *v.* Conly, 12 Ala. 678; Turnipseed *v.* Cunningham, 16 Ala. 501, 50 Am. Dec. 190, Brantley *v.* West, 27 Ala. 542; Harris *v.* Miller, 30 Ala. 221; Freeman *v.* Baldwin, 13 Ala. 246; Chapman *v.* Hughes, 14 Ala. 218.

Arkansas. — Williams *v.* Cheatham, 19 Ark. 278; Triaber *v.* Andrews, 31 Ark 163.

California. — Ganceart *v.* Henry, 98 Cal. 281, 33 Pac. 92.

Illinois. — Purington *v.* Akhurst, 74 Ill. 490.

Iowa. — Powers *v.* Benson, 120 Iowa 428, 94 N. W. 929.

Maryland. — Watkins *v.* Stockett, 6 Har. & J. 435.

New Jersey. — Cake *v.* Shull, 45 N. J. Eq. 208, 16 Atl. 134.

Wisconsin. — Mackey *v.* Stafford, 43 Wis. 653.

Less Degree of Proof Required Than in the Case of a Conveyance. The same strictness of proof that is required to convert a conveyance absolute of real estate into a mortgage is not required to convert a bill of sale of personal property into a mortgage.

"A large number of cases are cited to support this assignment of error [that the evidence was not sufficient, the rule requiring the proof to be clear and conclusive], and to maintain the proposition that the proof to convert a deed absolute into a mere security must be clear, convincing and unequivocal [citing cases]. But it must be remembered that a mere bill of sale, as this was, is not governed by the rules applicable to such solemn instruments as deeds under seal. It does not require by any means the same amount and strictness of proof to declare a mere bill of sale a chattel mortgage or security as it does to determine a deed to be a mortgage. 'A simple bill of sale does not embody the preliminaries nor the essential terms of a contract in such a way as to exclude parol evidence.' Pickard *v.* McCormick, 11 Mich. 68. See also Rowe *v.* Wright, 12 Mich. 289; Trevidick *v.* Mumford, 31 Mich. 467; Sirrine *v.* Briggs, *id.* 443." Seligman *v.* Ten Eyck, 74 Mich. 525, 42 N. W. 134.

17. Where doubt arises whether a transaction is a conditional sale or a mortgage, it is the duty of the purchaser to show clearly that it was intended to effect a sale, the presumption of mortgage in such case being preferred. Turnipseed *v.* Cunningham, 16 Ala. 501, 50 Am. Dec. 190.

18. Perkins *v.* Drye, 3 Dana (Ky.) 170; Kent *v.* Allbritain, 4 How. (Miss.) 317; McFadden *v.* Turner, 46 N. C. 481.

A contemporaneous parol defeasance will have like effect when proven as if written in the instrument. Omaha Book Co. *v.* Sutherland, 10 Neb. 334, 6 N. W. 367.

19. Stephens *v.* Sherrod, 6 Tex. 294, 55 Am. Dec. 776.

to the transaction made contemporaneously with, or subsequently to, the execution of the written instrument are not alone sufficient to convert the absolute writing into a conditional one of security.[20] The transaction must take its character from facts and circumstances accompanying it that more clearly show intent. That the buyer took from the seller no evidence of debt is a strong circumstance tending to show that a sale was intended, but this circumstance is not conclusive of the fact.[21] Where an evidence of debt is delivered to the seller at the time of the transaction, this circumstance is so far probative of the fact of sale that evidence of a considerable degree of perspicuity is required to give to it the character of a mortgage.[22] Where the seller seeks to have an instrument declared a mortgage it is not sufficient that he merely raise a doubt whether it was intended as a mortgage; he must prove that it was so intended.[23] In determining the sufficiency of the evidence in such a case it has been held that the test of the sufficiency of parol to create a resulting trust is applicable and controlling.[24] If it appear that the transaction was conceived in fraud of the seller's creditors, the parties having a secret intention that title should not pass under the bill of sale, equity will not relieve, but will leave the parties where it finds them.[25] For other cases in which the sufficiency of the evidence has been considered reference is made to the notes.[26]

20. Calvard *v.* Waugh, 56 N. C. 335; Blackwell *v.* Overby, 41 N. C. 38.

The buyer's positive denial under oath in his answer, the writing, and the testimony of the subscribing witnesses will not be overcome by testimony of the buyer's extra-judicial declarations that a mortgage only was intended, especially where one of the witnesses to such declarations is the plaintiff's mother. Harris *v.* Miller, 30 Ala. 221; Brantley *v.* West, 27 Ala. 542.

21. Robinson *v.* Farrelly, 16 Ala. 472.

22. McKinstry *v.* Conly, 12 Ala. 678.

23. Brantley *v.* West, 27 Ala. 542.

24. The court of appeals of Maryland has said that parol is admitted upon the principle that extrinsic proof is admitted to establish a resulting trust against an absolute deed, and that "as parol evidence is admitted upon the same principle that it is admitted to establish a resulting trust, so it must be tested by the same rules as to its sufficiency that would be required in the case of a resulting trust." Cochrane *v.* Price. (Md.), 8 Atl. 361.

25. Wheeler *v.* Eastwood, 88 Hun 160, 34 N. Y. Supp. 513; Brantley *v.* West, 27 Ala. 542; Wright *v.* Wright, 2 Litt. (Ky.) 8.

Evidence Held Sufficient To Show the Transaction To Be a Mortgage. English *v.* Lane, 1 Port. (Ala.) 328; Miller *v.* Campbell Commission Co., 13 Okla. 75, 74 Pac. 507.

26. Cochrane *v.* Price (Md.), 8 Atl. 361; Hatfield *v.* Montgomery, 2 Port. (Ala.) 58; Wheeler *v.* Eastwood, 88 Hun 160, 34 N. Y. Supp. 513.

Where the parties to the bill of sale swear, the one that it was intended as a mortgage, the other that it was intended to effect a sale, and it appears that, subsequently to the transaction, the purchaser claimed the property as absolute owner when the seller's creditors sought to attach it, and exercised exclusive ownership over it, it has been held that the transaction should be treated as a sale. Bodman *v.* Fisher (Ky.), 15 S. W. 8.

The fact that the grantee named in the deed expressed his unwillingness

III. EXECUTION AND DELIVERY.

1. Presumptions. — The execution of a mortgage beneficial to the mortgagee, and delivered to another person for his benefit, will be presumed to have been accepted by him so as to be a valid mortgage, where he has knowledge of the fact and assents to it, or by any act adopts the benefits of it, or where he does not, by any act or statement, evince any intention not to accept the benefit of the instrument.[27] The execution and recording by a mortgagor of a chattel mortgage, pursuant to an agreement with the mortgagee, will be presumed to be with the consent of the mortgagee, so as to perfect the delivery.[28] Delivery may be inferred from the fact that the mort-

at the time of the delivery of it to him to accept the mortgage is not conclusive that the parties did not in fact intend that the instrument should operate as a mortgage. Williams *v.* Chadwick, 74 Conn. 252, 50 Atl. 720; Mills *v.* Mills, 26 Conn. 213; Susman *v.* Whyard, 149 N. Y. 127, 43 N. E. 413.

27. Wadsworth *v.* Barlow, 68 Iowa 599, 27 N. W. 775; Fischer Leaf Co. *v.* Whipple, 51 Mo. App. 181; Day *v.* Sines, 15 Wash. 525, 46 Pac. 1048.

Where the mortgagee, upon receiving notice from the mortgagor that he has made an assignment for the benefit of creditors, places secured notes against the mortgagor in the hands of his agent for collection, and the particular time of their being received by the agent is not shown by the evidence, such facts are not sufficient to show a ratification of the act of the agent in taking possession of the mortgaged property for the mortgagee so as to make out an acceptance of the mortgage as against the mortgagor's attaching creditors. Kuh *v.* Garvin, 125 Mo. 547, 28 S. W. 847.

28. *Illinois.* — Wickler *v.* People, 68 Ill. App. 282.

Iowa. — Everett *v.* Whitney, 55 Iowa 146, 7 N. W. 487; *In re* Guyer, 69 Iowa 585, 29 N. W. 826.

Michigan. — Field *v.* Fisher, 65 Mich. 606, 32 N. W. 838.

Missouri. — State *v.* O'Neil, 74 Mo. App. 134.

Nebraska. — Rein *v.* Kendall, 55 Neb. 583, 75 N. W. 1104.

North Dakota. — Keith *v.* Haggart, 2 N. D. 18, 48 N. W. 432.

Washington. — Alford *v.* Sines, 15 Wash. 525, 46 Pac. 1048.

Wisconsin. — Sargent *v.* Solberg, 22 Wis. 132.

Mortgage Not Pursuant to Agreement. — Fischer Leaf Co. *v.* Whipple, 51 Mo. App. 181; Ensworth *v.* King, 50 Mo. 477; Mull *v.* Dooley, 89 Iowa 312, 56 N. W. 513. In Cobb *v.* Chase, 54 Iowa 253, 6 N. W. 300, the court says: "The question presented for our determination is whether, under the established facts, the mortgage should be regarded as delivered before the attachment. The mere execution and filing of an instrument for record does not constitute delivery. Day *v.* Griffith, 15 Iowa 104. . . . Where a person agrees with another to mortgage to him specific property, and in pursuance of the agreement executes a mortgage upon the property, and files it for record, there is much reason for holding that such mortgage is to be deemed accepted by the mortgagor. But the agreement in this case was merely that a mortgage should be given upon a certain kind of property. No one specific piece of property was agreed upon, nor even the quantity. The agreement, then, was far less definite than the mortgage, and, being so, we do not see how it could be construed as equivalent to an acceptance of the mortgage. Nor are we able to see how mere knowledge of the mortgage, after it had been filed for record, could be deemed an acceptance of it. Acceptance involves the exercise of volition upon the part of the acceptor. Mere knowledge does not involve the exercise of volition."

gage and the obligation it secures are in the mortgagee's possession,[29] but *a fortiori* would delivery appear from evidence that the mortgage was delivered to the proper officer for record, and after having been recorded was found in the mortgagee's possession.[30] The date of a mortgage appearing upon the face is presumptive evidence of the time of its execution[31] and delivery.[32] This presumption, however, is only *prima facie*, perhaps but an inference of fact, which may be overcome by parol.[33] Where there is no extrinsic evidence of the date of an undated mortgage it may be assumed to have been executed as of the date when it was proved by the subscribing witness.[34]

2. Admissibility of Parol as to Date. — The date of an undated mortgage may be proved by parol,[35] or a different day from that set forth in the instrument may be proved as the actual date of its execution.[36]

3. Admissibility of Parol as to Delivery. — Delivery may of course be disproved by parol, though the grantee has possession of the mortgage; nor is the receiving of such evidence a violation of the rule forbidding the varying of the writing by parol.[37]

The fact that the mortgagor, on the delivery of the mortgage to the recorder to be recorded, instructs such officer to return the mortgage to him (the mortgagor) after he has recorded it does not impair the sufficiency of the delivery. Kuh *v.* Garvin, 125 Mo. 547, 28 S. W. 847.

29. Wickler *v.* People, 68 Ill. App. 282; Foster *v.* Perkins, 42 Me. 168; Molineaux *v.* Coburn, 6 Gray (Mass.) 124.

The delivery of a chattel mortgage for record, by the mortgagor or his agent, without the mortgagee's knowledge, a year after the mortgagor had agreed to secure the mortgagee's debt, is not as matter of law a delivery, but is such evidence of the fact as may be submitted to the jury. Jordan *v.* Farnsworth, 15 Gray (Mass.) 517.

30. Molineaux *v.* Coburn, 6 Gray (Mass.) 124; Foster *v.* Perkins, 42 Me. 168.

31. Merrill *v.* Dawson, Hempst. 563, 17 Fed. Cas. No. 9469; Briggs *v.* Fleming, 112 Ind. 313, 14 N. E. 86.

32. Foster *v.* Perkins, 42 Me. 168; Briggs *v.* Fleming, 112 Ind. 313, 14 N. E. 86; Schweinber *v.* Great Western Elev. Co., 9 N. D. 113, 81 N. W. 35.

33. In Briggs *v.* Fleming, 112 Ind. 313, 14 N. E. 86, the court says: "Doubtless a mistake in the date may be shown, or it may be shown that the instrument was not delivered on the day it bears date; but there is here no attempt, directly or indirectly, to show either of these things. Where a mortgage is dated the presumption is that it was fully executed and delivered at its date. Foster *v.* Perkins, 42 Me. 168. It was incumbent on the plaintiff to remove, if he could, this presumption, and as he has not done so it must stand against him as a *prima facie* case."

34. Metropolitan Store & Saloon Fixture Co. *v.* Albrecht, 70 N. J. L. 149, 56 Atl. 237.

But the mortgage will not, under such circumstances, be presumed to have been executed previously to such date. The time of the acknowledgment and recording of a mortgage may furnish the date. Merrill *v.* Dawson, Hempst. 563, 17 Fed. Cas. No. 9469.

35. Burditt *v.* Hunt, 25 Me. 419, 43 Am. Dec. 289.

36. Stonebreaker *v.* Kerr, 40 Ind. 186; Briggs *v.* Fleming, 112 Ind. 313, 14 N. E. 86; Johnson *v.* Stellwagen, 67 Mich. 10, 34 N. W. 252; Partridge *v.* Swazey, 46 Me. 414; Clark *v.* Houghton, 12 Gray (Mass.) 38.

37. Roberts *v.* Webb, 1 Wend. (N. Y.) 478.

4. Mode of Proof of Mortgage. — The certificate of acknowledgment of a chattel mortgage is *prima facie* evidence of its execution where the execution of the instrument is in issue.[38] Where there are attesting or subscribing witnesses these generally should first be called if they are available.[39] If the attesting witnesses are not available, execution may be proved by one who was present at the time the instrument was executed,[40] or by the mortgagor himself.[41] When a chattel mortgage is both executed and attested by mark, and the witness is unable to identify his mark, the execution of the mortgage may be proved by the mortgagee or by any other person having knowledge of the fact.[42] Where the statute does not provide for the use of a certified copy of a chattel mortgage as evidence of the existence and contents of the instrument the copy will not in general be admissible;[43] but, notwithstanding the statute does not provide for its admissibility, where a mortgage is sought to be foreclosed in one county, and it is shown that it is on file in another county, and may not be removed therefrom, a duly certified copy of the mortgage is admissible as against the single objection that it is only a copy.[44] Of course, where the mortgage is shown to have

38. Andrews *v.* Reed (Kan.), 48 Pac. 29.

The assignment of a mortgage may be read in evidence without other proof of its execution than an acknowledgment by the assignor. Roberts *v.* Webb, 1 Wend. (N. Y.) 478.

39. Schouweiler *v.* McCaull (S. D.), 99 N. W. 95; Askew *v.* Steiner, 76 Ala. 218.

40. Seibold *v.* Rogers, 110 Ala. 438, 18 So. 312.

41. The execution of a mortgage should be proved by the subscribing witnesses thereto, but if one of such witnesses be absent and the other have no recollection of the execution of the mortgage, the fact of execution may be proved by the mortgagor. Schouweiler *v.* McCaull (S. D.), 99 N. W. 95. Under the Alabama code the execution of a mortgage attested by subscribing witnesses may be proven by the maker without calling such witnesses. Ballow *v.* Collins, 139 Ala. 543, 36 So. 712.

42. Jones *v.* Hough, 77 Ala. 437.

43. Admissibility of Copy Dependent on Statute. — Bissell *v.* Pearce, 28 N. Y. 252; Grounds *v.* Ingram, 75 Tex. 509, 12 S. W. 118; Boydston *v.* Morris, 71 Tex. 697, 10 S. W. 331.

44. "The objection was that the paper offered was a copy, and not that it was not a true copy of the original, nor that the paper of which it purported to be a copy was not shown to have been executed by appellant. It is shown that the paper of which that offered in evidence purports to be a copy was filed in the office of the county clerk of Taylor county, and that cannot be withdrawn. Thus is the non-production of the original sufficiently accounted for on the trial of this cause in Tarrant county. The objection that it was 'a copy' is not equivalent to one that it was not shown to be a true copy, but carries with it the implication that such was conceded to be its true character. Appellee, not being able to produce the original, because a filed paper in another county, was entitled to introduce such secondary evidence as was available. That a proved copy would have been admissible, the execution of the original being shown, under the circumstances of this case, cannot be questioned; and, had the objection been that the execution of the original had not been proved, or that the paper offered was not shown to be a true copy, then the objection should have been sustained, unless the proof was made." Grounds *v.* Ingram, 75 Tex. 509, 12 S. W. 118.

been lost its execution and contents may be proved by parol or other secondary evidence.[45]

IV. CONSIDERATION.

1. Admissibility of Parol. — A. In General. — The true consideration upon which a chattel mortgage is given and the real purpose and intent of the parties may be proved by parol or other evidence *dehors* the instrument.[46]

B. Where Consideration Is Contractual. — Where the consideration for a sale of chattels is contractual parol evidence is inadmissible to show that the transaction was intended as a mortgage only.[47]

V. THE PROPERTY MORTGAGED.

1. Admissibility of Extrinsic Evidence To Identify. — Parol or other extrinsic evidence is admissible to identify the mortgaged chattels,[48] or to make intelligible and certain an ambiguous or general

45. Huls *v.* Kimball, 52 Ill. 391; Atherton *v.* Phoenix Ins. Co., 109 Mass. 32.

46. Harrington *v.* Samples, 36 Minn. 200, 30 N. W. 671; Minor *v.* Sheehan, 30 Minn. 419, 15 N. W. 687; Goodheart *v.* Johnson, 88 Ill. 58; Sparks *v.* Brown, 46 Mo. App. 529; Bainbridge *v.* Richmond, 17 Hun (N. Y.) 391; McKinster *v.* Babcock, 26 N. Y. 378.

47. Reisterer *v.* Carpenter, 124 Ind. 30, 24 N. E. 371; Carr *v.* Hays, 110 Ind. 408, 11 N. E. 25; Conant *v.* National State Bank, 121 Ind. 323, 22 N. E. 250.

Contractual Consideration. — "It is certainly the general rule that the consideration expressed in an instrument of writing may be varied or contradicted to almost any conceivable extent. The reason generally given for the rule is that the language with reference to the consideration is not contractual; it is merely by way of recital of a fact, viz., the amount of the consideration, and not an agreement to pay it, and hence such recitals may be contradicted. There is also a rule, so well known that it needs no citation of authority, to the effect that parol testimony cannot be received to vary, contradict or add to the terms of a written contract; and out of this grows the exception to the rule first above stated, that where the contract is complete upon its face a stipulation as to the consideration becomes contractual, and where there is either a direct and positive promise to pay the consideration named, or an assumption of an incumbrance on the part of a grantee in a deed which becomes binding upon its acceptance, then the ordinary rules with reference to contracts apply, and the consideration expressed can no more be varied by parol than any other portion of the written contract." Pickett *v.* Green, 120 Ind. 584, 22 N. E. 737.

48. *United States.* — Wagner *v.* Watts, 2 Cranch C. C. 169, 28 Fed. Cas. No. 17,040.

Alabama. — Ellis *v.* Martin, 60 Ala. 394; Turner *v.* McFee, 61 Ala. 468; Holst *v.* Harmon, 122 Ala. 453, 26 So. 157; Hurt *v.* Reed, 64 Ala. 85.

Georgia. — Stephens *v.* Tucker, 58 Ga. 391; Wardlow *v.* Mayer, 77 Ga. 620.

Illinois. — Beach *v.* Derby, 19 Ill. 617; Pike *v.* Colvin, 67 Ill. 227; Mattingly *v.* Darwin, 23 Ill. 567; Chicago St. L. & S. R. Co. *v.* Beach, 29 Ill. App. 157; Myers *v.* Ladd, 26 Ill. 415; Spaulding *v.* Mozier, 57 Ill. 148; Bell *v.* Prewitt, 62 Ill. 361.

Indiana. — Tindall *v.* Wasson, 74 Ind. 495; Duke *v.* Strickland, 43 Ind. 494; Holmes *v.* Hinkle, 63 Ind. 518; Burns *v.* Harris, 66 Ind. 536; Ebberle *v.* Mayer, 51 Ind. 235.

description.[49] But parol is not admissible to extend the written description to property not mentioned in the mortgage,[50] or to effect

Iowa. — Myers *v.* Snyder, 96 Iowa 107, 64 N. W. 771; Becker *v.* Staab, 114 Iowa 319, 86 N. W. 305; Everett *v.* Brown, 64 Iowa 420, 20 N. W. 473; Citizens Bank *v.* Rhutasel, 67 Iowa 316, 25 N. W. 261; Frick *v.* Fritz, 115 Iowa 438, 88 N. W. 961.

Kansas. — Mills *v.* Kansas Lumb. Co., 26 Kan. 574.

Maine. — Chapin *v.* Cram, 40 Me. 561; Skowkegan Bank *v.* Farran, 46 Me. 293.

Massachusetts. — Harding *v.* Coburn, 12 Metc. 333, 46 Am. Dec. 680; Barry *v.* Bennett, 7 Metc. 354.

Minnesota. — Eddy *v.* Caldwell, 7 Minn. 225; Adamson *v.* Peterson, 35 Minn. 529, 29 N. W. 321; Beaupre *v.* Duyer, 43 Minn. 485, 45 N. W. 1094.

Missouri. — State *v.* Cabanne, 14 Mo. App. 294; Boeger *v.* Langenberg, 42 Mo. App. 7; Campbell *v.* Allen, 38 Mo. App. 27; Atchison Co. Bank *v.* Shackelford, 67 Mo. App. 475; Bank of Odessa *v.* Jennings, 18 Mo. App. 651.

Nebraska. — Jordan *v.* Hamilton Co. Bank, 11 Neb. 499, 9 N. W. 654.

New Hampshire. — Brooks *v.* Aldrich, 17 N. H. 443.

New Jersey. — Arnett *v.* Trimmer, 43 N. J. Eq. 488, 11 Atl. 487.

North Carolina. — Harris *v.* Allen, 104 N. C. 86, 10 S. E. 127; Morris *v.* Connor, 108 N. C. 321, 12 S. E. 917; Harris *v.* Woodard, 96 N. C. 232, 1 S. E. 544.

Ohio. — Lawrence *v.* Evarts, 7 Ohio St. 194.

Pennsylvania. — Passmore *v.* Eldridge, 12 Serg. & R. 198; Gill *v.* Weston, 110 Pa. St. 312, 1 Atl. 921.

Texas. — Ft. Worth Nat. Bank *v.* Red River Nat. Bank, 84 Tex. 369, 19 S. W. 517.

Location Without Statement of Amount of Property. — Where the mortgage does not give the amount of property mortgaged, but locates it, parol is admissible as between the parties to show just what was intended. Dunning *v.* Stearns, 9 Barb. (N. Y.) 630; Dodge *v.* Potter, 18 Barb. (N. Y.) 193; Weber *v.* Illing, 66 Wis. 79, 27 N. W. 834; Sargent *v.* Solberg, 22 Wis. 132.

49. Conkling *v.* Shelley, 28 N. Y. 360, 84 Am. Dec. 348; Weber *v.* Illing, 66 Wis. 79, 27 N. W. 834; Harris *v.* Allen, 104 N. C. 86, 10 S. E. 127.

Technical Words May Be Explained. — Where property asserted to have been mortgaged is in controversy, technical words used in the descriptions may be explained by witnesses cognizant of the special meaning of such words. Phillips *v.* Shackford, 21 R. I. 422, 44 Atl. 306.

General Description. — What Included. — Parol is admissible to show that a particular chattel is included in a general description. Boyle *v.* Miller, 93 Ill. App. 627; Harding *v.* Coburn, 12 Metc. (Mass.) 333, 46 Am. Dec. 680; Bell *v.* Prewitt, 62 Ill. 361; Willey *v.* Snyder, 34 Mich. 60; Sparks *v.* Brown, 46 Mo. 529; Ft. Worth Nat. Bank *v.* Red River Nat. Bank, 84 Tex. 369, 19 S. W. 517.

But where the description of the property mortgaged is clear and free from ambiguity, parol evidence will not be received to show the extent and meaning of the language the parties have employed. Drexel *v.* Murphy, 59 Neb. 210, 80 N. W. 813.

50. Property Not Mentioned in the Mortgage. — Mayer *v.* Keith, 55 Mo. App. 157; Hutton *v.* Arnett, 51 Ill. 198; Citizens Bank *v.* Rhutasel, 67 Iowa 316, 25 N. W. 261; Rowley *v.* Barthelomew, 37 Iowa 374; Cass *v.* Gunnison, 68 Mich. 147, 36 N. W. 45; Stonebraker *v.* Ford, 81 Mo. 532; New Hampshire Cattle Co. *v.* Bilby, 37 Mo. App. 43.

Crop Mortgages. — In the case of a mortgage on crops, parol is not admissible to extend the description in the mortgage so as to include the crops on lands other than the lands mentioned in the mortgage. Hunt *v.* Shackleford, 56 Miss. 397; Mayer *v.* Keith, 55 Mo. App. 157.

Admissibility of Parol To Show Contemplated Change of Location of Property Described. — Where property is described and referred to as being at a particular place, parol is admissible to show that the parties understood, at the time the mortgage was executed, that the property was to be removed to the place where it

a substitution of property.[51] Parol evidence will not be admissible to identify the property or to perfect a description as against an innocent purchaser, where the description used was not sufficient to put him upon inquiry.[52]

2. Particular Evidence Admissible on Issue of Identity. — In determining whether particular property was intended to be covered by the description in a mortgage, all the facts and circumstances attending the transaction and the situation of the subject-matter are proper to be received.[53] Evidence of the dealings between the parties[54] and their declarations with reference to a controverted article[55] may be received to identify it as the mortgaged chattel. A witness may even testify to his belief that a particular chattel is the one mentioned in the mortgage.[56]

As against the mortgagee, an adverse claimant having notice of the mortgage, parol evidence may be received to show that the mortgagor, at the time of executing the mortgage, was the owner of just the quantity of property described, and that the property in controversy is just of that quantity.[57] Evidence of usage and custom may also be received to aid the description or to identify the property.[58]

VI. THE DEBT OR OBLIGATION SECURED.

Identification by Extrinsic Evidence. — It is very well established that parol or other extrinsic evidence may be received to aid the description of the debt recited in the mortgage or to identify the debt or obligation secured.[59] It may even be shown that the mort-

was recited to be in the mortgage, the property being otherwise correctly described. Adamson *v.* Peterson, 35 Minn. 529, 29 N. W. 321.

Where the mortgage recited that it was given on an entire stock of drugs, parol is not admissible as against a subsequent levying creditor to show that it was intended that the mortgage should cover the fixtures and appliances used in conducting the business. Van Evra *v.* Davis, 51 Iowa 637, 2 N. W. 509.

51. Under a statute requiring a mortgage of personalty to be in writing, property not embraced in the mortgage cannot by parol be substituted for that therein described. Barbin *v.* Letlmaier, 6 Ohio Dec. 188, 4 Ohio N. P. 154; Bloch *v.* Edwards, 116 Ala. 90, 22 So. 600.

52. When Inadmissible as Against Third Parties. — Stewart *v.* Jaques, 77 Ga. 365, 3 S. E. 283. New Hampshire Cattle Co. *v.* Bilby, 37 Mo. App. 43; Eggert *v.* White, 59 Iowa 464, 13 N. W. 426.

53. Brody *v.* Chittenden, 106 Iowa 524, 76 N. W. 1009.

54. Goff *v.* Pope, 83 N. C. 123.

55. Goff *v.* Pope, 83 N. C. 123.

56. Turner *v.* McFee, 61 Ala. 468.

57. Where the property mortgaged was described as "eleven Smith farm wagons, four Ketchum farm wagons," in a controversy between the mortgagee and the attaching officer representing creditors with notice, it was held that parol was admissible to show that the mortgagor, at the time he executed the mortgage, had just the number of wagons of the kinds described, and that the property in controversy was of just that number. Clapp *v.* Trowbridge, 74 Iowa 550, 38 N. W. 411.

58. Schaub *v.* Dallas Brew. Co., 80 Tex. 634, 16 S. W. 429; Riggs *v.* Armstrong, 23 W. Va. 760.

59. *United States.* — Wood *v.* Weimar, 104 U. S. 786.

Illinois. — Quinn *v.* Schmidt, 91 Ill. 84.

gage was given to secure an obligation entirely different from that described, and that the obligation in fact intended to be secured has

Indiana. — Holmes *v.* Hinkle, 63 Ind. 518.

Massachusetts. — Johns *v.* Church, 12 Pick. 557.

Minnesota. — Harrington *v.* Samples, 36 Minn. 200, 30 N. W. 671.

New Hampshire. — Colby *v.* Everett, 10 N. H. 429; Melvin *v.* Fellows, 33 N. H. 401.

New York. — Dodge *v.* Potter, 18 Barb. 193; McKinster *v.* Babcock, 26 N. Y. 378, *reversing* 37 Barb. 265.

Wisconsin. — Paine *v.* Benton, 32 Wis. 491; Gilmore *v.* Roberts, 79 Wis. 450, 48 N. W. 522.

Discrepancy as to Amount. — Parol may be received to show that instead of the mortgage being given to secure a note for $150, it was given to secure one for $250. Cushman *v.* Luther, 53 N. H. 562.

Contingent Liability. — It may be shown by parol that a mortgage reciting that it was given to secure a specified sum certain was in fact given to secure a contingent liability of the mortgagee as security for the mortgagor. Sparks *v.* Brown, 46 Mo. App. 529. But see Varney *v.* Hawes, 68 Me. 442, which holds otherwise.

A note is admissible as the one secured even if it contains a stipulation, not noticed in the mortgage, that it is to be paid in a particular manner, and is signed by other persons than the mortgagor, a fact not appearing in the mortgage. Robertson *v.* Stark, 15 N. H. 109.

Where the mortgage gives a totally false description of the note it was intended to secure, the debt really intended to be secured cannot be shown by parol in a legal action, but the instrument must in equity be reformed. Follett *v.* Heath, 15 Wis. 601. Parol may be received to show an error in the date of the note recited to be secured. Clark *v.* Houghton, 12 Gray (Mass.) 38; Partridge *v.* Swazey, 46 Me. 414. Parol is not admissible to show that the mortgage was intended to secure a debt entirely different from that described. Morris *v.* Tillson, 81 Ill. 607.

In Mueller *v.* Provo, 80 Mich. 475, 45 N. W. 498, it was held that a bill of sale intended as a security given for a specified consideration, with nothing appearing on its face to indicate that it was intended to secure any other or greater sum, could not be shown, as against the creditors of the mortgagor, to have been intended to secure any other or larger amount, the court saying, "It is alleged that the circuit judge erred in instructing the jury that the bill of sale given July 20, 1887, was to secure an indebtedness of $3000, and it is claimed that there was no testimony in the case upon which to base such a charge; that the undisputed testimony of Mr. Christy showed that the bill of sale was given to secure advances made under the contract of October 26, 1886, amounting at the time the bill of sale was given to over $7000. This view is based upon the idea that the consideration named in the bill of sale is not conclusive, but that the plaintiffs were at liberty to show the actual demand which the instrument was intended to secure. This would be true if the instrument itself showed that it was intended to secure a larger amount than that named as the consideration, but this rule can only apply to those cases where a discrepancy appears upon the face of the paper between the consideration mentioned at the commencement and the debt described in the later conditions of the instrument. It is possible that, as between the plaintiffs and Olmstead, the bill of sale might have been construed as security for the entire debt due from Olmstead to them; but where, as in this case, the bill of sale is given for a named consideration, and nothing appears upon its face to indicate that it was intended to secure any other or greater sum, the creditors of the mortgagor are entitled to treat the instrument as valid only to the amount specified."

Where a mortgage is given to secure a debt until the same shall be paid, parol is admissible to show the amount remaining unpaid, where

been paid and the mortgage discharged.[60] That a mortgage was given to secure future advances may also be shown by parol as between the parties.[61] It may likewise be shown that a note, different from that described in the mortgage, was a renewal of the original note mentioned in the mortgage.[62] But parol may not be received to show that a less sum is due the mortgagee than is recited to be due.[63] The paper upon which the parties made their computations at the time the mortgage was executed may be received as extrinsic evidence to identify the debt secured.[64]

VII. FILING, RECORDING AND REGISTRATION.

1. Presumptions and Burden of Proof in General. — The party relying on the fact that his mortgage was duly recorded has the burden of proving a compliance with the statute in that regard.[65] But where a chattel mortgage is shown to have been once filed as required by the statute, it will be presumed, there being no proof to the contrary, that it continued on file in conformity to law.[66] The fact that a mortgage bears an entry of filing on it by the proper

it is changing. Truss *v.* Harvey, 120 Ala. 636, 24 So. 927.

60. Harrington *v.* Samples, 36 Minn. 200, 30 N. W. 671.

61. Speer *v.* Skinner, 35 Ill. 282; Huckaba *v.* Abbott, 87 Ala. 409, 6 So. 48; Monnot *v.* Ibert, 33 Barb. (N. Y.) 24; McKinster *v.* Babcock, 26 N. Y. 378. See, however, Walker *v.* Snediker, 1 Hoff. Ch. (N. Y.) 145; Divver *v.* McLaughlin, 2 Wend. (N. Y.) 596, 20 Am. Dec. 655; Jones *v.* Morey, 2 Cow. (N. Y.) 246.

62. Renewal of Original Note. Barrows *v.* Turner, 50 Me. 127.

63. Patchin *v.* Pierce, 12 Wend. (N. Y.) 61.

64. Dodge *v.* Potter, 18 Barb. (N. Y.) 193.

65. In an action by a mortgagee against a subsequent purchaser to recover the mortgaged property, the mortgagee has the burden to prove that his mortgage was recorded in the county of the mortgagor's residence. Stirk *v.* Hamilton, 83 Me. 524, 22 Atl. 391; Platt *v.* Stewart, 13 Blatchf. 481, 19 Fed. Cas. No. 11,220; Bither *v.* Buswell, 51 Me. 601; Smith *v.* Jenks, 1 Denio (N. Y.) 580.

A mortgagee has the burden to prove that a mortgage was on file at the time an attaching creditor levied on the goods, where a mortgage is required by the statute to be left on file. Griffis *v.* Whitson, 3 Kan. App. 437, 43 Pac. 813.

Proof of Residence Subsequent. Proof of residence at a particular time creates a presumption of its continuance at such place, but not as to when it began. The presumption is prospective, not retrospective. Hence such proof, subsequent to the filing of a mortgage, is insufficient. Clough *v.* Kyne, 40 Ill. App. 234.

Presumptions and Burden of Proof in General. — In a contest between successive mortgagees concerning the mortgaged property, the defendant, answering the invalidity of the plaintiff's mortgage because not recorded in the county of the mortgagor's residence, has the burden of proving that his own mortgage was filed for record in the proper county. Hockaday *v.* Jonnett (Tex. Civ. App.), 74 S. W. 71.

When a chattel mortgage is duly executed and recorded in the county where the property is situated, and is in the mortgagor's possession, a party disputing the validity of the record has the burden of showing that the mortgagor was not a resident of the county where the record was made. *In re* Brannock, 131 Fed. 819.

66. Vanarsdale *v.* Hax, 107 Fed. 878, 47 C. C. A. 31.

officer, whose particular capacity is proved, does not create a presumption that it continued on file and was on file at the time the attaching creditor levied on the goods, where the mortgage is at the trial produced by the mortgagee himself and is in his own possession.[67] When a mortgage to secure future advances has been recorded, the subsequent mortgagee has the burden of proving actual notice of his mortgage to the prior mortgagee, even when the making of such advances is optional with the latter.[68] If the mortgage is invalid without a change of possession unless recorded, the party claiming under a mortgage that is unrecorded has the burden of proving a delivery, or change of the possession, of the property.[69] Under a statute requiring a certificate of the mortgagee's interest under a mortgage to be filed at stated periods so as to keep the same valid against creditors, it must affirmatively appear, as against creditors, that the same was filed as required by statute.[70]

2. The Fact of Recording, Etc. — The certificate of the recording officer is competent to establish the fact of the due recording, filing or registering of a mortgage,[71] and is conclusive of the fact.[72] The

67. Griffis *v.* Whitson, 3 Kan. App. 437, 43 Pac. 813.

68. In Anderson *v.* Liston, 69 Minn. 82, 72 N. W. 52, the court said: "A subsequent mortgagee can limit the credit that may be given under a mortgage to secure future advances only by giving the holder actual notice of his lien. . . . If plaintiff would postpone Wallis' lien to his own, the burden was on him to prove such notice; and, having failed to do so, the court was right in finding against him."

69. Swiggett *v.* Dodson, 38 Kan. 702, 17 Pac. 594; McCarthy *v.* Grace, 23 Minn. 182; Baker *v.* Pottle, 48 Minn. 479, 51 N. W. 383.

70. Richardson *v.* Shelby, 3 Okla. 68, 41 Pac. 378.

71. Head *v.* Goodwin, 37 Me. 181; Adams *v.* Pratt, 109 Mass. 59; Ames *v.* Phelps, 18 Pick. (Mass.) 314; Ferguson *v.* Clifford, 37 N. H. 86; Smith *v.* Waggoner, 50 Wis. 155, 6 N. W. 568; Fuller *v.* Cunningham, 105 Mass. 442.

72. Thayer *v.* Stark, 6 Cush. (Mass.) 11; Adams *v.* Pratt, 109 Mass. 59; Jordan *v.* Farnsworth, 15 Gray (Mass.) 517; Fuller *v.* Cunningham, 105 Mass. 442; Ferguson *v.* Clifford, 37 N. H. 86.

In an action of trespass by a mortgagee against an officer who has attached the mortgaged property at the instance of a creditor of the mortgagor, the certificate of the recording officer, appearing on the mortgage, that it has been duly recorded cannot be disproved by the production of a copy of the supposed record of the mortgage showing a variance, the court in such a case saying: "The original mortgage is certified to have been recorded by the town clerk, who, for this purpose, is the regular certifying officer; the mortgagee relies upon it, and had good reason to rely upon it, as a valid security. It is like the return of an officer, and cannot be impeached or controlled by producing the supposed record and showing a variance." Ames *v.* Phelps, 18 Pick. (Mass.) 314.

Where the mortgagor delivers the mortgage to the recording officer, with instructions not to record it until further notified, and, disregarding his instructions, the officer immediately files it, noting on the mortgage the day and hour of its receipt, while the entry made by the officer may be conclusive of the facts it certifies it is not conclusive that the instrument was delivered for the purpose of being recorded in the ordinary manner. Town *v.* Griffith, 17 N. H. 165.

record is not admissible to impeach the certificate.[73] The officer's certificate need not specify the particular record in which the mortgage appears where it is certified that the mortgage is incorporated in the appropriate record.[74] The fact of record may be proven also by the recording officer's indorsement on the mortgage,[75] or by the production of the record itself showing an entry of the filing in proper form and in the due order of the time of its filing, accompanied by the testimony of the officer having legal custody of the record.[76]

3. The Time of Recording, Etc. — A. Presumptions and Burden of Proof. — The burden is on the mortgagee, as against third parties, to show that his mortgage has been duly recorded, under a statute requiring a mortgage to be recorded within a given period.[77]

B. Mode of Proof. — On an issue as to the time of recording or filing a mortgage the certificate of the recording officer is admissible,[78] and the time, like the fact, of recording the instrument thereby appearing, is not open to question by extrinsic evidence, but the certificate is conclusive of the issue.[79]

73. Adams *v.* Pratt, 109 Mass. 59.

74. Head *v.* Goodwin, 37 Me. 181.

75. Keating *v.* Retan, 80 Mich. 324, 45 N. W. 141; Freiberg *v.* Brunswick-Balke-Collender Co. (Tex. Civ. App.), 16 S. W. 784.

76. The production of the chattel mortgage record from the proper custody, containing an entry of the filing of a chattel mortgage as of a given date, appearing in the regular order as to time, accompanied by the testimony of the recording officer that the mortgage was among the files in his office until it was taken therefrom by the attorney of the party producing it, is sufficient evidence of the making of the entry of the filing and of the fact of filing. Keating *v.* Retan, 80 Mich. 324, 45 N. W. 141.

77. State *v.* Griffen, 16 Ind. App. 555, 45 N. E. 935.

Two Mortgages. — The fact that one of two mortgages, executed contemporaneously, was recorded before the other is no foundation for a presumption of its priority over the other. Sheldon *v.* Brown, 72 Minn. 496, 75 N. W. 709; Walker *v.* Buffandeau, 63 Cal. 312.

78. Certificate of Officer. — Ames *v.* Phelps, 18 Pick (Mass.) 314; Head *v.* Goodwin, 37 Me. 181; Ferguson *v.* Clifford, 37 N. H. 86.

The time of the filing of a chattel mortgage is not established by the introduction in evidence of a certified copy of the mortgage only, notwithstanding the entry of the filing is indorsed upon it. The indorsement itself should be introduced. Drexel *v.* Murphy, 59 Neb. 210, 80 N. W. 813.

79. A mortgage is deemed to be recorded when left in the proper office for record, and the certificate of the officer upon the mortgage recorded, as to the date of the recording of the same, is conclusive and may not be impeached by proof of a discrepancy between the copy in the register and the original instrument. Jacobs *v.* Denison, 141 Mass. 117, 5 N. E. 526. But a notation by the recording officer of the time when a mortgage was filed with him for record is open to explanation or contradiction by parol. Jones *v.* Parker, 73 Me. 248.

The date of the recording of a mortgage is shown conclusively by the certificate of the recording officer. Holmes *v.* Sprowl, 31 Me. 73; Fuller *v.* Cunningham, 105 Mass. 442. Where, however, the officer's certificate does not disclose the date when the mortgage was recorded, or where he is not required to make any entry or record of the time when the mortgage was deposited for record, or in fact recorded, parol may be received to establish the time of

C. Question of Reasonable Time. — Where a chattel mortgage is required by the statute to be recorded with reasonable dispatch, the question is one, not of law, but of fact.[80]

D. Effect of Recitals in the Mortgage. — A recital in a chattel mortgage of the mortgagor's place of residence, where such county is the place of record, is not evidence of such fact on an issue as to the proper place of record,[81] except between two mortgagees,[82] or as against the mortgagor.[83]

E. Admissibility. — In an action to set aside a mortgage because recorded in the wrong county, to establish the fact of his residence

such matters. Holman *v.* Doran, 56 Ind. 358; Truss *v.* Harvey, 120 Ala. 636, 24 So. 927.

80. Hardcastle *v.* Stiles, 70 N. J. L. 828, 59 Atl. 1117.

81. Effect of Recitals as Against Strangers. — Baumann *v.* Libetta, 3 Misc. 518, 23 N. Y. Supp. 1; Nickerson *v.* Wells-Stone Mercantile Co., 71 Minn. 230, 73 N. W. 959, 74 N. W. 891; Chandler *v.* Bunn, Lalor's Supp. 167; *In re* Brannock, 131 Fed. 819; Wickham *v.* Barlow, *id.*

The supreme court of the United States, in the case of Stewart *v.* Platt, 101 U. S. 731, holding that the recital in the mortgage cannot affect the rights of third parties, said: "If that is to be regarded as a representation by them [the mortgagors] that their fixed abode was in that city [the place where recorded], it is obvious that the statute designed for the protection of creditors, subsequent purchasers, and mortgagees, in good faith, cannot be thus defeated. Their rights depend, not upon recitals or representations of the mortgagors as to their residence, but upon the fact of such residence. The actual residence controls the place of filing; otherwise the object of the statute would be frustrated by the mere act of the parties, to the injury of those whose rights were intended to be protected."

Contra. — In Brown *v.* Corbin, 121 Ind. 455, 23 N. E. 276, the court says: "Two objections are made to the mortgage — one that it is not acknowledged by Augustus Palin, but only acknowledged by his wife; and, further, that as to the personal property it must appear to have been recorded within ten days in the county where the mortgagors reside, and that it does not appear by the pleadings or evidence that Palin and Palin resided in Warren county when the mortgage was executed and recorded. As to the latter objection, it is sufficient to say that it appears upon the face of the mortgage that both the mortgagor and mortgagees reside in Warren county, and the evidence shows it to have been recorded in the recorder's office of said county the same day of its execution. The mortgage showing upon its face that the mortgagors resided in Warren county, the mortgage would be *prima facie* a valid lien; and the burden of proof would rest on the person asserting its invalidity to show that it was not recorded in the county where the mortgagors resided."

On the question whether the mortgage was recorded in the proper county, the recitals in the mortgage of the residence of the mortgagor, in the county of record, are *prima facie* evidence of the due recording of the mortgage, without other proof of the actual status of the mortgaged chattels. Chator *v.* Brunswick-Balke-Collender Co., 71 Tex. 588, 10 S. W. 250.

82. Tweto *v.* Buran, 90 Minn. 451, 97 N. W. 128.

83. Chator *v.* Brunswick-Balke-Collender Co., 71 Tex. 588, 10 S. W. 250.

Such recital has the effect of an admission, not, however, conclusive, and he may still show that his residence is elsewhere. Hewitt *v.* General Elec. Co., 61 Ill. App. 168.

at the time of its execution certain written statements made by the mortgagor have been admitted.[84]

F. Failure to Record. — Actual Notice. — a. *Burden of Proof.* — The party claiming under or through an unrecorded mortgage against a subsequent innocent purchaser of the mortgaged property has the burden of proving actual notice of his mortgage to the party against whom he claims.[85] The authorities are not agreed upon this proposition, however, some cases holding that as the mortgage is valid as between the parties, though not recorded, the subsequent purchaser has the burden of proving lack of knowledge or notice of the other's rights under his mortgage.[86] In an action to foreclose a subsequent mortgage the plaintiff has the burden of showing that he took his mortgage without notice of a prior unrecorded mortgage, as against which the lien of the subsequent mortgage is alleged to be superior.[87] And the same rule as to burden

84. Recitals in Other Writings. A contract made between the parties prior to the execution of the mortgage, relating the mortgagor's residence, may be received in evidence. Brunnemer *v.* Cook, 89 App. Div. 406, 85 N. Y. Supp. 954.

The statements of the mortgagor made to the taxing officers, showing his residence to be in another place, may be received. Loeser *v.* Jorgensen (Mich.), 100 N. W. 450.

The mortgagor's claims, made to the proper board, for the purpose of voting, are admissible. Loeser *v.* Jorgensen (Mich.), 100 N. W. 450.

85. View That Mortgagee Under Unrecorded Mortgage Has Burden To Prove Notice to Subsequent Purchaser. — *Alabama.* — Pollak *v.* Davidson, 87 Ala. 551, 6 So. 312.

Iowa. — Dayton State Bank *v.* Felt, 99 Iowa 532, 68 N. W. 818, 61 Am. St. Rep. 253; Carson & Rand Lumb. Co. *v.* Bunker, 83 Iowa 751, 49 N. W. 1003.

Michigan. — Williams *v.* Bresnahan, 66 Mich. 634, 33 N. W. 739.

Nebraska. — Rogers *v.* Pierce, 12 Neb. 48, 10 N. W. 535.

Ohio. — Paine *v.* Mason, 7 Ohio St. 198.

South Dakota. — LaCrosse Boot & Shoe Mfg. Co. *v.* Mons Anderson Co., 9 S. D. 560, 70 N. W. 877; LaCrosse Boot & Shoe Mfg. Co. *v.* Mons Anderson Co., 14 S. D. 597, 81 N. W. 641.

In an action by the assignee of the mortgagor for the benefit of creditors against a mortgagee whose mortgage was not recorded at the time the assignment was made, the mortgagee has the burden of proving notice to the creditors of the mortgagor of the existence of his mortgage. Shay *v.* Security Bank of Duluth, 67 Minn. 287, 69 N. W. 920.

86. Ransom *v.* Schmela, 13 Neb. 73, 12 N. W. 926; Bank of Farmington *v.* Ellis, 30 Minn. 270, 15 N. W. 243; Diemer *v.* Guernsey, 112 Iowa 393, 83 N. W. 1047.

In the case of McNeil *v.* Finnegan, 33 Minn. 375, 23 N. W. 540, the Minnesota court thus states the rule: "Action to recover the value of personal property alleged to have been converted by the defendant. . . . The mortgage was effectual as between the mortgagor, owning the chattel, and the mortgagee, and if the defendant would defeat the *prima facie* title of the mortgagee upon the ground that he had become a subsequent purchaser in good faith, it was incumbent upon him to show that he was such."

In an action by a subsequent mortgagee, claiming under a recorded mortgage, against a prior mortgagee claiming under an unrecorded mortgage, the subsequent mortgagee has the burden of proving that he took his mortgage without notice of the prior mortgage. Wright *v.* Larson, 51 Minn. 321, 53 N. W. 712; Bank of Farmington *v.* Ellis, 30 Minn. 270, 15 N. W. 243.

87. Diemer *v.* Guernsey, 112 Iowa 393, 83 N. W. 1047.

of proof applies in an action by the subsequent mortgagee to set aside an earlier unrecorded mortgage.[88]

b. *Character of Evidence.* — Actual notice of an unrecorded mortgage need not be proved by direct evidence, but may be inferred from the circumstances.[89]

c. *Particular Matters Admissible.* — Good faith and lack of notice may be inferred from the fact that the subsequent mortgage was taken for a valuable consideration and in the usual course of business.[90] Where actual notice of a prior unrecorded mortgage is not shown in a controversy with a third party, evidence of the consideration of the prior mortgage is not material.[91]

VIII. OWNERSHIP, POSSESSION AND PRIORITIES.

1. In General. — A. Presumption of Ownership From Execution of Mortgage. — The giving of a chattel mortgage creates a presumption, as against the mortgagor and persons claiming through or under him, that the mortgagor was the owner of the mortgaged property at the time the instrument was executed,[92] though, as against persons not parties to the instrument, or their privies, it has no such presumptive force.[93]

88. Caulfield *v.* Curry, 63 Mich. 594, 30 N. W. 191.

89. Merrill *v.* Dawson, Hempst. 563, 17 Fed. Cas. No. 9469; McNeil *v.* Finnegan, 33 Minn. 375, 23 N. W. 540.

90. When Lack of Notice Presumed. — Bank of Farmington *v.* Ellis, 30 Minn. 270, 15 N. W. 243; Wright *v.* Larson, 51 Minn. 321, 53 N. W. 712.

To Charge Vendee With Notice. To charge the owner of real estate with notice or knowledge of a mortgage on the crops grown thereon, executed by his vendor, evidence of mortgages executed by the vendor to other parties on such crops, and the negotiations of the parties to the conveyance relating to such mortgages, is properly received. Luce *v.* Moorehead, 77 Iowa 367, 42 N. W. 328.

Mortgagor's Declarations as to Incumbrances. — The declarations of the mortgagor to the subsequent mortgagee, that the property is unincumbered, are admissible in such mortgagee's behalf on the question whether he had notice of a prior unrecorded mortgage on the property. Sumner *v.* Dalton, 58 N. H. 295.

91. See Johnson *v.* Wilson, 137 Ala. 468, 34 So. 392.

92. Mathew *v.* Mathew, 138 Cal. 334, 71 Pac. 344.

93. Everett *v.* Brown, 64 Iowa 420, 20 N. W. 743; Andregg *v.* Brunskill, 87 Iowa 351, 54 N. W. 135, 43 Am. St. Rep. 388; Union Bank of Trenton *v.* First Nat. Bank, 2 Mo. App. Rep. 990; State Bank *v.* Felt, 99 Iowa 532, 68 N. W. 818.

As Against Subsequent Mortgagee. Warner *v.* Wilson, 73 Iowa 719, 36 N. W. 719, 5 Am. St. Rep. 710.

The recital in a chattel mortgage that the property mortgaged is free from other incumbrances and is in the mortgagor's possession is not to be received as substantive proof in favor of the mortgagee as against a purchase under an attachment sale at the instance of the mortgagor's creditors. Syck *v.* Bossingham, 120 Iowa 363, 94 N. W. 920.

Where neither the mortgagor nor the mortgagee is shown ever to have had possession of the mortgaged chattels, in an action by the mortgagee against a stranger to the mortgage for possession of the mortgaged chattels, the mortgage is only *res inter alios*; and proof of its execution and delivery does not, in such circumstances, make out a *prima facie* case for the plaintiff. Gibbs *v.* Childs,

B. Burden To Show Notice. — A purchaser of mortgaged property at a foreclosure sale of the same has the burden of showing want of notice of the vendor's right on the part of the mortgagee as against a party asserting a conditional sale of the property to the mortgagor and a breach of the condition.[94]

2. Actions Between Parties to the Instrument. — A. Burden of Proof in General. — In an action by the mortgagor against the mortgagee to recover possession of the mortgaged chattels,[95] or for their value,[96] the mortgagee, justifying under his mortgage, has the burden of showing facts authorizing his acts. A mortgagee suing the mortgagor for breach of the warranty of title to the mortgaged

143 Mass. 103, 9 N. E. 3. In this case the court said: "There was no evidence that the plaintiffs ever had possession of the boat, or any title to it except as mortgagees under a mortgage given by William H. Chadwick on January 8, 1885, and there was no evidence that William H. Chadwick ever had possession of the boat, or any right or title to it. The plaintiffs can only recover upon their own title or right of possession. The execution and delivery of a mortgage of personal property are not evidence of title to the property included in the mortgage, as against a stranger. Such acts are not necessarily acts of dominion over the property itself. If there was no possession of the property by either the mortgagor or mortgagees, the mortgage was, with respect to the defendant, *res inter alios*. The mortgage in this case is not an ancient document. If the execution, delivery and recording of a mortgage were held to create a *prima facie* title to personal property against a person in possession, then a *prima facie* right to the property of another could be created by any one at will."

Contra. — Where the mortgagor is in possession of the mortgaged property at the time he made a mortgage, the making of the mortgage is an act of dominion over the property, and some evidence of title in the mortgagor. Eames *v.* Snell, 143 Mass. 165, 9 N. E. 522.

94. In an action by a vendor under an unrecorded conditional bill of sale, required by the statute to be recorded, against a party claiming by purchase at a mortgage foreclosure sale under a mortgage from the vendee, the defendant has the burden of showing that the mortgagee, through whom he claims, accepted the mortgage without notice of the vendor's rights. Berner *v.* Kaye, 14 Misc. 1, 35 N. Y. Supp. 181.

95. Replevin by Mortgagor. — In an action of replevin by a mortgagor against a mortgagee, wherein the defendant answers the giving of the mortgage with a stipulation that upon a sale or attempt to sell by the mortgagor the mortgagee shall have the right to take the property, and the plaintiff merely replies the general denial, the defendant has the burden under the issue thus joined of showing a sale or an attempt to sell without his consent. Matthews *v.* Granger, 196 Ill. 164, 63 N. E. 658.

In Trespass. — In an action of trespass by the mortgagor against the mortgagee for a wrongful sale of the mortgaged chattels the defendant has the burden of showing such a breach of the conditions of the mortgage as authorized the sale. Davis *v.* Bowers Granite Co., 75 Vt. 286, 54 Atl. 1084.

96. Action by Mortgagor for Conversion. — Under a chattel mortgage giving the mortgagor the possession of the mortgaged chattels until a certain contingency should arise, in an action by the mortgagor against the mortgagee for the conversion of the mortgaged property the mortgagee has the burden of showing by a preponderance of the evidence the fulfillment of the conditions entitling him to possession under the mort-

property has the burden of showing the amount of damage sustained.[97]

B. Insecurity as Ground of Forfeiture. — a. *Burden of Proof.* It is a common clause in chattel mortgages that the mortgagee shall have the right to take possession of the mortgaged property whenever he shall deem himself insecure. The prevailing rule is that in justifying his possession under such a clause the mortgagee must show that he has reasonable grounds for his belief of insecurity.[98]

b. *Admissibility of Evidence.* — The mortgagor's property in general and the condition of his family are circumstances improper for

gage. Rector-Wilhelmy Co. *v.* Nissen, 35 Neb. 716, 53 N. W. 670.

97. Breach of Warranty of Title. To warrant a recovery for breach of a warranty of title in the mortgagor, proof of the mortgagee's damage must be made, and merely that some of the mortgaged chattels were taken from the mortgagee under a prior chattel mortgage, the existence of which is not shown, is insufficient. Hanson *v.* Kassmayer, 91 N. Y. Supp. 755.

98. Deal *v.* Osborne, 42 Minn. 102, 43 N. W. 835; Bailey *v.* Godfrey, 54 Ill. 507, 5 Am. Rep. 157; Bank of Carroll *v.* Taylor, 67 Iowa 572, 25 N. W. 810; Sills *v.* Hawes, 14 Colo. App. 157, 59 Pac. 422; Hogan *v.* Akin, 181 Ill. 448, 55 N. E. 137, *reversing* 81 Ill. App. 62; Slingo *v.* Steele-Wedles Co., 82 Ill. App. 139; Ley *v.* Reitz, 25 Ill. App. 615; Woods *v.* Gaar, 93 Mich. 143, 53 N. W. 14; Brown *v.* Hogan, 49 Neb. 746, 69 N. W. 100; Hyer *v.* Sutton, 59 Hun 40, 12 N. Y. Supp. 378; Brook *v.* Bayless, 6 Okla. 568, 52 Pac. 738; First Nat. Bank *v.* Teat, 40 Okla. 454, 46 Pac. 474; Humpfner *v.* Osborne, 2 S. D. 310, 50 N. W. 88.

Under a provision that the mortgagee may take possession of the mortgaged property whenever he shall "feel himself unsafe or insecure," there must be reasonable ground or probable cause for such action. Roy *v.* Goings, 96 Ill. 361, 36 Am. Rep. 151; Furlong *v.* Cox, 77 Ill. 293.

In a controversy between the parties over the mortgaged property the mortgagee, relying on this clause of his mortgage, need not produce the secured note in evidence where it is shown that prior to the time the mortgagee took the property the mortgagor had sold part of it and had indicated his intention to sell more of it. Hill *v.* Merriman, 72 Wis. 483, 40 N. W. 399.

Where the mortgage provides that the mortgagee may take possession of the mortgaged premises whenever he "shall at any time deem himself unsafe," the mortgagee must prove some ground for claiming that he deems himself insecure. Hawver *v.* Bell, 141 N. Y. 140, 36 N. E. 6. See also Newlean *v.* Olson, 22 Neb. 717, 36 N. W. 155.

The question whether there were reasonable grounds for a belief of insecurity to warrant a forfeiture under the mortgage is one of fact for the jury. Nash *v.* Larson, 80 Minn. 458, 83 N. W. 451, 81 Am. St. Rep. 272.

There are authorities however, to the effect that such a clause gives absolute power to be exercised according to his own judgment. Cline *v.* Libby, 46 Wis. 123, 49 N. W. 832, 32 Am. Rep. 700; Gage *v.* Wayland, 67 Wis. 566, 31 N. W. 108; Werner *v.* Bergman, 28 Kan. 60, 42 Am. Rep. 152; Huebner *v.* Koebke, 42 Wis. 319; Evans *v.* Graham, 50 Wis. 450, 7 N. W. 380; Allen *v.* Vose, 34 Hun (N. Y.) 57.

Mortgagee Must Act in Good Faith. — Barret *v.* Hart, 42 Ohio St. 41, 51 Am. Rep. 801; Hill *v.* Merriman, 72 Wis. 483, 40 N. W. 309.

Where the mortgagee is authorized to take possession when he deems himself unsafe he need not prove that he is unsafe or insecure, but it will be presumed when he takes possession that he considers himself insecure. Smith *v.* Post, 1 Hun (N. Y.) 516.

consideration.[99] Evidence of the mortgagor s conduct toward the mortgaged property is competent, and the mortgagee's own testimony, it is held, is competent on the question whether he deemed himself insecure.[1]

C. DEFENSES. — a. *To the Mortgagor's Action.* — A mortgagee may show subsequent liens on the property, in an action brought against him for conversion.[2] The mortgagee establishes against the mortgagor a *prima facie* defense to his action for the possession of the goods by producing the mortgage and the obligation it secures.[3]

b. *To the Mortgagee's Action.* — The right of possession in another, when asserted as a defense, must be an absolute and not a conditional right.[4] The mortgagor in such an action has the burden of proving his defense to the note secured.[5]

99. Grady *v.* Smith, 14 Ill. App. 305.

But Mere Rumors Are Incompetent. — Rector-Wilhelmy Co. *v.* Nissen, 35 Neb. 716, 53 N. W. 670.

1. Huggans *v.* Fryer, 1 Lans. (N. Y.) 276.

Under a clause that the mortgagee may take possession when he "*deems himself in danger,*" the mortgagee must act in good faith. Not the *fact* of danger, but the *belief* of danger, is material. "The true standard must be, whether or not the mortgagee, *acting in good faith,* at the time deems himself in danger. And the mortgagee, if a competent witness in the case, may testify as to whether or not he then deemed himself in such danger. Then the grounds of such thought may be tested to ascertain whether or not he did deem himself in such danger." Barret *v.* Hart, 42 Ohio St. 41, 51 Am. Rep. 801.

2. Subsequent Mortgages. — Mitigation of Damages. — Kohn *v.* Davis, 94 Fed. 288, 36 C. C. A. 253.

But in an action by the mortgagor to replevin a mortgaged chattel, alleged to have been taken by the mortgagee in violation of the agreement between the parties, evidence of any other indebtedness of the mortgagor to the mortgagee is not admissible in mitigation of the plaintiff's damages. Finley *v.* Cudd, 42 S. C. 121, 26 S. E. 32.

3. Fikes *v.* Manchester, 43 Ill. 379.

4. Action by Second Mortgagee Against Mortgagor. — Prior Mortgagee's Right to Possession. — James *v.* Wilson, 8 N. D. 186, 77 N. W. 603; Adams *v.* Wildes, 107 Mass. 123. In Gardner *v.* Morrison, 12 Ala. 547, the court says: "It is no objection to this conclusion that plaintiff's title is subordinate to that of the first mortgagee, and that the property may be recovered of him by the latter. This is a matter with which the defendant has no concern. The plaintiff may relieve himself from the lien of the first mortgage by purchasing it, or paying the debt for which it provides, or he may go into equity and foreclose, giving the first mortgagee the preference in the payment of his demand. Whatever be the rights and remedies between prior and subsequent mortgagees it is unimportant to the defense set up."

The Kansas court, in Rankine *v.* Greer, 38 Kan. 343, 16 Pac. 680, thus says: "But this right of possession must be an absolute right; one not contingent nor dependent upon circumstances or conditions. . . . This right of possession under a mortgage is a right to be claimed by the mortgagee. He might never claim the property; it might not be necessary for him to do so; the debt might be paid, or he might have other security or other property included in his mortgage sufficient to satisfy his claim independent of this property."

5. Burden as to Failure of Consideration. — Fikes *v.* Manchester, 43 Ill. 379.

D. Admissibility. — In the note will be found several instances of the rule that the evidence must follow the pleadings.[6]

a. *Varying by Parol.* — A parol agreement, made contemporaneously with the written mortgage, is not admissible to affect the mortgagee's right to possession as secured by the mortgage.[7]

b. *Proof of Circumstances in General.* — Where the ownership or the right to the possession of the mortgaged goods is in controversy, the circumstances leading up to the transactions between the parties and their dealings under the contractual relation may be proved.[8]

c. *The Mortgage as Proof of the Mortgagee's Right.* — Where the mortgage is relied on by the mortgagee it is competent proof of his rights without the introduction of the obligation it secures.[9]

3. Actions Between Mortgagor and Third Parties. — Parol evidence to show license to sell may be given.[10]

4. Actions Between Mortgagee and Third Parties. — A. Burden of Proof. — a. *On the Mortgagee.* — Where the mortgagee is attempting to assert a right in or to the mortgaged property superior to the right of a creditor of the mortgagor or a purchaser of the

6. Allegation of Bill of Sale. Proof of Mortgage. — Powers *v.* Benson, 120 Iowa 428, 94 N. W. 929.

Substitution of Relation of Pledgor and Pledgee. — Marsh *v.* Wade, 1 Wash. 538, 20 Pac. 578.

Plea of Failure of Consideration. Evidence of Fraud Inadmissible. Bufford *v.* Raney, 122 Ala. 565, 26 So. 120.

Under General Denial. — Right of Possession in Third Party. — James *v.* Wilson, 8 N. D. 186, 77 N. W. 603. See article "Replevin."

7. In Robieson *v.* Royce, 63 Kan. 886, 66 Pac. 646, the court held inadmissible evidence offered by the mortgagor that at the time the mortgage was executed it was agreed between the parties that the mortgagee would not enforce the mortgage or disturb the mortgaged property until a given time, saying: "This testimony was inadmissible. It was an attempt to incorporate in the written instrument verbal agreements made contemporaneously with its execution."

8. In an action for conversion against the mortgagee brought by the mortgagor, the giving of the mortgage and the amount of debt which it secured, and other matters leading up to the controversy out of which the mortgagor's claim arose, are all competent matters. Cadwell *v.* Pray, 86 Mich. 266, 49 N. W. 150.

In an action against the mortgagee for conversion of the mortgaged property the mortgagor may introduce in evidence the original mortgage upon the property, and the renewals thereof, to bring before the court the entire transaction had between the parties. Casey *v.* Ballou Bkg. Co., 98 Iowa 107, 67 N. W. 98.

9. Where the mortgagee in an action for conversion relies upon the provision of the mortgage authorizing him to take possession of the mortgaged property when he shall deem himself insecure, he may introduce the mortgage in evidence without producing the note which the mortgage was given to secure. Hill *v.* Merriman, 72 Wis. 483, 40 N. W. 399.

The mortgage may be received in evidence to establish the special ownership of the mortgagee in the property, though the date of the note therein mentioned is different from the actual date, where the evidence shows their contemporaneous execution. Scrafford *v.* Gibbons, 44 Kan. 533, 24 Pac. 968.

10. In an action by a mortgagor against the purchaser of the mortgaged property from the mortgagee, the defendant may justify under a

property, he has in general the burden of proving every fact upon which the validity of his claim depends.[11]

parol license to sell, given to the mortgagee, notwithstanding the mortgage is under seal. Hunt *v.* Allen, 73 Vt. 322, 50 Atl. 1103.

11. Chenyworth *v.* Daily, 7 Ind. 284; Matlock *v.* Straughn, 21 Ind. 128; State *v.* O'Neill, 151 Mo. 67, 52 S. W. 240.

Prima Facie Case as to Good Faith. In an action by a mortgagee of a chattel under an unrecorded mortgage against a subsequent purchaser from the mortgagor for conversion, the plaintiff makes a *prima facie* case by proof of the mortgage; the non-payment of the mortgage debt; demand, after maturity, for the delivery of the property, and the refusal to deliver the same. The defendant thereupon must show that he is a subsequent purchaser in good faith. McNeil *v.* Finnegan, 33 Minn. 375, 23 N. W. 540.

The mortgagee makes out a *prima facie* case of good faith in the taking of his mortgage by proof that the mortgage was given to secure an actual indebtedness, together with the amount thereof, unless something appears upon its face giving it a different character, whereupon the creditor has the burden to establish his relation to the mortgagor as such and that the mortgage was fraudulent. James *v.* Van Duyn, 45 Wis. 512.

If the trial court erroneously excludes the mortgage as being void for insufficient description, in an action against the officer taking the mortgaged chattel under an execution in behalf of a creditor of the mortgagor, the plaintiff is not required to proceed to prove the seizure and sale of the chattel under the writ. Plano Mfg. Co. *v.* Griffith, 75 Iowa 102, 39 N. W. 214.

A mortgagee, suing for the conversion of the mortgaged chattel, has the burden to establish that the alleged wrongful acts occurred after the accrual of his right to the possession of the property. Johnson *v.* Wilson, 137 Ala. 468, 34 So. 392.

Including Due Recording of His Mortgagee. — Where the mortgagee seeks to recover the mortgaged property which has been taken from the mortgagor's possession under an execution, the mortgagee must show that his mortgage was duly recorded. Chenyworth *v.* Daily, 7 Ind. 284; Matlock *v.* Straughn, 21 Ind. 128; Griffis *v.* Whitson, 3 Kan. App. 437, 43 Pac. 813.

The mortgagee under the unrecorded mortgage has the burden to show, as against a creditor of the mortgagor, that he took possession of the mortgaged property within a reasonable time after the mortgage was executed. Robinson *v.* Hawley, 45 App. Div. 287, 61 N. Y. Supp. 138.

That He Took Possession. — After a mortgagee has proven his mortgage, and that he was by the mortgagor put in possession of merchandise answering the description in the mortgage, the defendant who has attached the property has the burden of showing that the mortgaged property had been sold and that the property attached was additional property supplied to replace the mortgaged property. Janssen *v.* Stone, 60 Mo. App. 402.

The party claiming under a chattel mortgage has the burden of proving the change of possession or delivery of the property necessary to the validity of his mortgage. McCarthy *v.* Grace, 23 Minn. 182.

Existence of the Mortgage. Where mortgaged property has been attached by a creditor of the mortgagor, and the mortgagee appears and claims the property under his mortgage, the mortgagor has the burden of proving a valid and existing debt secured by the mortgage at the time of the levy of the attachment. Mitcham *v.* Schuessler, 98 Ala. 635, 13 So. 617.

Proof of Debt and Consideration Therefor. — As between the mortgagee and the representative of a creditor of the mortgagor the mortgagee has the burden of establishing the good faith of the mortgage, where the mortgagor has retained the possession of the property; and this burden is not satisfied by proof merely that notes such as are described in the mortgage as secured

b. *On Third Party.* — In a contest with an attaching officer the officer has the burden of proving that he represents creditors of the mortgagor.[12] Of course, where the defendant relies upon a lien superior to that of the mortgagee, the burden is upon the party so defending to prove the superior title.[13] Where a discharge of the mortgage is relied on it must be proved by the party claiming against the mortgage.[14]

B. Existence of the Right Under the Mortgage. — Where the mortgagee sues for the conversion of the mortgaged chattel he has the burden of showing that his right to the property had accrued under his mortgage at the time of the occurrence of the wrongful acts complained of.[15] The existence of the debt secured by the mortgage[16] and the mortgagee's special property in the mortgaged chattels[17] are established *prima facie* by proof of the execution of

were in existence at the time the mortgage was executed. There must be proof of their consideration or of the *bona fides* of the debt they represent. Darnell *v.* Mack, 46 Neb. 740, 65 N. W. 805.

It has been held that the fact that the mortgage debt remains is *prima facie* established by the production of the mortgage by the mortgagee. Talbott *v.* Parker, 15 S. C. 617; Brooks *v.* Briggs, 32 Me. 447.

That the Sale Was Without His Consent. — Conwell *v.* Jeger, 21 Ind. App. 110, 51 N. E. 733.

Must Show Demand and Refusal for Redelivery. — McNeil *v.* Finnegan, 33 Minn. 375, 23 N. W. 540.

12. An officer justifying his possession of a mortgaged chattel as representing a creditor of the mortgagor must prove that the person he represents is a creditor; and proving the writ merely is not sufficient as against the mortgagee. James *v.* Van Duyn, 45 Wis. 512.

As to Assignee for Benefit of Creditors. — An assignee of a mortgagor for the benefit of creditors is presumed, in a contest with the mortgagee, to represent the creditors of the mortgagor, and the holder of the mortgage has the burden of showing the contrary. Shay *v.* Security Bank of Duluth, 67 Minn. 287, 69 N. W. 290.

13. Subrogation to Landlord's Lien. — In an action by a mortgagee against a third party, the latter, if he relies upon subrogation to the landlord's lien thereon, has the burden of proving the subrogation. Gerson *v.* Norman, 111 Ala. 433, 20 So. 453.

14. Payment. — Gardner *v.* Roach, 111 Iowa 413, 82 N. W. 897; Brooks *v.* Briggs, 32 Me. 447.

Discharge by Application of Property. — Miller *v.* McElwain, 52 Kan. 91, 34 Pac. 396.

15. Johnson *v.* Wilson, 137 Ala. 468, 34 So. 392. See also Wilkes *v.* Gates, 68 Miss. 263, 8 So. 847.

Abandonment of Claim by Attaching Officer. — Where the attaching officer, after service of notice on him of the mortgagee's claim under his mortgage, abandons his attachment, the mortgagee may maintain his action for the possession of the property without the determination of an issue questioning the validity of the mortgage. Boynton *v.* Warren, 99 Mass. 172.

The mortgagee must make a *prima facie* showing of his own title before he can show the weakness of the other party's. Hall *v.* Johnson, 21 Colo. 414, 42 Pac. 660.

The mortgagee may show also, in his action against the judgment creditors of the mortgagor, that he is entitled to the possession of the mortgaged property by virtue of an arrangement made between himself and the mortgagor subsequently to the levy by the creditors on the goods. Ganong *v.* Green, 64 Mich. 488, 31 N. W. 401.

16. Davis *v.* Mills, 18 Pick. (Mass.) 394.

17. Scrafford *v.* Gibbons, 44 Kan. 533, 24 Pac. 968.

The mortgage may be received as

the mortgage, without the production of the note, bond or other obligation secured.[18] As to the production of the obligation, however, the authorities are not agreed.[19] The fact that a mortgage has been declared void as against the creditors of the mortgagor does not render it inadmissible in the mortgagee's behalf as against one

evidence of the amount due as well as of the existence of a debt to be secured. Mantonya *v.* Martin Emerich Outfitting Co., 69 Ill. App. 62.

Proof of Title. — Prima Facie Case. — The mortgage is sufficient evidence of title in the mortgagee, after condition broken, to recover the property mortgaged. Reinstein *v.* Roberts, 34 Or. 87, 55 Pac. 90.

The introduction of the mortgage by the mortgagee is *prima facie* evidence of his special property in the mortgaged chattel, and a subsequent purchaser from the mortgagor, relying upon the payment of the mortgage debt, has the burden of proving such as a defense. Brooks *v.* Briggs, 32 Me. 447.

The mortgage is admissible in the mortgagee's behalf on the issue of his ownership of the mortgaged property, in a controversy with third parties, after condition broken, to support the averment of ownership. Hixon *v.* Hubbell, 4 Okla. 224, 44 Pac. 222.

In an action between the mortgagee and third parties respecting the mortgaged chattels, the mortgage itself and the notice of sale under it are admissible on the mortgagee's behalf as evidence of ownership of the property. Sweetman *v.* Ramsey, 22 Mont. 323, 56 Pac. 361.

In an action for the possession of a mortgaged chattel the original note and mortgage need not be filed with the complaint. Burns *v.* Harris, 66 Ind. 536.

18. Brooks *v.* Briggs, 32 Me. 447; Talbott *v.* Parker, 15 S. C. 617; Hill *v.* Merriman, 72 Wis. 483, 40 N. W. 399.

The note secured need not be produced where the mortgage fully describes the debt. Quinn *v.* Schmidt, 91 Ill. 84. In an action by a mortgagee, to whom the mortgage was executed to secure him as surety on the mortgagor's note, and an attaching officer representing the mortgagor's creditors, the note on which the plaintiff is surety need not be proved or produced by him, as under such circumstances it is not in his possession. Davis *v.* Mills, 18 Pick. (Mass.) 394.

Distinctions Between Wrongdoers and Others. — In a suit by one otherwise entitled to the possession of the mortgaged chattels the mortgagee must prove his mortgage and the obligation it was given to secure; though as against a wrongdoer he need only produce the mortgage. This rule was announced in an action of replevin by the real owner of the chattels against the mortgagee thereof, who held them under a mortgage given by one who had them in his possession. Hendrie *v.* Canadian Bank of Commerce, 49 Mich. 401, 13 N. W. 792.

The debt, though evidenced by the mortgagor's note, may be proven, as against third parties, by the testimony of the mortgagor and without the production of the note itself. Hibbard *v.* Zenor, 82 Iowa 505, 49 N. W. 63.

As against a third party, in an action for possession, the mortgage is competent evidence of the mortgagee's right, without the production of the note, where no issue is made as to the ownership or payment of the same. Hibbard *v.* Zenor, 82 Iowa 505, 49 N. W. 63.

19. Huls *v.* Kimball, 52 Ill. 391; Young *v.* Kimball, 59 N. H. 446. See also Hendrie *v.* Canadian Bank of Commerce, 49 Mich. 101, 13 N. W. 792, for qualification of the rule.

Production and Proof of Note Required. — In an action by a mortgagee against a third party for possession of the mortgaged chattels the note and mortgage must be produced or accounted for. In such a case the execution of the note must be proved. It may not be admitted on mere production. Flynn *v.* Hathaway, 65 Ill. 462.

not a creditor of the mortgagor.[20] The mortgage may not, in such an action, be proved by the certificate of the officer in whose office it is filed.[21] It is no objection to the admissibility of the mortgage that its description was insufficient to give notice of the property mortgaged where the purchaser had actual notice of the fact.[22]

C. Admissibility. — a. *Declarations of Mortgagor.* — The declarations of the mortgagor respecting the mortgage or the mortgaged property are not in general admissible for or against either the mortgagee or a stranger to the mortgage in an action concerning the title to, or the possession of, the mortgaged property.[23] Such declarations may be received, of course, when against the interest of the declarant.[24]

b. *Parol Evidence.* — It has been held, though there is authority to the contrary, that the stipulations of the mortgage may be varied, as against third parties, or in their favor, by proof of contemporaneous parol agreements respecting the rights of the parties to the possession of the property mortgaged, or to dispose of the same.[25]

20. Davis *v.* Ramson, 26 Ill. 100.

21. Bissell *v.* Pearce, 28 N. Y. 252.

22. Plano Mfg. Co. *v.* Griffith, 75 Iowa 102, 39 N. W. 214; Ordway *v.* Kittle, 83 Iowa 752, 49 N. W. 1022.

23. Admissibility Against Purchasers With Knowledge. — In trover by a mortgagee against a third party, claiming under the mortgagor, evidence of conversations or acts of the mortgagor treating the mortgage as subsisting is not admissible in the mortgagee's behalf unless they were brought home to the defendant. Clark *v.* Houghton, 12 Gray (Mass.) 38.

As Against Mortgagee. — The declarations and admissions of a mortgagor made after the execution of the mortgage are inadmissible against the mortgagee in a contest between the latter and a third party. Bell *v.* Prewitt, 62 Ill. 361. See also Sparks *v.* Brown, 46 Mo. App. 529.

Otherwise When Party To Be Affected Is Connected in Any Way With the Declarations. — Haenschen *v.* Luchtemeyer, 49 Mo. 51.

In a contest between the mortgagee and the creditors of the mortgagor, statements made by the mortgagor to his creditors to obtain credit are admissible on the question of the *bona fides* of the transaction, though of course such evidence is to be limited to affect the rights of the mortgagee only when he is privy to the mortgagor's intent. Kalk *v.* Fielding, 50 Wis. 339, 7 N. W. 296.

Where the mortgagor remains in possession his acts and declarations in recording the mortgage will be presumed to be those of an agent of the mortgagee. Haenschen *v.* Luchtemeyer, 49 Mo. 51.

24. Declarations Against Interest. In a contest between a mortgagee and an attaching officer, declarations of the one in possession of the property that it was owned by the mortgagee are admissible in his behalf as a declaration against interest. Putnam *v.* Osgood, 52 N. H. 148.

25. Doctrine of Admissibility of Parol. — The mortgagee may show, as against a stranger to the mortgage claiming the property, that at the time of the execution of the mortgage it was orally agreed between the parties that the mortgagor should retain the possession of the mortgaged chattels. Pierce *v.* Stevens, 30 Me. 184.

Negotiations and Agreements of Parties. — As between the mortgagee and the purchaser from the mortgagor, evidence of the negotiations and agreements of the parties to the mortgage tending to show authority in the mortgagor to sell the mortgaged property is competent and material in favor of the purchaser under the rule permitting parol to vary a writing where the rights of

Possession of the mortgaged property, when not provided for in the mortgage, may of course be controlled by proof of a contemporaneous parol agreement.[26] In trespass by a mortgagee against an attaching officer the mortgagee may show that the mortgaged property remaining in his possession was not the property of the mortgagor, and that he could not have given a valid mortgage, where the defendant justifies under the plea that he took only part of the mortgaged property, leaving sufficient in the mortgagee's possession to satisfy his debt.[27]

c. *Return of Officer.* — As between a mortgagee and another who claims as a purchaser at a sheriff's sale of the judgment debtor's property, the sheriff's return on the execution as to the time of the levy is not conclusive against such mortgagee.[28]

d. *Waiver of the Lien.* — The waiver of a mortgage lien need not be established by written or direct evidence, but may be made to appear by a course of dealing between the parties to the mortgage.[29]

e. *Invalid Mortgage. — When Admissible.* — A chattel mortgage otherwise void for uncertainty in its description may be received in evidence against the sheriff taking property on an execution against the mortgagor, subject to proof of actual notice to the judgment creditor of the property covered by it.[30]

f. *On the Issue of Fraud.* — In actions of this class, where the good faith of the mortgage transaction is involved, a full and exhaustive examination of the parties upon all questions relating to

a stranger to the instrument are involved. Livingston *v.* Stevens, 122 Iowa 62, 94 N. W. 925.

In an action of trover by a mortgagee against the creditors of the mortgagor or their representatives, evidence of an agreement between the mortgagor and the mortgagee by which the latter was entitled to the immediate possession of the mortgaged chattels and the right to sell them until his debt should be due or paid is admissible. Ganong *v.* Green, 64 Mich. 488, 31 N. W. 461, second appeal 71 Mich. 1, 38 N. W. 661.

Contra. — Evidence of an agreement in parol between the mortgagor and the mortgagee, concurrently with the execution of the mortgage, that the mortgagor should retain the right to sell or exchange the mortgaged property is inadmissible in an action between the mortgagee and a third party to control a contrary provision in the mortgage itself. Clark *v.* Houghton, 12 Gray (Mass.) 38.

In an action of trover by a mortgagee against a third party evidence of a parol understanding between the mortgagor and the mortgagee regarding the possession of the mortgaged chattels is inadmissible in the defendant's behalf. Harvey *v.* McAdams, 32 Mich. 472.

26. Butts *v.* Privett, 36 Kan. 711, 14 Pac. 247; Pierce *v.* Stevens, 30 Me. 184.

27. Ward *v.* Henry, 19 Wis. 76, 88 Am. Dec. 672.

28. Not Conclusive as to Time of Levy. — Nall *v.* Granger, 8 Mich. 449, 77 Am. Dec. 462.

Proof of Fraud or Collusion May Be Made. — Nall *v.* Granger, 8 Mich. 449, 77 Am. Dec. 462.

To Show Disposition of Property. Putnam *v.* Osgood, 52 N. H. 148.

29. Proof by Circumstantial Evidence. — Livingston *v.* Stevens, 122 Iowa 62, 94 N. W. 825.

Evidence of Other Sales. — Mortgagee's Consent. — Livingston *v.* Stevens, 122 Iowa 62, 94 N. W. 925.

30. Admissibility of Mortgage Conditioned on Subsequent Proof. Ordway *v.* Kittle, 83 Iowa 752, 49 N. W. 1022.

the good faith of the transaction is permitted, though what the assignee of the alleged fraudulent mortgage may have paid for it is an immaterial circumstance.[31]

g. *Proof of Consideration After Judgment of Foreclosure.* Where a claim to the mortgaged property is made by a third party after it has been levied on under foreclosure, evidence that the mortgagor was not indebted to the mortgagee is not admissible.[32]

h. *Production of Obligation Secured as Evidence of Non-Payment.* In a controversy between the mortgagee and a third party over the possession of the property, the production by the mortgagee of the notes evidencing his debt is *prima facie* evidence that his debt remains unpaid.[33]

i. *Source of Mortgagor's Title.* — The source of the mortgagor's title to the mortgaged chattels is an immaterial inquiry in the mortgagee's action.[34]

j. *Irregularities in Foreclosure Proceedings.* — Where the plaintiff, in an action in replevin against a third party, claims under his mortgage, and not under a foreclosure of it, evidence of irregularities in the foreclosure proceedings is immaterial and inadmissible.[35]

5. Priorities. — The priorities of mortgages may be shown by parol.[36]

IX. SALE OR REMOVAL OF MORTGAGED PROPERTY.

1. Criminal Responsibility. — A. Burden of Proof. — If the statute penalizes a sale of the mortgaged property, made willfully and without the mortgagee's consent, the state is not required to establish fraudulent purpose and intent as an ingredient of the crime, nor to prove the absence of the mortgagee's consent to the sale.[37]

31. Kalk *v.* Fielding, 50 Wis. 339, 7 N. W. 296.

May Prove the Consideration for His Mortgage. — Knapp *v.* Gregory, 65 Hun 621, 20 N. Y. Supp. 21. The mortgagee may show a contingent liability at the time suit was brought, and that since it was brought the contingency has happened. Kackley *v.* State, 91 Ind. 437.

Though What the Assignee Paid is Immaterial. — Pyle *v.* Warren, 2 Neb. 241. See articles "Fraud" and "Fraudulent Conveyances," Vol. VI.

32. Ford *v.* Fargason, 120 Ga. 606, 48 S. E. 180.

33. Heagney *v.* J. I. Case Threshing Mach. Co., 4 Neb. (Unof.) 753, 99 N. W. 260.

34. Darnall *v.* Bennett, 98 Iowa 410, 67 N. W. 273.

35. Smith *v.* Phelan, 40 Neb. 765, 59 N. W. 562.

36. Admissibility of Parol to Show Respective Priorities Contemporaneously Filed or Recorded. Minor *v.* Sheehan, 30 Minn. 419, 15 N. W. 687. So the priorities of mortgages recorded at different dates may be shown by extrinsic evidence to be different from what they are presumptively by the order and time of their recording. Wray *v.* Fedlerke, 43 N. Y. Super. Ct. 335.

Evidence of fraud or lack of consideration may not be received to defeat the priority of an otherwise superior mortgage where an agreement respecting the priorities of the several mortgages is relied on. Lewis *v.* Burnham, 41 Kan. 546, 21 Pac. 572.

37. State *v.* Bronkol, 5 N. D. 507, 67 N. W. 680.

Where the fact of sale without the mortgagee's consent is by the statute made *prima facie* evidence of an intent to defraud, the defendant, upon proof of such facts, has the burden to disprove intent.[38] Of course there must be proof of the existence of the mortgage debt at the time of the sale, and upon such proof, together with proof of the sale of the property leaving the mortgage unsatisfied, fraudulent intent will be *prima facie* presumed.[39]

Proof of sale merely is not sufficient to support a conviction under a statute making criminal a removal of the property.[40] In a prosecution for the removal of the mortgaged property the value of the property is an immaterial circumstance and need not be proved where the punishment is not controlled by the value of the property.[41]

B. Admissibility of Evidence. — a. *Exemplified Copy of Mortgage.* — An exemplified copy of a mortgage duly recorded is admissible in a criminal prosecution for selling the mortgaged property, without other proof of the execution of the original.[42]

b. *As to the Property Mortgaged.* — Parol may be received to identify the mortgaged property and apply the description, even in a criminal prosecution for removing or disposing of the property.[43]

c. *Miscellaneous Matters.* — The declarations of the mortgagor while negotiating a sale of the mortgaged property, that he had obtained the permission of the mortgagee to sell it, are not competent evidence in his behalf.[44] The mortgagor may show that at the time of the execution of the mortgage a parol agreement was made that he should have the right to sell the property.[45] So in a prosecution under an indemnifying mortgage, parol is admissible to show that a

Where fraudulent intent is an element in the offense the prosecution has the burden of proving it like any other fact. Hampton *v.* State, 67 Ark. 266, 54 S. W. 746. See where particular instructions as to burden of proof on intent were considered.

38. State *v.* Williams, 35 S. C. 344, 14 S. E. 819.

Where the fact of sale without the mortgagee's consent to the sale is by the statute made *prima facie* evidence of an intent to defraud, the defendant, upon proof of such fact, has the burden of disproving intent. State *v.* Surles, 117 N. C. 720, 23 S. E. 324.

39. McCaskill *v.* State, 68 Ark. 490, 60 S. W. 234.

When Fraudulent Intent Presumed. — State *v.* Holmes, 120 N. C. 573, 26 S. E. 692; State *v.* Rice, 43 S. C. 200, 20 S. E. 986; Com. *v.* Cutler, 153 Mass. 252, 26 N. E. 855; State *v.* Manning, 107 N. C. 910, 12 S. E. 248.

40. Polk *v.* State, 65 Miss. 433, 4 So. 540.

41. Wilson *v.* State, 43 Neb. 745, 62 N. W. 209.

It will be presumed that the property was of some value. Wilson *v.* State, 85 Ga. 348, 11 S. E. 659.

42. Exemplified Copy Sufficient Proof of Execution. — Conley *v.* State, 85 Ga. 348, 11 S. E. 659.

43. Varnum *v.* State, 78 Ala. 29. But see Barclay *v.* State, 55 Ga. 179, where the mortgage described the property mortgaged as "one bay mare mule," and it was held that parol was inadmissible to show that there was a mistake in the description, and that it was intended to apply to a bay horse mule, and this even when the indictment alleged the mistake.

44. Mortgagor's Declarations as to Mortgagee's Consent. — Atwell *v.* State, 63 Ala. 61.

45. Proof of Parol Agreement. In Walker *v.* Camp, 69 Iowa 741, 27

liability has arisen under the instrument.[46] On the question of the mortgagor's intent in making the sale, evidence of prior sales by the mortgagor of other property covered by the particular mortgage is admissible.[47] It is also a circumstance proper for the jury's consideration that no attempt was made by the mortgagor to put the property beyond the mortgagee's reach or to hinder him in enforcing his lien.[48]

C. Defenses. — It is competent for a mortgagor, prosecuted for wrongfully selling part of a mortgaged crop, to show, as disproving intent, that the landlord's prior lien was so great as to consume the entire crop.[49] The defendant may also show that at the time of the sale he was mentally incapable of understanding what he was doing, and that after the sale he was in a hospital for treatment, and that he denied the validity of the sale as soon as he was restored to sanity.[50] Where the sale of mortgaged property is made an offense only when done with fraudulent intent the defendant may show that the sale was made for the purpose of procuring funds with which to pay the mortgage debt; and that consent thereto was given by the mortgagee's agent;[51] and where consent by the agent is asserted to have been given, the mortgagor may show the general authority of the agent, though both agent and principal deny the particular authority.[52] The fact that the purchaser of the property took with

N. W. 800, the court, on the proposition stated in the text, says: "We come, then, to the only question which seems to us to present any difficulty, and that is as to whether the rule of evidence relied upon as to the inadmissibility of parol evidence applicable to such a kind of case as this. In answer to this question we have to say that, in our opinion, it is not. The seller of mortgaged property is not to be convicted therefor without a criminal intent. If the consent is such, in whatever way it may be given, that the seller honestly believes that he is authorized to sell the property, his honest act cannot be converted into a criminal one by a technical rule of evidence framed for the protection of civil rights."

46. Where the mortgage was executed to indemnify the mortgagee against loss on account of a contract of suretyship for the mortgagor, the mortgagee may testify what amount he has paid under the suretyship contract. Conley *v.* State, 85 Ga. 348, 11 S. E. 659.

47. "In this case, the sale of the oxen by the defendant prior to the time he sold the corn and wagon was a fact which tended to show a fraudulent intent on his part in selling the corn and wagon. It was a fact which bore, if not directly, at least relevantly, upon that issue, and the state was entitled to have it considered by the jury. Having disposed of the oxen, a portion of the mortgaged property, thereby diminishing the security of the mortgagee, the subsequent disposition of the remainder of the mortgaged property would certainly have more the appearance of a fraudulent disposition than if he had not previously disposed of the oxen." Martin *v.* State, 28 Tex. App. 364, 13 S. W. 151.

48. Cobb *v.* State, 100 Ala. 19, 14 So. 362.

49. State *v.* Ellington, 98 N. C. 749, 4 S. E. 534.

50. State *v.* Munsen, 72 Mo. App. 543.

51. Atwell *v.* State, 63 Ala. 61; Walker *v.* Camp, 69 Iowa 741, 27 N. W. 800.

52. Authority of Agent. — Atwell *v.* State, 63 Ala. 61.

notice, actual or constructive, may be considered by the jury on the question of the mortgagor's intent,[53] that question being one of fact to be submitted to the jury.[54]

2. Civil Liability. — Defenses. — In a suit by the mortgagee against the mortgagor for the conversion of the mortgaged property the mortgagor may show that the property was removed to avoid damage from its peculiar situation.[55]

X. PAYMENT, RELEASE AND DISCHARGE.

1. Presumptions and Burden of Proof. — A. In General. — The party alleging payment of the mortgage debt and the discharge of the mortgage has the burden of proving such matters.[56]

B. Presumptions From Particular Facts. — a. *Possession of the Mortgaged Property.* — Possession of the mortgaged property by the mortgagor after the maturity of the debt, and after the property had once been in the mortgagee's possession, is presumptive evidence of payment of the mortgage debt.[57]

53. Notice. — Competent as a Circumstance. — In Briggs *v.* State (Tex. Crim.), 44 S. W. 491, the court said: "As a matter of law, it is not a defense to this character of prosecution that the appellant may have informed the party to whom he sold the property that it was under mortgage. See Thornton *v.* State, 34 Tex. Crim. 469, 31 S. W. 372. Of course this character of testimony is admissible, and it was so admitted by the court as going to relieve the defendant of the charge of fraudulent intent in the disposition of the property. Although the purchaser may have been informed by appellant that a mortgage existed against the property, yet the sale may still have been made with intent to defraud the mortgagee. The evidence introduced in this case does not even show that the purchaser bought with the understanding that he assumed the debt. Defendant's evidence does not suggest that, but merely that he informed the purchaser that the property was mortgaged. . . . The jury were authorized to determine the question of fraudulent intent from all the evidence before them, including that offered by the defendant, to the effect that he informed the purchaser at the time of the sale that the prosecutor had a mortgage against the property."

54. State *v.* Manning, 107 N. C. 910, 12 S. E. 248; Glass *v.* State, 23 Tex. App. 425, 5 S. W. 131.

55. Smith *v.* Anderson, 70 Vt. 424, 41 Atl. 441.

56. A third party, relying upon the satisfaction of the plaintiff's mortgage by reason of his having taken of the mortgaged property equal in value to the amount of his debt, has the burden of proving such fact. Miller *v.* McElwain, 52 Kan. 91, 34 Pac. 396. In an action by a junior against a prior mortgagee for possession of the mortgaged property, the junior mortgagee has the burden of establishing the satisfaction of the prior mortgage. McBrayer *v.* Haynes, 132 N. C. 608, 44 S. E. 115.

57. No such presumption obtains, however, where possession is not shown to have been delivered to the mortgagee. Carpenter *v.* Bridges, 32 Miss. 265.

Presumption Rebuttable. — The presumption of payment and discharge of a mortgage against crops, arising from the mortgagor's possession of the crop, may be explained by showing that he secured such possession surreptitiously. Zorn *v.* Livesley, 44 Or. 501, 75 Pac. 1057.

b. *Possession of the Mortgage and Obligation Secured.* — The possession by the mortgagor of the mortgage and the obligation which it was given to secure is *prima facie* evidence that the debt has been paid and the mortgage discharged.[58]

c. *Entries of Release and Recitals Therein.* — A recital of payment in the release of a chattel mortgage is only conclusive in favor of third parties who have acquired rights relying upon such recital.[59]

C. ADMISSIBILITY. — a. *As to Tender.* — Evidence of a tender to the mortgagee, by a third party representing the mortgagor, of the amount of the mortgagee's debt on the day of its maturity is admissible as tending to show a release of the mortgage.[60]

b. *As to Time for Payment.* — The time for the payment of a mortgage debt may be extended by proof of a parol agreement between the parties, even if the mortgage is under seal.[61]

XI. PENALTIES.

In an action to recover a penalty for failure to enter a partial payment of record, if the defendant sets up that the mortgage was wholly paid, he has the burden of proving such defense.[62] Where a penalty attaches only after a demand for a release, the plaintiff must, of course, prove the making of a proper demand.[63] Evidence of usury

58. Presumption From Possession by Mortgagor. — Wilkinson *v.* Solomon, 83 Ala. 438, 3 So. 705.

Even in Absence of Entry of Satisfaction. — Wilkinson *v.* Solomon, 83 Ala. 438, 3 So. 705.

As to Innocent Purchasers. — In a controversy between the mortgagee and a purchaser of the property, involving the lien of the mortgage, it was said: "The mortgagor's possession of the note and mortgage was *prima facie* evidence of its payment and discharge, though no entry of satisfaction was made on the margin of the record thereof. On the presumption of payment arising from the possession of the mortgage, a purchaser from the mortgagor may rely. The mortgagee and purchaser may both be innocent parties, but in such case the mortgagee, who furnished the mortgagor with the means and power to do the wrong, must bear the consequences." Wilkinson *v.* Solomon, 83 Ala. 438, 3 So. 705.

59. As to Innocent Purchasers. Waggoner *v.* First Nat. Bank, 43 Neb. 84, 61 N. W. 112. Thus the rule that the entry of release is open to explanation applies against a mortgagee who took his mortgage before the entry of release was made. See "Real Estate Mortgages," *infra* this article.

The recital of payment of the mortgage debt in a release is not always conclusive between the parties, but may be explained. Homer *v.* Grosholz, 38 Md. 520.

60. Tender as Evidence of Release. — Bledsoe *v.* Palmer (Tex. Civ. App.), 81 S. W. 97.

61. Flanders *v.* Barstow, 18 Me. 357.

Parol evidence is not admissible to establish an agreement that a debt secured by a mortgage, which does not name a time for the payment of the debt secured, should be payable at once. Baltes *v.* Ripp, 1 Abb. App. Dec. (N. Y.) 78.

62. Burden To Prove Payment. Lynn *v.* Bean (Ala.), 37 So. 515.

63. Where Demand Held Sufficiently Shown. — Clearwater Bank *v.* Kurkonski, 45 Neb. 1, 63 N. W. 133.

Satisfaction After Penalty Has Accrued. — Deeter *v.* Crossley, 26 Iowa 180; Hall *v.* Hurd, 40 Kan. 740.

in the debt secured may be received as tending to show whether the amount legally due had been paid before the mortgagee was called upon to discharge the mortgage.[64]

XII. FORECLOSURE.

1. Burden of Proof. — A. Future Property. — The plaintiff in foreclosure has the burden of showing that his mortgage has attached to property not in existence at the time the mortgage was executed.[65]

B. Priority of Mortgage Subsequently Executed and Recorded. — A mortgagee alleging the lien of his mortgage to be prior to an earlier and recorded mortgage has the burden of proving that it is so.[66]

C. Damage to Security. — Between Mortgagees. — The holder of a second mortgage claiming damages through the act of a prior chattel mortgagee, whereby his lien is lost, has the burden of proving that other property, by which also his debt is secured, is inadequate.[67]

D. As to Equitable Mortgage. — A party alleging an oral agreement to execute a mortgage, thereby constituting an equitable mortgage, and seeking to foreclose the same, has the burden of establishing the existence of the agreement amounting to such a mortgage by clear and convincing proof. The casual and indefinite declarations of the alleged mortgagor are not sufficient proof of such a mortgage.[68]

2. Admissibility and Proof of Mortgage. — When the original of a chattel mortgage is filed in another county than that in which it is

21 Pac. 585; Lynn *v.* Bean (Ala.), 37 So. 515.

64. Proof of Usury. — When Admissible. — "The amount of the debt secured by the chattel mortgage legally due from the plaintiff to the defendant was necessarily involved in determining whether the plaintiff had fully paid it before demanding that the defendant should discharge the mortgage. If, as claimed by the plaintiff, usury was included in the note secured by the mortgage, he was entitled to show the amount of such usury, to enable the jury to determine whether he had fully paid all that was legally due from him to the defendant thereon, before he called upon the defendant to discharge the mortgage. Hence it was not error to admit evidence tending to show that usury was included in the mortgage note. The fact that it became afterward, in the course of the trial, immaterial to the issue whether usury was or was not included in the mortgage note did not render the admission of evidence, legitimate at the time it was admitted, erroneous," Giffin *v.* Barr, 60 Vt. 599, 15 Atl. 190.

65. In a proceeding for foreclosure against particular livestock and its increase, where such is covered by the mortgage, the plaintiff has the burden of showing that there has been an increase, and the extent of the same. Gammon *v.* Bull, 86 Iowa 754, 53 N. W. 340.

66. A mortgagee in a mortgage subsequent in time to another recorded mortgage, given to secure money loaned to be applied in satisfaction of the earlier mortgage, has the burden to establish an agreement that his mortgage shall be superior to the lien of the earlier mortgage. Citizens State Bank *v.* Smith, 125 Iowa 505, 101 N. W. 172.

67. Union Nat. Bank *v.* Moline, 7 N. D. 201, 73 N. W. 527.

68. Shelburne *v.* Letsinger, 52 Ala. 96.

sought to be foreclosed, and cannot be withdrawn, a certified copy thereof is admissible in evidence."[69] In a suit for foreclosure on property in the possession of a third party, as against such third party the execution of the mortgage is sufficiently proved to admit it in evidence by evidence of the mortgagor's declarations that the subscribing witnesses are non-residents of the state, and by the testimony of two competent witnesses that the mortgagor's signature is genuine.[70]

3. Proof of the Debt Secured. — Where a mortgage recites that it is given to secure a particular instrument of debt, the failure of the mortgagee to produce such writing or to explain its non-production is *prima facie* evidence of the non-existence or discharge of the debt.[71]

4. Record of Judgment as Proof of Debt. — Third Party. — The record of a judgment against the mortgagor is not admissible in favor of a purchaser of mortgaged property sold under an execution on the judgment to show, as against the mortgagee, the existence of a debt prior to the judgment.[72]

5. Mode of Exercise of Power of Private Sale. — The exercise by a mortgagee of his right under a private sale clause by selling the property, consisting of several different articles, *en masse,* is *prima facie* evidence of unfairness.[73]

PART II.— REAL ESTATE MORTGAGES.

I. NATURE OF TRANSACTION.

1. Intention as Criterion. — Whether a transaction, in form a sale or conveyance, absolute or conditional, is such in fact depends upon the intention of the parties to the instrument.[74] The material

69. And this is true even under the statute (Sayles Stat. Tex., Art. 3190*c*, Par. 3) providing that a copy of such an instrument, certified by the clerk, shall be received only for the purpose of proving the fact of filing according to the indorsement thereon. Grounds *v.* Ingram, 75 Tex. 509, 12 S. W. 118.

70. Chator *v.* Brunswick-Balke-Collender Co., 71 Tex. 588, 10 S. W. 250.

71. This rule does not apply, however, where it does not appear that any separate written evidence of the debt accompanied the mortgage, and in such a case the recitals of the mortgage are alone sufficient. Scott *v.* Cotten, 91 Ala. 623, 8 So. 783.

When foreclosure only is sought it has been held that the recitals in the mortgage are alone sufficient to show an indebtedness, and are *prima facie* proof of the execution of the note secured. Andrews *v.* Reed (Kan.), 48 Pac. 29.

72. Troy *v.* Smith, 33 Ala. 469.

73. Johnson Bros. *v.* Selden, 140 Ala. 418, 37 So. 249. But see Keating *v.* Hannenkamp, 100 Mo. 161, 13 S. W. 89.

74. Intention of Parties as Decisive of Nature of Instrument. *California.* — Henley *v.* Hotaling, 41 Cal. 22.

Illinois. — Sutphen *v.* Cushman, 35 Ill. 186; Fisher *v.* Green, 142 Ill. 80, 31 N. E. 172; Aetna Ins. Co. *v.* Jacobson, 105 Ill. App. 283; Preschebaker *v.* Feaman, 32 Ill. 475.

intention is that existing at the time the instrument is executed and the transaction takes place, and evidence of subsequent matters is competent only so far as it tends to illustrate the character of the transaction at the time.[75] The intention here meant is not the secret and unexpressed intention of either of the parties, but the intention of both parties as declared or manifested by appropriate acts or declarations, or by circumstances attending the transaction exemplifying its true nature.[76]

Iowa. — Hughes *v.* Sheaff, 19 Iowa 335.

Maine. — Hawes *v.* Williams, 92 Me. 483, 43 Atl. 101.

Maryland. — Hopper *v.* Smyser, 90 Md. 363, 45 Atl. 206.

Michigan. — Cornell *v.* Hall, 22 Mich. 377.

Minnesota. — King *v.* McCarthy, 50 Minn. 222, 52 N. W. 648.

New York. — James *v.* Morey, 2 Cow. 266; Kraemer *v.* Adelsberger, 122 N. Y. 467, 25 N. E. 859.

Oklahoma. — Weiseham *v.* Hocker, 7 Okla. 250, 54 Pac. 464.

Pennsylvania. — Null *v.* Fries, 110 Pa. St. 521, 1 Atl. 551; Wallace *v.* Smith, 155 Pa. St. 78, 25 Atl. 807, 35 Am. St. Rep. 868.

Texas. — Davis *v.* Brewster, 59 Tex. 93; Howard *v.* Kopperl, 74 Tex. 494, 5 S. W. 627.

Vermont. — Graham *v.* Stevens, 34 Vt. 166, 80 Am. Dec. 675.

West Virginia. — Sadler *v.* Taylor, 49 W. Va. 104, 38 S. E. 583.

Wisconsin. — Smith *v.* Crosby, 47 Wis. 160, 2 N. W. 104; Hunter *v.* Maanum, 78 Wis. 656, 48 N. W. 51.

75. Intention at Time of Execution Governs Character of Transaction. — *Alabama.* — Freeman *v.* Baldwin, 13 Ala. 246.

Kansas. — Knowles *v.* Williams, 58 Kan. 221, 48 Pac. 856.

Maine. — Hawes *v.* Williams, 92 Me. 483, 43 Atl. 101; Reed *v.* Reed, 75 Me. 264.

Massachusetts. — Harrison *v.* Phillips Academy, 12 Mass. 455; Marden *v.* Babcock, 2 Metc. 99.

Michigan. — Swetland *v.* Swetland, 3 Mich. 482.

Minnesota. — King *v.* McCarthy, 50 Minn. 222, 52 N. W. 648; Buse *v.* Page, 32 Minn. 111, 19 N. W. 736, 20 N. W. 95.

Montana. — Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240; Kleinschmidt *v.* Kleinschmidt, 9 Mont. 477, 24 Pac. 266.

Nebraska. — Saunders *v.* Ayres, 63 Neb. 271, 88 N. W. 526.

New Hampshire. — Lund *v.* Lund, 1 N. H. 39, 8 Am. Dec. 29.

New Jersey. — Kearney *v.* Macomb, 16 N. J. Eq. 189; Frink *v.* Adams, 36 N. J. Eq. 485.

New York. — Barrett *v.* Carter, 3 Lans. 68; McCauley *v.* Smith, 132 N. Y. 524, 30 N. E. 997.

North Carolina. — Poston *v.* Jones, 122 N. C. 536, 29 S. E. 951.

North Dakota. — Devore *v.* Woodruff, 1 N. D. 143, 45 N. W. 701.

Ohio. — Miami Exp. Co. *v.* United States Bank, Wright 248.

Pennsylvania. — Kelly *v.* Thompson, 7 Watts 401.

Texas. — Gray *v.* Shelby, 83 Tex. 405, 18 S. W. 809.

Utah. — Wasatch Min. Co. *v.* Jennings, 5 Utah 385, 16 Pac. 399.

West Virginia. — Hursey *v.* Hursey, 49 S. E. 367.

A deed absolute on its face cannot be converted by parol evidence into a mortgage where circumstances indicate a sale and the grantee took the property with a view to speculation. Whelan *v.* Tobener, 71 Mo. App. 361.

76. *United States.* — Lewis *v.* Wells, 85 Fed. 896; Jones *v.* Brittan, 1 Woods 667, 13 Fed. Cas. No. 7455; Andrews *v.* Hyde, 3 Cliff. 516, 1 Fed. Cas. No. 377.

Alabama. — Reeves *v.* Abercrombie, 108 Ala. 535, 19 So. 41; Martin *v.* Martin, 123 Ala. 191, 26 So. 525; Turnipseed *v.* Cunningham, 16 Ala. 501, 50 Am. Dec. 190; Vincent *v.* Walker, 86 Ala. 33, 5 So. 465; Adams *v.* Pilcher, 92 Ala. 474, 8 So. 757; Douglass *v.* Moody, 80 Ala. 61; West *v.* Hendrix, 28 Ala. 226.

California. — Low *v.* Henry, 9 Cal.

2. Relevancy and Admissibility. — A. Admissibility of Parol in General. — a. *In Equity and Under the Code.* — The rule universally obtains, in equity and under the codes of the various states, that parol evidence is admissible to show that an instrument, in form a deed, whether absolute or conditional, was intended by the parties to be in fact a mortgage.[77] In some jurisdictions the operation of

538; Ahern *v.* McCarthy, 107 Cal. 382, 40 Pac. 482.

Iowa. — Hughes *v.* Sheaff, 19 Iowa 335.

Kansas. — Reeder *v.* Gorusch, 55 Kan. 553, 40 Pac. 897.

Louisiana. — Benjamin's Succession, 39 La. Ann. 612, 2 So. 187.

Maryland. — Hopper *v.* Smyser, 90 Md. 363, 45 Atl. 206.

Michigan. — Cornell *v.* Hall, 22 Mich. 377.

Minnesota. — Phoenix *v.* Gardner, 13 Minn. 430.

Missouri. — Holmes *v.* Fresh, 9 Mo. 201.

Montana. — Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240.

Nebraska. — Gadsden *v.* Thrush, 56 Neb. 565, 76 N. W. 1060.

New York. — Barton *v.* Lynch, 69 Hun 1, 23 N. Y. Supp. 217; Jones *v.* Jones, 43 N. Y. St. 434, 17 N. Y. Supp. 905.

Pennsylvania. — Todd *v.* Campbell, 32 Pa. St. 250.

Texas. — Gazley *v.* Herring (Tex. Civ. App.), 17 S. W. 17; Focke *v.* Buchaman (Tex. Civ. App.), 59 S. W. 820; Haney *v.* Clark, 65 Tex. 93.

Washington. — Swarm *v.* Boggs, 12 Wash. 246, 40 Pac. 941.

Wisconsin. — Smith *v.* Crosby, 47 Wis. 160, 2 N. W. 104.

The unexpressed intention of the wife that a conveyance absolute made on negotiations carried on by the husband should be a mortgage is not sufficient to reduce the deed to a mortgage. Brewster *v.* Davis, 56 Tex. 478. But see same case on second appeal, Davis *v.* Brewster, 59 Tex. 93.

To convert a deed into a security the proof must clearly show a mutual understanding of the parties to the instrument that it was executed, delivered and accepted as a mortgage. Larson *v.* Dutiel, 14 S. D. 476, 85 N. W. 1006; Tilden *v.* Streeter, 45 Mich. 533, 8 N. W. 502; Jasper *v.* Hazen, 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58; Rue *v.* Dole, 107 Ill. 275; Henley *v.* Hotaling, 41 Cal. 22.

An Indiana case holds it is not permissible for the grantee to testify as to his understanding that he was buying the property in controversy rather than lending money upon its security. Zimmerman *v.* Marchland, 23 Ind. 474.

77. Parol Admissible in Equity and Under the Code.

United States. — Taylor *v.* Luther, 2 Sumn. 228, 23 Fed. Cas. No. 13,796; Wyman *v.* Babcock, 2 Curt. 386, 30 Fed. Cas. No. 18,113; Jenkins *v.* Eldredge, 3 Story 181, 13 Fed. Cas. No. 7266; Hubbard *v.* Stetson, 3 MacArthur 113; Dow *v.* Chamberlin, 5 McLean 281, 7 Fed. Cas. No. 4037; Pioneer Gold Mine Co. *v.* Baker, 10 Sawy. 539; Andrews *v.* Hyde, 3 Cliff. 516, 1 Fed. Cas. No. 377; Amory *v.* Lawrence, 3 Cliff. 523, 1 Fed. Cas. No. 336; Jackson *v.* Lawrence, 117 U. S. 679; Brick *v.* Brick, 98 U. S. 514; Peugh *v.* Davis, 96 U. S. 332; Horbach *v.* Hill, 112 U. S. 144.

Alabama. — Chapman *v.* Hughes, 14 Ala. 218; Williams *v.* Reggan, 111 Ala. 621, 20 So. 614; Daniels *v.* Lowery, 92 Ala. 519, 8 So. 352; Reeves *v.* Abercrombie, 108 Ala. 535, 19 So. 41; Kramer *v.* Brown, 114 Ala. 612, 21 So. 817; Glass *v.* Hieronymus, 125 Ala. 140, 28 So. 71; Rose *v.* Gandy, 137 Ala. 329, 34 So. 239; Richter *v.* Noll, 128 Ala. 198, 30 So. 740.

Arkansas. — Blakemore *v.* Byrnside, 7 Ark. 505; Jordan *v.* Fenno, 13 Ark. 593; Hannah *v.* Carrington, 18 Ark. 85; Williams *v.* Cheatham, 19 Ark. 278; Anthony *v.* Anthony, 23 Ark. 479; Harmon *v.* May, 40 Ark. 146; Stryker *v.* Hershy, 38 Ark. 264; Hershey *v.* Luce, 56 Ark. 320, 19 S. W. 963, 20 S. W. 6; Trieber *v.* Andrews, 31 Ark. 163.

California. — Pierce *v.* Robinson, 13 Cal. 116; Baker *v.* Firemen's Fund Ins. Co., 79 Cal. 34, 21 Pac. 357; Ahern *v.* McCarthy, 107 Cal. 382, 40 Pac. 482; Johnson *v.* Sherman, 15 Cal. 287, 76 Am. Dec. 481; Ross *v.* Brusie, 64 Cal. 245, 30 Pac. 811; Vance *v.* Anderson, 113 Cal. 532, 45 Pac. 816; Husheon *v.* Husheon, 71 Cal. 407, 12 Pac. 410; Locke *v.* Moulton, 96 Cal. 21, 30 Pac. 957, 108 Cal. 49, 41 Pac. 28, 132 Cal. 145, 64 Pac. 87.

Colorado. — Townsend *v.* Petersen, 12 Colo. 491, 21 Pac. 619; Jefferson Co. Bank *v.* Hummel, 11 Colo. App. 337, 53 Pac. 286; Davis *v.* Hopkins, 18 Colo. 153, 32 Pac. 70; Perot *v.* Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258. See Code Civ. Proc., § 263, authorizing the receiving of such evidence.

Connecticut. — Bacon *v.* Brown, 19 Conn. 29; Reading *v.* Weston, 8 Conn. 117, 20 Am. Dec. 97; French *v.* Burns, 35 Conn. 359; Williams *v.* Chadwick, 74 Conn. 252, 50 Atl. 720. See Osgood *v.* Thompson Bank, 30 Conn. 27.

Delaware. — Walker *v.* Farmers Bank, 8 Houst. 258, 10 Atl. 94, 14 Atl. 819; Hall *v.* Livingston, 3 Del. Ch. 348.

Florida. — First Nat. Bank *v.* Ashmead, 23 Fla. 379, 2 So. 657; Chiares *v.* Brady, 10 Fla. 133; Lindsay *v.* Matthews, 17 Fla. 575; Shear *v.* Robinson, 18 Fla. 379; Franklin *v.* Ayer, 22 Fla. 654.

Georgia. — Jones *v.* Grantham, 80 Ga. 472, 5 S. E. 764. See § 3809, Code of 1882, and § 2725, Code of 1895, limiting the rule stated in the text.

Idaho. — Kelly *v.* Leachman, 2 Idaho 1112, 3 Pac. 15; Winters *v.* Swift, 2 Idaho 60, 3 Pac. 15; Felland *v.* Vollmer Mill. & Merc. Co., 6 Idaho 120, 53 Pac. 268.

Illinois. — Strong *v.* Strong, 126 Ill. 301, 18 N. E. 665; Northern Assur. Co. *v.* Chicago Mut. Bldg. & L. Ass'n, 98 Ill. App. 152, *affirmed* 198 Ill. 474, 64 N. E. 979; Gillespie *v.* Hughes, 86 Ill. App. 202; Heaton *v.* Gaines, 198 Ill. 479, 64 N. E. 1081; Helm *v.* Boyd, 124 Ill. 370, 16 N. E. 85; Whittemore *v.* Fisher, 132 Ill. 243, 24 N. E. 636; May *v.* May, 158 Ill. 209, 42 N. E. 56; Trogdon *v.* Trogdon, 164 Ill. 144, 45 N. E. 575.

Indiana. — Loeb *v.* McCalister, 15 Ind. App. 643, 41 N. E. 1061; Matchett *v.* Knisely, 27 Ind. App. 664, 62 N. E. 87; Wolfe *v.* McMillan, 117 Ind. 587, 20 N. E. 509; Diven *v.* Johnson, 117 Ind. 512, 20 N. E. 428, 3 L. R. A. 308; Kitts *v.* Willson, 130 Ind. 492, 29 N. E. 401; Mott *v.* Fiske, 155 Ind. 597, 58 N. E. 1053; Brown *v.* Follette, 155 Ind. 316, 58 N. E. 197.

Iowa. — Bigler *v.* Jack, 114 Iowa 667, 87 N. W. 700; Butterfield *v.* Kirtley, 114 Iowa 520, 87 N. W. 407; Rogers *v.* Davis, 91 Iowa 730, 59 N. W. 265; Ensminger *v.* Ensminger, 75 Iowa 89, 39 N. W. 208, 9 Am. St. Rep. 462; Robertson *v.* Moline, Milburn-Stoddard Co., 106 Iowa 414, 76 N. W. 736; Knight *v.* McCord, 63 Iowa 429, 19 N. W. 310; Haggerty *v.* Brower, 105 Iowa 395, 75 N. W. 321.

Kansas. — Barnes *v.* Crockett, 4 Kan. App. 777, 46 Pac. 997; Reeder *v.* Gorsuch, 55 Kan. 553, 40 Pac. 897; McDonald *v.* Kellogg, 30 Kan. 170, 2 Pac. 507; Winston *v.* Burnell, 44 Kan. 367, 24 Pac. 477.

Kentucky. — Oberdorfer *v.* White, 25 Ky. L. Rep. 1629, 78 S. W. 436; Trimble *v.* McCormick, 12 Ky. L. Rep. 857, 15 S. W. 358; Seiler *v.* Northern Bank, 86 Ky. 128, 5 S. W. 536. But see *contra,* Munford *v.* Green, 103 Ky. 140, 44 S. W. 419, collecting, reviewing and criticising earlier cases in that state.

Louisiana. — See Crozier *v.* Ragan, 38 La. Ann. 154; Mulhaupt *v.* Youree, 35 La. Ann. 1052. But see Franklin *v.* Sewall, 110 La. Ann. 292, 34 So. 448, and Janney *v.* Ober, 28 La. Ann. 281, which apparently hold otherwise.

Maine. — Knapp *v.* Bailey, 79 Me. 195, 9 Atl. 122, 1 Am. St. Rep. 295; Libby *v.* Clark, 88 Me. 32, 33 Atl. 657; Lewis *v.* Small, 71 Me. 552; Bradley *v.* Merrill, 88 Me. 319, 34 Atl. 160; Stinchfield *v.* Milliken, 71 Me. 567.

Maryland. — Booth *v.* Robinson, 55 Md. 419; Pickett *v.* Wadlow, 94 Md. 564, 51 Atl. 423; Baugher *v.* Merryman, 32 Md. 185; Gaither *v.* Clarke, 67 Md. 18, 8 Atl. 740.

Massachusetts. — Flagg *v.* Mann, 14 Pick. 467; Cullen *v.* Carey, 146 Mass. 50, 15 N. E. 131; Hassan *v.* Barrett, 115 Mass. 256; Campbell *v.* Dearborn, 109 Mass. 130, 12 Am.

Rep. 671; Pond *v.* Eddy, 113 Mass. 149.

Michigan. — Carveth *v.* Winegar, 133 Mich. 34, 94 N. W. 381; McArthur *v.* Robinson, 104 Mich. 540, 62 N. W. 713; Kellogg *v.* Northrup, 115 Mich. 327, 73 N. W. 230; Abbott *v.* Gruner, 121 Mich. 140, 79 N. W. 1065; Sowles *v.* Wilcox, 127 Mich. 166, 86 N. W. 689.

Minnesota. — Belote *v.* Morrison, 8 Minn. 87; Backus *v.* Burke, 63 Minn. 272, 65 N. W. 459; Marshall *v.* Thompson, 39 Minn. 137, 39 N. W. 309; Nye *v.* Swan, 49 Minn. 431, 52 N. W. 39; Terry *v.* Wilson, 50 Minn. 570, 52 N. W. 973.

Mississippi. — Blake *v.* Morrisson, 33 Miss. 123; Vasser *v.* Vasser, 1 Cushm. 378; Freeman *v.* Wilson, 51 Miss. 329; Culp *v.* Wooten, 79 Miss. 503, 31 So. 1; Littlewort *v.* Davis, 50 Miss. 403; Weathersly *v.* Weathersly, 40 Miss. 462, 90 Am. Dec. 344; Schwartz *v.* Lieber, 79 Miss. 257, 30 So. 649.

Missouri. — Zittlosen Tent Co. *v.* Exchange Bank, 57 Mo. App. 19; Book *v.* Beasly, 138 Mo. 455, 40 S. W. 101; Hargadine *v.* Henderson, 97 Mo. 375, 11 S. W. 218; Reilly *v.* Cullen, 159 Mo. 322, 60 S. W. 126; Wood *v.* Matthews, 73 Mo. 477; Bobb *v.* Wolff, 148 Mo. 335, 49 S. W. 996; Jones *v.* Rush, 156 Mo. 364, 57 S. W. 118.

Montana. — Gregg *v.* Kommers, 22 Mont. 511, 57 Pac. 92; Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240.

Nebraska. — Morrow *v.* Jones, 41 Neb. 867, 60 N. W. 369; Tower *v.* Fetz, 26 Neb. 706, 42 N. W. 884, 18 Am. St. Rep. 795; Tannyhill *v.* Pepperl, 96 N. W. 1005; Dickson *v.* Stewart, 98 N. W. 1085; Stall *v.* Jones, 47 Neb. 706, 66 N. W. 653.

Nevada. — Saunders *v.* Stewart, 7 Nev. 200.

New Jersey. — Vanderhoven *v.* Romaine, 56 N. J. Eq. 1, 39 Atl. 129; Phillips *v.* Hullziger, 20 N. J. Eq. 308; De Camp *v.* Crane, 19 N. J. Eq. 166; Van Keuren *v.* McLaughlin, 19 N. J. Eq. 187; Crane *v.* Decamp, 21 N. J. Eq. 414; Winters *v.* Earl, 52 N. J. Eq. 52, 28 Atl. 15; Pace *v.* Bartles, 47 N. J. Eq. 170, 20 Atl. 352.

New Mexico. — King *v.* Warrington, 2 N. M. 318.

New York. — Tibbs *v.* Morris, 44 Barb. 138; Barry *v.* Hamburg-Bremen F. Ins. Co., 110 N. Y. 1, 17 N. E. 405; Ryan *v.* Dox, 34 N. Y. 307, 90 Am. Dec. 696, *reversing* 25 Barb. 440; Burnett *v.* Wright, 135 N. Y. 543, 32 N. E. 253; Barry *v.* Colville, 129 N. Y. 302, 29 N. E. 307; Van Buren *v.* Olmstead, 5 Paige 9; *In re* Holmes, 79 App. Div. 264, 79 N. Y. Supp. 592; Strong *v.* Stewart, 4 Johns. Ch. 167; Clark *v.* Henry, 2 Cow. 324; Cook *v.* Eaton, 16 Barb. 439; Sidway *v.* Sidway, 54 Hun 634, 7 N. Y. Supp. 421; Odell *v.* Montross, 68 N. Y. 499; Clifford *v.* Gates, 70 Hun 597, 23 N. Y. Supp. 1085.

North Carolina. — Kimborough *v.* Smith, 17 N. C. 558; Sprague *v.* Bond, 115 N. C. 530, 20 S. E. 709; Hall *v.* Lewis, 118 N. C. 509, 24 S. E. 209; Egerton *v.* Jones, 102 N. C. 278, 9 S. E. 2, 107 N. C. 284, 12 S. E. 434; Green *v.* Sherrod, 105 N. C. 197, 10 S. E. 986.

North Dakota. — Jasper *v.* Hazen, 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58; Devore *v.* Woodruff, 1 N. D. 143, 45 N. W. 701; O'Toole *v.* Omlie, 8 N. D. 444, 79 N. W. 849.

Ohio. — First Nat. Bank *v.* Central Chandelier Co., 9 O. C. D. 807; Mathews *v.* Leaman, 24 Ohio St. 615; Slutz *v.* Desenberg, 28 Ohio St. 371; Wilson *v.* Giddings, 28 Ohio St. 554; Shaw *v.* Walbridge, 33 Ohio St. 1; Kemper *v.* Campbell, 44 Ohio St. 210, 6 N. E. 566.

Oklahoma. — Yingling *v.* Redwine, 12 Okla 64, 69 Pac. 810; Stith *v.* Peckham, 4 Okla. 254, 46 Pac. 664; Balduff *v.* Griswold, 9 Okla. 438, 60 Pac. 223; Weiseham *v.* Hocker, 7 Okla. 250, 54 Pac. 464.

Oregon. — Hurford *v.* Harned, 6 Or. 362; Stephens *v.* Allen, 11 Or. 188, 3 Pac. 168; Swegle *v.* Belle, 20 Or. 323, 25 Pac. 633; Marshall *v.* Williams, 21 Or. 268, 28 Pac. 137; Lovejoy *v.* Chapman, 23 Or. 571, 32 Pac. 687.

Pennsylvania. — Kelly *v.* Thompson, 7 Watts 401; Friedley *v.* Hamilton, 17 Serg. & R. 70, 17 Am. Dec. 638; Paige *v.* Wheeler, 92 Pa. St. 282; Todd *v.* Campbell, 32 Pa. St. 250; Houser *v.* Lamont, 55 Pa. St. 311, 93 Am. Dec. 755; McClurkan *v.* Thompson, 69 Pa. St. 305; Umbenhower *v.* Miller, 101 Pa. St. 71; Wallace *v.* Smith, 155 Pa. St. 78, 25 Atl. 807, 35 Am. St. Rep. 868; Pancake

v. Cauffman, 114 Pa. St. 113, 7 Atl. 67; Fisher *v.* Witham, 132 Pa. St. 488, 19 Atl. 276; Reeder *v.* Trullinger, 151 Pa. St. 287, 24 Atl. 1104.

South Carolina. — Welborn *v.* Dixon, 70 S. C. 108, 49 S. E. 232; Walker *v.* Walker, 17 S. C. 329; Lewie *v.* Hallman, 53 S. C. 18, 30 S. E. 601; Campbell *v.* Linder, 50 S. C. 169, 27 S. E. 648; Brickle *v.* Leach, 55 S. C. 510, 33 S. E. 720; Shiver *v.* Arthur, 54 S. C. 184, 32 S. E. 310.

South Dakota. — Meyer *v.* Davenport Elev. Co., 12 S. D. 172, 80 N. W. 189; Forester *v.* Van Auken, 96 N. W. 301.

Tennessee. — Jones *v.* Jones, 1 Head 105; Lane *v.* Dickerson, 10 Yerg. 373; Turbeville *v.* Gibson, 5 Heisk. 565; Ruggles *v.* Williams, 1 Head 141; Robinson *v.* Lincoln Sav. Bank, 85 Tenn. 363, 3 S. W. 656.

Texas. — Brewster *v.* Davis, 56 Tex. 478; Hexter *v.* Urwitz, 6 Tex. Civ. App. 580, 25 S. W. 1101; Wiggins *v.* Wiggins, 16 Tex. Civ. App. 335, 40 S. W. 643; White *v.* Harris, 85 Tex. 42, 19 S. W. 1077; Stafford *v.* Stafford, 29 Tex. Civ. App. 73, 71 S. W. 984; Lehman *v.* Chatham Mach. Co., 28 Tex. Civ. App. 228, 66 S. W. 796; Loving *v.* Milliken, 59 Tex. 423; Calhoun *v.* Lumpkin, 60 Tex. 185; McLean *v.* Ellis, 79 Tex. 398, 15 S. W. 394; Miller *v.* Yturria, 69 Tex. 549, 7 S. W. 206.

Utah. — Wasatch Min. Co. *v.* Jennings, 5 Utah 243, 15 Pac. 65, 5 Utah 385, 16 Pac. 399; Peck *v.* Girard F. & M. Ins. Co., 16 Utah 121, 51 Pac. 255, 27 Am. St. Rep. 600; Ewing *v.* Keith, 16 Utah 312, 52 Pac. 4.

Vermont. — Hills *v.* Loomis, 42 Vt. 562; Wright *v.* Bates, 13 Vt. 341; Conner *v.* Chase, 15 Vt. 764; Crosby *v.* Leavitt, 50 Vt. 239; Morgan *v.* Walbridge, 56 Vt. 405; Rich *v.* Doane, 35 Vt. 125.

Virginia. — Ransone *v.* Frayser, 10 Leigh 592; Snavely *v.* Pickle, 29 Gratt. 27; Ross *v.* Norvell, 1 Wash. 14, 1 Am. Dec. 422; Edwards *v.* Wall, 79 Va. 321; Phelps *v.* Seely, 22 Gratt. 573; Tuggle *v.* Berkeley, 101 Va. 83, 43 S. E. 199.

Washington. — Ross *v.* Howard, 31 Wash. 393, 72 Pac. 74; Goon Gan *v.* Richardson, 16 Wash. 373, 47 Pac. 762.

West Virginia. — Lawrence *v.* DuBois, 16 W. Va. 443; Billingsley *v.* Stutler, 52 W. Va. 92, 43 S. E. 96; Shank *v.* Groff, 43 W. Va. 337, 27 S. E. 340; McNeel *v.* Auldridge, 34 W. Va. 748, 12 S. E. 851; Gilchrist *v.* Beswick, 33 W. Va. 168, 10 S. E. 371; Hoffman *v.* Ryan, 21 W. Va. 415; Davis *v.* Demming, 12 W. Va. 246.

Wisconsin. — Nightingale *v.* Barens, 47 Wis. 389, 2 N. W. 767; Hoile *v.* Bailey, 58 Wis. 434, 17 N. W. 322; Schriber *v.* LeClair, 66 Wis. 579, 29 N. W. 570, 889; McCormack *v.* Herndon, 67 Wis. 648, 31 N. W. 303; Schierl *v.* Newburg, 102 Wis. 552, 78 N. W. 761; Jordan *v.* Warner, 107 Wis. 539, 83 N. W. 946; Beebe *v.* Wisconsin Mtge. & Loan Co., 117 Wis. 328, 93 N. W. 1103.

Parol evidence is admissible in equity to show that a deed absolute was intended as a mortgage, having been placed in escrow accompanied by a written agreement authorizing redemption by making certain payments. Lewis *v.* Wells, 85 Fed. 896.

Under the Illinois statute providing that a deed in form absolute intended to operate as a security only shall be so considered, parol may be received to show that a deed in which the grantee assumed a mortgage was itself a mortgage, and that it had never been delivered or accepted by the grantee. Merriman *v.* Schmidtt, 211 Ill. 263, 71 N. E. 986.

Parol is admissible for such a purpose in a controversy between the grantor's wife and his creditors. Carter *v.* Hallahan, 61 Ga. 314.

Where a deed is absolute on its face, and was intended so to be, it cannot be shown to have been made pursuant to an oral agreement for a conditional sale or a mortgage. Hopper *v.* Smyser, 90 Md. 363, 45 Atl. 206.

Parol is admissible in equity to show the relations of parties, or any fact or circumstance which would establish an equity of right to redeem and no further. Sutphen *v.* Cushman, 35 Ill. 186.

It may be shown by parol that a formal deed was executed, not as security for, but in payment of, the husband's debt, where the wife claims it to have been otherwise executed pursuant to a written contract to this effect. Blazy *v.* McLean, 129 N. Y. 44, 29 N. E. 6.

this rule is limited by statute.[78] Such evidence may be received in favor of either the grantor[79] or grantee[80] against the other or against third parties, unless they have been misled by the form of the transaction and acquired rights upon the faith of the transaction being what it purports to be,[81] or in favor of third parties.[82] It makes no difference that the evidence offered will defeat the very operation of the instrument; it is nevertheless admissible.[83] The rules stated apply to official deeds, as of sheriff's, to the same extent.[84]

b. *At Law.* — While there are cases to the contrary,[85] the prevail-

Statute of Limitations. — When a deed was intended to be a mortgage parol is admissible at any time until barred by the statute to show the character of the transaction. Anding *v.* Davis, 38 Miss. 574, 77 Am. Dec. 658.

The recital in a deed absolute that the consideration therefor had been paid, and an answer that it was not fully paid, will not justify the admission of parol evidence to show the instrument to have been intended as a mortgage in a jurisdiction where parol is admissible to show the character of the deed to be a mortgage only when fraud or mistake is an issue. Thomas *v.* McCormack, 9 Dana (Ky.) 108.

78. See Statutes of Various States. — In Mississippi by statute it is provided that where the grantor parts with his possession of the property he cannot show by parol that an instrument in form an absolute conveyance was intended as a mortgage, unless fraud be alleged. Heirmann *v.* Stricklin, 60 Miss. 234; Schwartz *v.* Liever (Miss.), 32 So. 954; Culp *v.* Wooten, 79 Miss. 503, 31 So. 1. See also Kieth *v.* Catchings, 64 Ga. 773; Mitchell *v.* Fullington, 83 Ga. 301, 9 S. E. 1083.

79. See authorities cited in note 77, *supra*.

80. In Favor of Grantee. — Ingram *v.* Illges, 98 Ala. 511, 13 So. 548; Woods *v.* Wallace, 22 Pa. St. 171; Zittlosen Tent Co. *v.* Exchange Bank, 57 Mo. App. 19; McMillan *v.* Bissell, 63 Mich. 66, 29 N. W. 737; Kellogg *v.* Northrup, 115 Mich. 327, 73 N. W. 230.

81. Zittlosen Tent Co. *v.* Exchange Bank, 57 Mo. App. 19; New England Mtge. Security Co. *v.* Tarver, 60 Fed. 660, 9 C. C. A. 190, 23 U. S. App. 114; Cullen *v.* Carey, 146 Mass. 50, 15 N. E. 131; Walton *v.* Cronly, 14 Wend. (N. Y.) 63.

Where a deed is one of warranty, and has been followed by possession through several successive grantees by similar deeds, parol is inadmissible to show that the instrument was intended as a mortgage, though such subsequent grantees knew of the first grantor's claim that the transaction was a mortgage only. Conner *v.* Chase, 15 Vt. 764.

Under a statute providing that where a deed purporting to be an absolute conveyance has been executed, but is made defeasible by an instrument for the purpose, the conveyance shall not be defeated thereby, as against any one but the person executing it and persons having notice, unless it shall be duly recorded, as the statute manifestly was intended to protect innocent purchasers, it was held in an action by the grantor on an insurance contract that an unrecorded defeasance was admissible in his behalf to show that his deed was in fact only a mortgage. Wolf *v.* Theresa Village Mut. F. Ins. Co., 115 Wis. 402, 91 N. W. 1014.

82. Hodges *v.* Tennessee M. & F. Ins. Co., 8 N. Y. 416.

83. Brewster *v.* Davis, 56 Tex. 478.

84. As to Official Deeds. — Appeal of Logue, 104 Pa. St. 136; Gaines *v.* Brockerhoff, 136 Pa. St. 175, 19 Atl. 958; Guinn *v.* Locke, 1 Head (Tenn.) 110; Reigard *v.* McNeil, 38 Ill. 400; Sweetzer's Appeal, 71 Pa. St. 264; Ryan *v.* Dox, 34 N. Y. 307, 90 Am. Dec. 696, *reversing* 25 Barb. 440. See *contra*, Fox *v.* Heffner, 1 Watts & S. (Pa.) 372; Dickson *v.* Stewart (Neb.), 98 N. W. 1085.

85. Hayworth *v.* Worthington, 5 Blackf. (Ind.) 361, 35 Am. Dec. 126;

ing rule is that at law parol is not admissible[86] to show a deed to have been intended as a mortgage only.

c. *Ground of Admissibility.* — Many of the early cases and some of the later ones put the admissibility of parol in this class of cases upon the ground of fraud, accident or mistake, holding such evidence admissible only where one of these elements of general equitable

Fuller *v.* Parrish, 3 Mich. 211; Swart *v.* Service, 21 Wend. (N. Y.) 36, 34 Am. Dec. 211; Roach *v.* Cosine, 9 Wend. (N. Y.) 227; Walton *v.* Cronly, 14 Wend. (N. Y.) 63. See also Tillson *v.* Moulton, 23 Ill. 648.

As to Third Persons. — A deed may be shown by parol to be a mortgage where the question arises collaterally, as in an action on a policy of fire insurance, where it is answered that the fire clause invalidating the policy in case of a change of interest or title has been violated by a conveyance, the insured may show that the deed was intended to operate only as a mortgage. Hodges *v.* Tennessee M. & F. Ins. Co., 8 N. Y. 416; Northern Assur. Co. *v.* Chicago Mut. Bldg. & Loan Ass'n, 98 Ill. App. 152, *affirmed* 198 Ill. 474, 64 N. E. 979.

86. *Alabama.* — Parish *v.* Gates, 29 Ala. 254; Jones *v.* Trawicke, 31 Ala. 253; Bragg *v.* Massie, 38 Ala. 89, 79 Am. Dec. 82.

Arkansas. — George *v.* Norris, 23 Ark. 121.

California. — Lodge *v.* Turman, 24 Cal. 385.

Connecticut. — Reading *v.* Weston, 8 Conn. 117, 20 Am. Dec. 97; Benton *v.* Jones, 8 Conn. 186.

Illinois. — Finlon *v.* Clark, 118 Ill. 32, 7 N. E. 475; McGinnis *v.* Fernandes, 126 Ill. 228, 19 N. E. 44.

Kansas. — Moore *v.* Wade, 8 Kan. 380.

Kentucky. — Staton *v.* Com., 2 Dana 397.

Maine. — Bryant *v.* Crosby, 36 Me. 562, 58 Am. Dec. 767; Stinchfield *v.* Milliken, 71 Me. 567; Hale *v.* Jewell, 7 Me. 435, 22 Am. Dec. 212; Ellis *v.* Higgins, 32 Me. 34; Thomaston Bank *v.* Stimpson, 21 Me. 195.

Massachusetts. — Flint *v.* Sheldon, 13 Mass. 443, 7 Am. Dec. 162; Waite *v.* Dimick, 10 Allen 364.

Minnesota. — McClane *v.* White, 5 Minn. 178; Jones *v.* Blake, 33 Minn. 362, 23 N. W. 538; Belote *v.* Morrison, 8 Minn. 87; Swedish-American Nat. Bank *v.* Germania Bank, 76 Minn. 409, 79 N. W. 399.

Mississippi. — Watson *v.* Dickens, 12 Smed. & M. 608; Blake *v.* Morrisson, 33 Miss. 123.

Missouri. — Hogel *v.* Lindell, 10 Mo. 483.

New York. — Ryan *v.* Dox, 25 Barb. 440; Gilchrist *v.* Cunningham, 8 Wend. 641; Webb *v.* Rice, 6 Hill 219; Cook *v.* Eaton, 16 Barb. 439.

In the absence of fraud, mistake or surprise parol is inadmissible in an action of forcible entry and detainer by a lessor after the lease has been terminated to show that the lease which provided for the purchase of the premises by the lessee during the lease was intended as a mortgage. Stewart *v.* Murray, 13 Minn. 426.

Where possession is given the purchaser, a sale with an agreement of redemption may be shown to be a mortgage by written evidence only, unless, of course, in case of fraud or mistake. Mulhaupt *v.* Youree, 35 La. Ann. 1052.

A lessor who has conveyed his reversionary interest in the leased property by deed absolute may not show by parol, to maintain an action for rent, that such deed was intended as a mortgage. Abbott *v.* Hanson, 24 N. J. L. 493.

Where an opposing party in his pleading partly admits an absolute deed to be a mortgage the other may show by parol that the instrument was intended only as a security. Lewis *v.* Robards, 3 T. B. Mon. (Ky.) 406.

Parol evidence is not admissible to show a formal notarial act of sale to have been intended only as a conditional security. Janney *v.* Ober, 28 La. Ann. 281.

relief, or the relation of trust, is present.[87] The later cases, however, have in the main departed from this view, and hold that parol is admissible independently of the grounds upon which the early decisions relied, creating an equitable exception operating only in this particular class of cases.[88]

d. *The Statute of Frauds. — Parol Trusts.* — Consonant to the well-established rule that the statute of frauds shall not be a cover for fraud, it is quite generally held that the statute is not contravened by the admission of parol to show the true intent of the parties where they have couched their transaction in the form of a sale or

87. Fraud, Etc., as Ground of Admissibility.

United States. — Morris *v.* Nixon, 1 How. 118.

Alabama. — Hudson *v.* Isbell, 5 Stew. & P. 67; Chapman *v.* Hughes, 14 Ala. 218; English *v.* Lane, 1 Port. 328; Brantley *v.* West, 27 Ala. 542.

Arkansas. — Jordan *v.* Fenno, 13 Ark. 593.

California. — Lee *v.* Evans, 8 Cal. 424; Low *v.* Henry, 9 Cal. 538.

Connecticut. — Bacon *v.* Brown, 19 Conn. 29; Jarvis *v.* Woodruff, 26 Conn. 213; Collins *v.* Tillou, 26 Conn. 368, 38 Am. Dec. 398; French *v.* Burns, 35 Conn. 359.

Florida. — Chiares *v.* Brady, 10 Fla. 133; Matthews *v.* Porter, 16 Fla. 466.

Georgia. — Kieth *v.* Catchings, 64 Ga. 773; Greer *v.* Caldwell, 14 Ga. 207, 58 Am. Dec. 553. See *supra*, "In Equity and Under the Code."

Kentucky. — Fleming *v.* Harrison, 2 Bibb 171, 4 Am. Dec. 691; Thompson *v.* Patton, 5 Litt. 74, 15 Am. Dec. 44; Coger *v.* McGee, 2 Bibb 321, 5 Am. Dec. 610; Crutcher *v.* Muir, 90 Ky. 142, 13 S. W. 435, 29 Am. St. Rep. 356; Munford *v.* Green, 103 Ky. 140, 44 S. W. 419; Murphy *v.* Trigg, 1 T. B. Mon. 72; Lewis *v.* Robards, 3 T. B. Mon. 406; Thomas *v.* McCormack, 9 Dana 109; Lemaster *v.* Burckhart, 2 Bibb 25; Garten *v.* Chandler, 2 Bibb 246; Martin *v.* Lewis, 1 A. K. Marsh. 75; Wight *v.* Shelby Co., 16 B. Mon. 4. But see *obiter* Seiler *v.* Bank, 86 Ky. 128, 5 S. W. 536; Lindley *v.* Sharp, 7 T. B. Mon. 248.

Maryland. — Bank of Westminster *v.* Whyte, 1 Md. Ch. 536; Artz *v.* Grove, 21 Md. 456; Hopper *v.* Smyser, 90 Md. 363, 45 Atl. 206; Kidd *v.* Carson, 33 Md. 37.

Minnesota. — Hill *v.* Edwards, 11 Minn. 22; Belote *v.* Morrison, 8 Minn. 87; McClane *v.* White, 5 Minn. 178.

Mississippi. — Craft *v.* Bullard, 1 Smed. & M. Ch. 366.

New Jersey. — Lokerson *v.* Stilwell, 13 N. J. Eq. 357.

New York. — Taylor *v.* Baldwin, 10 Barb. 582; Cook *v.* Eaton, 16 Barb. 439; Swart *v.* Service, 21 Wend. 36, 34 Am. Dec. 211; Marks *v.* Pell, 1 Johns. Ch. 596; Strong *v.* Stewart, 4 Johns. Ch. 167; Van Buren *v.* Olmstead, 5 Paige 9.

North Carolina. — Streator *v.* Jones, 10 N. C. 423; Steel *v.* Black, 56 N. C. 427; Kelly *v.* Bryan, 42 N. C. 283; McDonald *v.* McLeod, 36 N. C. 221; Sellers *v.* Stalcup, 42 N. C. 13; Link *v.* Link, 90 N. C. 235; Bonham *v.* Craig, 80 N. C. 224; Richard *v.* Harrill, 55 N. C. 209; Cook *v.* Gudger, 55 N. C. 172; McLaurin *v.* Wright, 37 N. C. 94; Sprague *v.* Bond, 115 N. C. 530, 20 S. E. 709; Hall *v.* Lewis, 118 N. C. 509, 24 S. E. 209.

Ohio. — Miami Exp. Co. *v.* United States Bank, Wright 248.

Pennsylvania. — Haines *v.* Thomson, 70 Pa. St. 434.

Parol is admissible to show that a contract of mortgage has by fraud been converted into an absolute conveyance. Brainerd *v.* Brainerd, 15 Conn. 575.

88. Bigler *v.* Jack, 114 Iowa 667, 87 N. W. 700. See the cases collected and cited *supra*, "Admissibility of Parol," "In Equity and Under the Code." See also McMillan *v.* Bissell, 63 Mich. 66, 29 N. W. 737; Campbell *v.* Dearborn, 109 Mass. 130, 12 Am. Rep. 671.

conveyance.[89] The statutes forbidding the creation of trusts in land by parol do not affect the admissibility of parol to show the true character of a mortgage transaction.[90]

e. *Varying Writing by Parol.* — The admission of parol to show the real nature of an instrument, on its face a sale or conveyance, to be a mortgage only is not in opposition, nor an exception to the rule of evidence that a writing may not be varied by parol. The purpose of parol in such case is to complete the transaction and to exemplify the entire contract between the parties, including the substance of the writing and the circumstances with relation to which it must be construed.[91]

89. *United States.* — Jenkins *v.* Eldredge, 3 Story 181, 13 Fed. Cas. No. 7266; Wyman *v.* Babcock, 2 Curt. 386, 30 Fed. Cas. No. 18,113.

Alabama. — Sewell *v.* Price, 32 Ala. 97; Glass *v.* Hieronymus, 125 Ala. 140, 28 So. 71.

Colorado. — Whitsett *v.* Kershow, 4 Colo. 419.

Illinois. — Reigard *v.* McNeil, 38 Ill. 400.

Indiana. — Landers *v.* Beck, 92 Ind. 49; Brown *v.* Follette, 155 Ind. 316, 58 N. E. 197.

Iowa. — Bigler *v.* Jack, 114 Iowa 667, 87 N. W. 700.

Kansas. — Moore *v.* Wade, 8 Kan. 380.

Maine. — Reed *v.* Reed, 75 Me. 264.

Massachusetts. — Newton *v.* Fay, 10 Allen 505; Campbell *v.* Dearborn, 109 Mass. 130, 12 Am. Rep. 671.

Mississippi. — Anding *v.* Davis, 38 Miss. 574, 77 Am. Dec. 658; Klein *v.* McNamara, 54 Miss. 90.

Missouri. — Chance *v.* Jennings, 159 Mo. 544, 61 S. W. 177.

New York. — Sturtevant *v.* Sturtevant, 20 N. Y. 39, 75 Am. Dec. 371; Horn *v.* Keteltas, 46 N. Y. 605; Carr *v.* Carr, 52 N. Y. 251.

North Carolina. — Streator *v.* Jones, 10 N. C. 423; Sprague *v.* Bond, 115 N. C. 530, 20 S. E. 709.

Oregon. — Swegle *v.* Belle, 20 Or. 323, 25 Pac. 633.

Pennsylvania. — Sweetzer's Appeal, 71 Pa. St. 264; Hartley's Appeal, 103 Pa. St. 23.

Tennessee. — Guinn *v.* Locke, 1 Head 110.

Texas. — Hexter *v.* Urwitz, 6 Tex. Civ. App. 580, 25 S. W. 1101.

Utah. — Wasatch Min. Co. *v.* Jennings, 5 Utah 385, 16 Pac. 339, 5 Utah 243, 15 Pac. 65.

Wisconsin. — Jordan *v.* Warner, 107 Wis. 539, 83 N. W. 946.

90. Glass *v.* Hieronymus, 125 Ala. 140, 28 So. 71; Crane *v.* Buchanan, 29 Ind. 570; Klein *v.* McNamara, 54 Miss. 90; *In re* Hacker's Estate, 5 Pa. Co. Ct. 586; Tower *v.* Fetz, 26 Neb. 706, 42 N. W. 884, 18 Am. St. Rep. 795.

Contra. — But parol has been held by the Wisconsin court inadmissible to show that a release of the equity of redemption executed by the grantor in a formal deed to the grantee subsequently to the execution of the deed was intended only to give the grantee an indefeasible title so that he could sell and convey so much of the premises as was necessary to pay the mortgage debt, and that the grantor's equity in the remainder should continue unimpaired. This is on the ground that parol is not admissible to show an express trust reserved in land conveyed by absolute deed. Sweet *v.* Mitchell, 14 Wis. 709.

91. Admission of Parol Does Not Violate Rule as to Varying Writing.

United States. — Peugh *v.* Davis, 96 U. S. 332.

Connecticut. — Reading *v.* Weston, 8 Conn. 117, 20 Am. Dec. 97.

Iowa. — Trucks *v.* Lindsey, 18 Iowa 504.

Massachusetts. — Campbell *v.* Dearborn, 109 Mass. 130, 12 Am. Rep. 671.

Minnesota. — Madigan *v.* Mead, 31 Minn. 94, 16 N. W. 539.

New York. — Sturtevant *v.* Sturte-

f. *Recitals in the Instrument. — Effect.* — In a formal conveyance, the recital in detail of its nature and the purpose of the parties in executing it does not exclude parol to show the real nature of the transaction.[92]

g. *To Convert a Mortgage Into a Sale or Conveyance.* — Parol is not admissible to show that a mortgage was intended to operate as a sale or conveyance of the realty.[93] If the transaction is evidenced

vant, 20 N. Y. 39, 75 Am. Dec. 371; Horn *v.* Keteltas, 46 N. Y. 605.

North Carolina. — Streator *v.* Jones, 10 N. C. 423.

Wisconsin. — Rogan *v.* Walker, 1 Wis. 527; Butler *v.* Butler, 46 Wis. 430, 1 N. W. 70; Jordan *v.* Warner, 107 Wis. 539, 83 N. W. 946.

92. Rankin *v.* Mortimere, 7 Watts (Pa.) 372. The express recital in the deed that it was given upon the consideration of money advanced for the purchase of the lands, and that the money so advanced was used by the grantor in buying the land mentioned, does not exclude parol to show it to be only a mortgage. In McLean *v.* Ellis, 79 Tex. 398, 15 S. W. 394, the court, on the proposition stated, said: "The defendant objected to the introduction of any parol evidence to disprove the recitals in the deed of the considerations on which it was made. It is well settled that the true consideration of a deed may be proved by parol evidence, and that a deed absolute on its face may be shown to have been executed in fact as a security for the money, and for that reason be treated as a mortgage. Gibbs *v.* Penny, 43 Tex. 563. The rule does not depend upon the manner of statement of the consideration in the deed. The right is a substantial one not to be varied or defeated by any form of expression or character of recitals contained in the instrument itself."

93. *Illinois.* — Johnson *v.* Prosperity Bldg. & Loan Ass'n, 94 Ill. App. 260.

Indiana. — Voss *v.* Eller, 109 Ind. 260, 10 N. E. 74; Proctor *v.* Cole, 66 Ind. 576.

Montana. — Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240.

Pennsylvania. — Kunkle *v.* Wolfersberger, 6 Watts 126; Brown *v.* Nickle, 6 Pa. St. 390; Wharf *v.* Howell, 5 Binn. 499; Woods *v.* Wallace, 22 Pa. St. 171; Reitenbaugh *v.* Ludwick, 31 Pa. St. 131; McClintock *v.* McClintock, 3 Brewst. 76; Kerr *v.* Gilmore, 6 Watts 405.

In Eckford *v.* Berry, 87 Tex. 415, 28 S. W. 937, the court, after stating the reasons for admitting testimony to prove a deed a mortgage said: "But when, from the face of the instrument, it clearly appeared that the purpose of the transaction was to secure the payment of a debt, the court of equity would hold it to be a mere security, without any parol evidence, and would enforce the equity of redemption by allowing the debtor a reasonable time in which to pay. In such cases neither the debtor nor the creditor have ever been permitted to introduce parol evidence to show the instrument to be other than what it purports to be on its face. If this were not true, any written obligation to pay money, secured by conveyance of land, could be shown by parol evidence to be a conditional sale or an absolute conveyance, under the pretext of ascertaining the real intention of the parties; and thus the debtor could satisfy the debt by surrendering the security, or the creditor could insist upon taking the property for the sum advanced thereon, upon proof by parol evidence, to the satisfaction of a court or jury that the instrument was not in fact what it purports to be — a security for money — but a conditional sale or absolute conveyance. The true rule is that parol evidence is not admissible to contradict or vary the terms of the written instrument, except in cases where equity sets aside the general rule of evidence for the purpose of allowing the parties to show that the real trans-

by a deed and defeasance of the same date, in contemplation of law a mortgage, parol is equally to be excluded.[94] But where the two writings are of widely different dates, but the defeasance recites a contemporaneous delivery with the deed, parol evidence may in such circumstances be received to show the delivery of the two instruments in fact at different times, and that it was the intention of the parties to effect a sale rather than a mortgage.[95]

h. *Connecting Writings by Parol.* — Several writings, on their face unconnected, may be shown by parol to constitute parts of one entire transaction in the nature of a mortgage.[96] So a written defeasance, of a date later than the mortgage, may be shown by parol to have been in fact executed contemporaneously with the deed[97] or subsequently, pursuant to a contemporaneous oral agreement.[98]

i. *Evidence of Understanding.* — Evidence of the mere understanding of the parties is incompetent.[99]

action was the securing of a debt, as above indicated, in order that the equity of redemption may be allowed at the instance of the debtor, or foreclosed at the instance of the creditor."

Proof of an understanding between the parties to a conveyance and an agreement for reconveyance that the transaction was not a mortgage is inadmissible to change the character of the transaction. Haines *v.* Thomson, 70 Pa. St. 434.

94. Haines *v.* Thomson, 70 Pa. St. 434.

95. Haines *v.* Thomson, 70 Pa. St. 434.

96. Preschebaker *v.* Feaman, 32 Ill. 475; Tillson *v.* Moulton, 23 Ill. 648; Haines *v.* Thomson, 70 Pa. St. 434; Farmer *v.* Grose, 42 Cal. 169; Waters *v.* Crabtree, 105 N. C. 394, 11 S. E. 240; Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240.

Parol evidence is admissible to show that the purpose of several writings taken together was to create the relation of mortgagor and mortgagee, though they bear on their face no evidence of such intention. Beebe *v.* Wisconsin Mtge. Loan Co., 117 Wis. 328, 93 N. W. 1103.

Where a deed and a defeasance are contemporaneously executed, parol is admissible to show that they were parts of the same transaction, and that they together constitute a mortgage. Gray *v.* Hamilton, 33 Cal. 686. Of course where several instruments themselves show that they have been executed as parts of one transaction parol is not necessary. Franklin *v.* Ayer, 22 Fla. 654; First Nat. Bank *v.* Ashmead, 23 Fla. 379, 2 So. 657; Wilson *v.* Schoenberger, 31 Pa. St. 295. But see Baker *v.* Firemen's Fund Ins. Co., 79 Cal. 34, 21 Pac. 357.

The grantee in an absolute deed may show that a written defeasance was executed after the conveyance had been made, not as a part of the same transaction, but a mere agreement that has never been complied with. Murray *v.* McCarthy (Pa.), 6 Atl. 243.

97. First Nat. Bank *v.* Ashmead, 23 Fla. 379, 2 So. 657; Umbenhower *v.* Miller, 101 Pa. St. 71.

98. First Nat. Bank *v.* Ashmead, 23 Fla. 379, 2 So. 657; Umbenhower *v.* Miller, 101 Pa. St. 71; Nicolls *v.* McDonald, 101 Pa. St. 514; Reitenbaugh *v.* Ludwick, 31 Pa. St. 131; Wilson *v.* Shoenberger, 31 Pa. St. 295.

99. Haines *v.* Thompson, 70 Pa. St. 434.

If the instrument in question contains the exact terms agreed upon by the parties, the fact that they thought it was a mortgage and believed it to be one cannot change its character where as written it is otherwise. Hershey *v.* Luce, 56 Ark. 320, 19 S. W. 963, 20 S. W. 6.

The testimony of the wife of the grantor as to the understanding of

B. Circumstances in General Attending Transaction. The circumstances attending the transaction may in general be fully inquired into, and a wide latitude in this regard is permitted by the courts.[1]

herself and other parties to the conveyance, where the grantee is deceased, is inadmissible. Gray *v.* Shelby, 83 Tex. 405, 18 S. W. 809.

1. Evidence of Circumstances in General. — *United States.* — Horbach *v.* Hill, 112 U. S. 144.

Alabama. — Micou *v.* Ashurst, 55 Ala. 607.

California. — Pendergrass *v.* Burris, 19 Pac. 187; Vance *v.* Anderson, 113 Cal. 532, 19 Pac. 187; Baker *v.* Fireman's Fund Ins. Co., 79 Cal. 34, 21 Pac. 357.

Illinois. — Evart *v.* Walling, 42 Ill. 453; Darst *v.* Murphy, 119 Ill. 343, 9 N. E. 887; Workman *v.* Greening, 115 Ill. 477, 4 N. E. 385; Helm *v.* Boyd, 124 Ill. 370, 16 N. E. 85; Williams *v.* Bishop, 15 Ill. 553; Bartling *v.* Brasuhn, 102 Ill. 441; Bentley *v.* O'Bryan, 111 Ill. 53.

Indiana. — Davis *v.* Stonestreet, 4 Ind. 101; Heath *v.* Williams, 30 Ind. 495; Loeb *v.* McCalister, 15 Ind. App. 643, 41 N. E. 1061, 44 N. E. 378.

Iowa. — Hughes *v.* Sheaff, 19 Iowa 335.

Kansas. — Reeder *v.* Gorsuch, 55 Kan. 553, 40 Pac. 897; Barnes *v.* Crockett, 4 Kan. App. 777, 46 Pac. 997; McDonald *v.* Kellogg, 30 Kan. 170, 2 Pac. 507; McNamara *v.* Culver, 22 Kan. 661; Bennett *v.* Wolverton, 24 Kan. 284.

Kentucky.— Edrington *v.* Harper, 3 J. J. Marsh. 353, 20 Am. Dec. 145; Trimble *v.* McCormick, 12 Ky. L. Rep. 857, 15 S. W. 358.

Maine. — Stinchfield *v.* Milliken, 71 Me. 567.

Maryland. — Baugher *v.* Merryman, 32 Md. 185; Artz *v.* Grove, 21 Md. 456; Montague *v.* Sewell, 57 Md. 408; Packard *v.* Corporation for Relief of Widows, 77 Md. 240, 26 Atl. 411.

Massachusetts. — Rice *v.* Rice, 4 Pick. 349.

Michigan. — Ferris *v.* Wilcox, 51 Mich. 105, 16 N. W. 252; Stahl *v.* Dehn, 72 Mich. 645, 40 N. W. 922; Carveth *v.* Winegar, 133 Mich. 34, 94 N. W. 381.

Minnesota. — Buse *v.* Page, 32 Minn. 111, 19 N. W. 736; King *v.* McCarthy, 50 Minn. 222, 52 N. W. 648.

Missouri. — Turner *v.* Kerr, 44 Mo. 429; McNees *v.* Swaney, 50 Mo. 388.

Montana. — Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240.

Nebraska. — Saunders *v.* Ayres, 63 Neb. 271, 88 N. W. 526.

New York. — Henry *v.* Davis, 7 Johns. Ch. 40.

North Carolina. — Robinson *v.* Willoughby, 65 N. C. 520.

North Dakota. — Devore *v.* Woodruff, 1 N. D. 143, 45 N. W. 701.

Oregon. — Wilhelm *v.* Woodcock, 11 Or. 518, 5 Pac. 202; Swegle *v.* Belle, 20 Or. 323, 25 Pac. 633; Stephens *v.* Allen, 11 Or. 188, 3 Pac. 168.

Pennsylvania. — Wheeland *v.* Swartz, 1 Yeates 579; Todd *v.* Campbell, 32 Pa. St. 250; Null *v.* Fries, 110 Pa. St. 521, 1 Atl. 551; Sweetzer's Appeal, 71 Pa. St. 264.

South Dakota. — Bradley *v.* Helgerson, 14 S. D. 593, 86 N. W. 634; Morris *v.* Nyswanger, 5 S. D. 307, 58 N. W. 800.

Tennessee. — Overton *v.* Bigelow, 3 Yerg. 513.

Texas. — Stampers *v.* Johnson, 3 Tex. 1; Gibbs *v.* Penny, 43 Tex. 560; Calhoun *v.* Lumpkin, 60 Tex. 185; Pierce *v.* Fort, 60 Tex. 464; Gray *v.* Shelby, 83 Tex. 405, 18 S. W. 809; Loving *v.* Milliken, 59 Tex. 423.

Vermont. — Rich *v.* Doane, 35 Vt. 125; Wing *v.* Cooper, 37 Vt. 169.

West Virginia. — Sadler *v.* Taylor, 49 W. Va. 104, 38 S. E. 583.

Wisconsin. — Goulding *v.* Bunster, 9 Wis. 513; Rockwell *v.* Humphrey, 57 Wis. 410, 15 N. W. 394; Jordan *v.* Warner, 107 Wis. 539, 83 N. W. 946.

Parol evidence of every material fact known to the parties at the time of executing a deed and agreement to reconvey is inadmissible on this

C. Declarations and Admissions of Parties. — The declarations and admissions of the parties tending to show the character of a controverted, formal conveyance, are admissible against the declarant on such an issue.[2] The declarations of a party are of

issue. Russell *v.* Southard, 12 How. (U. S.) 139.

In behalf of the party claiming an instrument in form a deed to express the real intention of the parties, circumstances may be proven which show the probability of the instrument's having been intended to be a deed rather than a mortgage. Thus it may be shown that the grantee had previously recovered judgments against the grantor, that proceedings to revive these judgments were brought and that they were dismissed when the deed was given. Miller *v.* Yturria, 69 Tex. 549, 7 S. W. 206.

Circumstances Must Illustrate Transaction. — In determining whether an absolute deed was a mortgage, the circumstances attending the execution alone must be considered, and circumstances subsequently arising which might make it to the advantage of the mortgagor to have same declared a sale are not proper to be considered. Herrick *v.* Teachant, 74 Vt. 196, 52 Atl. 432.

The grantor's conduct and his pecuniary condition at the time of the conveyance may be considered in determining the nature of the deed. Peres *v.* Crocker (Cal.), 47 Pac. 928.

2. Declarations and Admissions in General. — Ross *v.* Brusie, 64 Cal. 245, 30 Pac. 811; Darst *v.* Murphy, 119 Ill. 343, 9 N. E. 887; Marks *v.* Pell, 1 Johns. Ch. (N. Y.) 596; Van Buren *v.* Olmstead, 5 Paige (N. Y.) 9; Gray *v.* Shelby, 83 Tex. 405, 18 S. W. 809; Carter *v.* Carter, 5 Tex. 96; Loving *v.* Milliken, 50 Tex. 423.

Admissions and Declarations of Grantee. — Bentley *v.* Phelps, 2 Woodb. & M. 426, 3 Fed. Cas. No. 1331; Saunders *v.* Ayres, 63 Neb. 271, 88 N. W. 526; Peugh *v.* Davis, 2 McArthur (D. C.) 14; Ruckman *v.* Alwood, 71 Ill. 155; Freeman *v.* Wilson, 51 Miss. 329; McIntyre *v.* Humphreys, Hoff. Ch. (N. Y.) 31.

Where there is a doubt as to the intention of the parties to an instrument, the subsequent action of the mortgagees in referring to the same as a mortgage may be looked to in determining the question. Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712. The subsequent declarations of the grantee are admissible, however, only so far as they show intention at the time of the execution. McMillan *v.* Bissell, 63 Mich. 66, 29 N. W. 737. The grantee's declarations after the conveyance are admissible, with corroborating facts and circumstances, to show a deed to be a mortgage. Couch *v.* Sutton, 1 Grant's Cas. (Pa.) 114.

Where the instrument is in terms absolute, the statements of the grantee's agent referring to the property conveyed as belonging to the grantor are admissible. Kirby *v.* National Loan & Inv. Co., 22 Tex. Civ. App. 257, 54 S. W. 1081.

When a deed is sought to be shown to be a mortgage, the declarations of the attorney for the grantee in the deed and his subsequent declarations relating thereto while representing the grantee are admissible in the grantor's behalf. Murray *v.* Sweasy, 69 App. Div. 45, 74 N. Y. Supp. 543.

Admissions and Declarations of Grantor. — Peres *v.* Crocker (Cal.), 47 Pac. 928.

The Grantor's Letters. — Letters written by the grantor to the grantee, accompanying the instrument inclosed to him, stating that it is a security, are admissible as against the grantor as part of the *res gestae*. Subsequent letters written by the grantor to the grantee may also be admissible as proving a fact inconsistent with the theory that the deed was an absolute conveyance, where the grantor so claims. Phoenix *v.* Gardner, 13 Minn. 430.

The admission of a grantee in his unsworn answer that the conveyance to him was intended as a mortgage to secure the payment of borrowed money is not evidence against the grantor or a subsequent assignee for the benefit of creditors when the con-

course not admissible for him.[3] Remote declarations of the parties should be received with caution.[4] Evidence of conversations between the grantor and a third person subsequent to the execution of the deed, tending to show intent, is also incompetent.[5] The fact that the grantor has made admissions under oath in another proceeding that he has no interest in the property in controversy may be proven,[6] though such admissions are not necessarily conclusive against him.[7]

D. Conversations of Parties. — Evidence of the conversations of the parties relating to the transaction, had contemporaneously with the transaction, or prior or subsequently to it, may be received.[8]

E. Opinion Evidence. — Opinion evidence as to whether the controverted transaction was one thing or another is not admissible.[9]

F. Relations of the Parties. — a. *In General.* — The relations

veyance is assailed for fraud, on the ground that it was intended as a mortgage only. Danner Land & Lumb. Co. *v.* Stonewall Ins. Co., 77 Ala. 184.

3. See Chiares *v.* Brady, 10 Fla. 133.

Grantor's Declarations in His Own Behalf. — On an issue as to the character of a formal deed, evidence of statements by the grantor to his wife, who joined in the deed, made prior to the execution of the instrument, that the instrument was to be executed only as a security, is inadmissible, being hearsay, and objectionable because offered to affect the written contract as between the husband and the grantee. Andrews *v.* Bonham, 19 Tex. Civ. App. 179, 46 S. W. 902.

4. McIntyre *v.* Humphreys, Hoff. Ch. (N. Y.) 31.

5. Statements of Grantor to Third Parties Subsequent to Execution of Deed Inadmissible. — Jones *v.* Jones, 43 N. Y. St. 434, 17 N. Y. Supp. 905.

6. Smith *v.* Cremer, 71 Ill. 185.

7. Affidavit in Bankruptcy. That the grantor in an absolute conveyance has made affidavit, in his proceedings in bankruptcy, that he had no interest in the property so conveyed does not estop him from asserting against the grantee that the conveyance was in fact a mortgage. Smith *v.* Cremer, 71 Ill. 185.

8. Prior Conversations of Parties. McGinity *v.* McGinity, 63 Pa. St. 38; Gray *v.* Shelby, 83 Tex. 405, 18 S. W. 800.

Subsequent Conversations. — Ross *v.* Brusie, 64 Cal. 245, 30 Pac. 811; Carveth *v.* Winegar, 133 Mich. 34, 94 N. W. 381.

Contemporaneous Conversations. Beroud *v.* Lyons, 85 Iowa 482, 52 N. W. 486.

Evidence of oral agreements and conversations between the parties prior to or contemporaneous with the execution of the instrument, absolute on its face, may be received to ascertain its true character. First Nat. Bank *v.* Central Chandelier Co., 17 Ohio. Cir. Ct. 443.

In an action to declare a formal deed a mortgage as having been given to secure another's debt, the defendant may prove the concurrent and subsequent conversations of the grantor tending to show it was a conveyance absolute in part satisfaction of such debt. Blazy *v.* McLean, 129 N. Y. 44, 29 N. E. 6.

The testimony of an agent of the party asserting a transaction to constitute a mortgage, of conversations had at the time with the other party to the transaction, tending to show the character of the mortgage, is admissible. Queen City Bank *v.* Hood, 15 Misc. 237, 36 N. Y. Supp. 981.

9. Thus testimony of the grantor that he never sold the land is on such an issue inadmissible, being merely the statement of his opinion as to the character of the transaction. Ashton

of the parties to the transaction at and prior to the time of executing the instrument may be shown in determining the character of the instrument.[10]

b. *Debtor and Creditor.* — It is always a material inquiry whether the relation of debtor and creditor was created by the transaction in which the instrument was executed, or whether, if previously existing, it was continued or extinguished. While such evidence may not be conclusive in such an inquiry, it is a fact of large importance.[11]

v. Ashton, 11 S. D. 610, 79 N. W. 1001.

10. *United States.* — Russell *v.* Southard, 12 How. 139; Bentley *v.* Phelps, 2 Woodb. & M. 426, 3 Fed. Cas. No. 1331.

Georgia. — DeLaigle *v.* Denham, 65 Ga. 482.

Illinois. — Sutphen *v.* Cushman, 35 Ill. 186; Rubo *v.* Bennett, 85 Ill. App. 473.

Indiana. — Voss *v.* Eller, 109 Ind. 260, 10 N. E. 74.

Massachusetts. — Campbell *v.* Dearborn, 109 Mass. 130, 12 Am. Rep. 671; Rice *v.* Rice, 4 Pick. 349.

Minnesota. — Phoenix *v.* Gardner, 13 Minn. 430.

Missouri. — Brant *v.* Robertson, 16 Mo. 129.

New York. — Queen City Bank *v.* Hood, 15 Misc. 237, 36 N. Y. Supp. 981.

Pennsylvania. — Wallace *v.* Smith, 155 Pa. St. 78, 25 Atl. 807, 35 Am. St. Rep. 868.

Vermont. — Wing *v.* Cooper, 37 Vt. 169.

Contracts between the mortgagor and mortgagee for the purpose of extinguishing the equity of redemption are regarded with jealousy by the courts, and where the making of such a contract is averred, the relations between the parties may be inquired into to ascertain whether the transaction was fair. Cassem *v.* Heustis, 201 Ill. 208, 66 N. E. 283; Sutphen *v.* Cushman, 35 Ill. 186. See relation of "Debtor and Creditor," *infra.*

11. *United States.* — Conway *v.* Alexander, 7 Cranch 218; Villa *v.* Rodriguez, 12 Wall. 323; Flagg *v.* Mann, 2 Sumn. 486, 9 Fed. Cas. No. 4847; Reavis *v.* Reavis, 103 Fed. 813; Simpson *v.* First Nat. Bank, 93 Fed. 309; Bentley *v.* Phelps, 2 Woodb. & M. 426, 3 Fed. Cas. No. 1331.

Alabama. — Turner *v.* Wilkinson, 72 Ala. 361; Vincent *v.* Walker, 86 Ala. 333, 5 So. 465; Purdue *v.* Bell, 83 Ala. 396, 3 So. 698; Mitchell *v.* Wellman, 80 Ala. 16; Knaus *v.* Dreher, 84 Ala. 319, 4 So. 287; Adams *v.* Pilcher, 92 Ala. 474, 8 So. 757; Haynie *v.* Robertson, 58 Ala. 37; Weels *v.* Morrow, 38 Ala. 125; Reeves *v.* Abercrombie, 108 Ala. 535, 19 So. 41; Williams *v.* Reggan, 111 Ala. 621, 20 So. 614; Kramer *v.* Brown, 114 Ala. 612, 21 So. 817; Martin *v.* Martin, 123 Ala. 191, 26 So. 525.

Arkansas. — Stryker *v.* Hershy, 38 Ark. 264.

California. — Hickox *v.* Lowe, 10 Cal. 197; Henley *v.* Hotaling, 41 Cal. 22; Montgomery *v.* Spect, 55 Cal. 352; Manasse *v.* Dinkelspiel, 68 Cal. 404, 9 Pac. 547; Hall *v.* Arnott, 80 Cal. 348, 22 Pac. 200; Ahern *v.* McCarthy, 107 Cal. 382, 40 Pac. 482; Vance *v.* Anderson, 113 Cal. 532, 45 Pac. 816.

Connecticut. — Reading *v.* Weston, 7 Conn. 143, 18 Am. Dec. 89; Hillhouse *v.* Dunning, 7 Conn. 139; Bacon *v.* Brown, 19 Conn. 29; Mills *v.* Mills, 26 Conn. 213; Pritchard *v.* Elton, 38 Conn. 434; French *v.* Burns, 35 Conn. 359; Lounsbury *v.* Norton, 59 Conn. 170, 22 Atl. 153.

Florida. — Franklin *v.* Ayer, 22 Fla. 654.

Georgia. — Galt *v.* Jackson, 9 Ga. 151; Spence *v.* Steadman, 49 Ga. 133; Murphy *v.* Purifoy, 52 Ga. 480; Pitts *v.* Maier, 115 Ga. 281, 41 S. E. 570.

Illinois. — Westlake *v.* Horton, 85 Ill. 228; Darst *v.* Murphy, 119 Ill. 343, 9 N. E. 887; Whitcomb *v.* Sutherland, 18 Ill. 578; Rue *v.* Dole, 107 Ill. 275; Freer *v.* Lake, 115 Ill. 662,

4 N. E. 512; Fisher *v.* Green, 142 Ill. 80, 31 N. E. 172; Kerting *v.* Hilton, 152 Ill. 658, 38 N. E. 941; Batcheller *v.* Batcheller, 144 Ill. 471, 33 N. E. 24; Burgett *v.* Osborne, 172 Ill. 227, 50 N. E. 206; Crane *v.* Chandler, 190 Ill. 584, 60 N. E. 826.

Indiana. — Voss *v.* Eller, 109 Ind. 260, 10 N. E. 74; Hays *v.* Carr, 83 Ind. 275; Rogers *v.* Beach, 115 Ind. 413, 17 N. E. 609.

Iowa. — Hughes *v.* Sheaff, 19 Iowa 335; White *v.* Lucas, 46 Iowa 319; Barthell *v.* Syverson, 54 Iowa 160, 6 N. W. 178; Stroup *v.* Haycock, 56 Iowa 729, 10 N. W. 257; Bridges *v.* Linder, 60 Iowa 190, 14 N. W. 217; Wright *v.* Mahaffey, 76 Iowa 96, 40 N. W. 112; Bigler *v.* Jack, 114 Iowa 667, 87 N. W. 700; Froud *v.* Merritt, 99 Iowa 410, 68 N. W. 728.

Kansas. — McNamara *v.* Culver, 22 Kan. 661.

Kentucky. — Tygret *v.* Potter, 97 Ky. 54, 29 S. W. 976; Honore *v.* Hutchings, 8 Bush 687.

Maine. — French *v.* Sturdivant, 8 Me. 246; Stinchfield *v.* Milliken, 71 Me. 567; Reed *v.* Reed, 75 Me. 264; Jameson *v.* Emerson, 82 Me. 359, 19 Atl. 831; Hawes *v.* Williams, 92 Me. 483, 43 Atl. 101.

Maryland. — Hopper *v.* Smyser, 90 Md. 363, 45 Atl. 206.

Massachusetts. — Flagg *v.* Mann, 14 Pick. 467; Eaton *v.* Green, 22 Pick. 526.

Michigan. — Blumberg *v.* Beekman, 121 Mich. 647, 80 N. W. 710.

Minnesota. — Marshall *v.* Thompson, 39 Minn. 137, 39 N. W. 309.

Mississippi. — Klein *v.* McNamara, 54 Miss. 90; Freeman *v.* Wilson, 51 Miss. 329.

Missouri. — Slowey *v.* McMurray, 27 Mo. 113, 72 Am. Dec. 251; O'Neill *v.* Capelle, 62 Mo. 202; Frost Mfg. Co. *v.* Springfield Foundry & Mach. Co., 79 Mo. App. 652; Stowe *v.* Banks, 123 Mo. 672, 27 S. W. 347.

Montana. — Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240; Kleinschmidt *v.* Kleinschmidt, 9 Mont. 447, 24 Pac. 266.

Nebraska. — Nelson *v.* Atkinson, 37 Neb. 577, 56 N. W. 313; Riley *v.* Starr, 48 Neb. 243, 67 N. W. 187.

New Hampshire. — Lund *v.* Lund, 1 N. H. 39, 8 Am. Dec. 29; Page *v.* Foster, 7 N. H. 392.

New Jersey. — Judge *v.* Reese, 24 N. J. Eq. 387; Budd *v.* Van Orden, 33 N. J. Eq. 143; Wilmerding *v.* Mitchell, 42 N. J. L. 476; Doying *v.* Chesebrough (N. J. Eq.), 36 Atl. 893.

New York. — Slee *v.* Manhattan Co., 1 Paige 48; Holmes *v.* Grant, 8 Paige 243; Morrison *v.* Brand, 5 Daly 40; Hone *v.* Fisher, 2 Barb. Ch. 559; Saxton *v.* Hitchcock, 47 Barb. 220; Glover *v.* Payn, 19 Wend. 518; Horn *v.* Keteltas, 46 N. Y. 605; Queen City Bank *v.* Hood, 15 Misc. 237, 36 N. Y. Supp. 981; Meehan *v.* Forrester, 52 N. Y. 277; Odell *v.* Montross, 68 N. Y. 499; Barry *v.* Hamburg-Bremen F. Ins. Co., 110 N. Y. 1, 17 N. E. 405; Mooney *v.* Byrne, 163 N. Y. 86, 57 N. E. 163; Kraemer *v.* Adelsberger, 122 N. Y. 467, 25 N. E. 859.

North Carolina. — Robinson *v.* Willoughby, 65 N. C. 520; Pemberton *v.* Simmons, 100 N. C. 316, 6 S. E. 122; Sprague *v.* Bond, 115 N. C. 530, 20 S. E. 709; King *v.* Kincey, 36 N. C. 187, 36 Am. Dec. 40.

North Dakota. — McGuin *v.* Lee, 10 N. D. 160, 86 N. W. 714.

Oklahoma. — Weiseham *v.* Hocker, 7 Okla. 250, 54 Pac. 464.

South Carolina. — Hodge *v.* Weeks, 31 S. C. 276.

South Dakota. — Morris *v.* Nyswanger, 5 S. D. 307, 58 N. W. 800.

Tennessee. — Blizzard *v.* Craig Miles, 7 Lea 693.

Texas. — Ruffier *v.* Womack, 30 Tex. 332; Loving *v.* Milliken, 59 Tex. 423; Seeligson *v.* Singletary, 66 Tex. 271, 17 S. W. 541; Gray *v.* Shelby, 83 Tex. 405, 18 S. W. 809; Gazley *v.* Herring (Tex. Civ. App.), 17 S. W. 17; Williams *v.* Chambers (Tex. Civ. App.), 26 S. W. 270; Wilcox *v.* Tennant, 13 Tex. Civ. App. 220, 35 S. W. 865.

Virginia. — Chapman *v.* Turner, 1 Call 280, 1 Am. Dec. 514; Robertson *v.* Campbell, 2 Call 421; Ross *v.* Norvell, 1 Wash. 14, 1 Am. Dec. 422; Snavely *v.* Pickle, 29 Gratt. 27.

West Virginia. — Hoffman *v.* Ryan, 21 W. Va. 415; Lawrence *v.* Du Bois, 16 W. Va. 443; Ogle *v.* Adams, 12 W. Va. 213; Kerr *v.* Hill, 27 W. Va. 576;

The lack of a personal agreement by a borrower to repay the money secured by a formal conveyance is not conclusive of the character of the transaction, but is a circumstance merely to be considered with the other evidence relating to the nature of the transaction.[12]

G. Acts and Conduct of the Parties. — a. *In General.* — The acts and conduct in general of the parties with respect to the mortgaged property and relating to the transaction are proper matters for consideration.[13]

Sadler *v.* Taylor, 49 W. Va. 104, 38 S. E. 583; Davis *v.* Demming, 12 W. Va. 246.

Wisconsin. — Smith *v.* Crosby, 47 Wis. 160, 2 N. W. 104; Hunter *v.* Maanum, 78 Wis. 656, 48 N. W. 51; Rockwell *v.* Humphrey, 57 Wis. 410, 15 N. W. 394; Scheiber *v.* Le Clair, 66 Wis. 579, 29 N. W. 570; Hoile *v.* Bailey, 58 Wis. 434, 17 N. W. 322.

12. *California.* — Locke *v.* Moulton, 96 Cal. 21, 30 Pac. 957.

Connecticut. — Bacon *v.* Brown, 19 Conn. 29; Jarvis *v.* Woodruff, 22 Conn. 548.

Massachusetts. — Flint *v.* Sheldon, 13 Mass. 443, 7 Am. Dec. 162; Rice *v.* Rice, 4 Pick. 349; Murphy *v.* Calley, 1 Allen 107; Kelly *v.* Beers, 12 Mass. 387; Flagg *v.* Mann, 14 Pick. 467; Bodwell *v.* Webster, 13 Pick. 411.

Minnesota. — Fisk *v.* Stewart, 24 Minn. 97; Niggeler *v.* Maurin, 34 Minn. 118, 24 N. W. 369.

Missouri. — Brant *v.* Robertson, 16 Mo. 129.

New Jersey. — Doying *v.* Chesebrough (N. J. Eq.), 36 Atl. 893.

New York. — Horn *v.* Keteltas, 46 N. Y. 605; Kraemer *v.* Adelsberger, 122 N. Y. 467, 25 N. E. 859; Brumfield *v.* Boutall, 24 Hun 451; Brown *v.* Dewey, 1 Sandf. Ch. 56; Holmes *v.* Grant, 8 Paige 243; Morris *v.* Budlong, 78 N. Y. 543; Matthews *v.* Sheehan, 69 N. Y. 585; Macauley *v.* Smith, 132 N. Y. 524, 30 N. E. 997.

North Dakota. — McGuin *v.* Lee, 10 N. D. 160, 86 N. W. 714.

Oregon. — Stephens *v.* Allen, 11 Or. 188, 3 Pac. 168.

Texas. — Hubby *v.* Harris, 68 Tex. 91, 3 S. W. 558; McCamant *v.* Roberts, 80 Tex. 316, 15 S. W. 580, 1054.

Wisconsin. — Rockwell *v.* Humphrey, 57 Wis. 410, 15 N. W. 394; Scheiber *v.* Le Clair, 66 Wis. 579, 29 N. W. 570.

To show the relation of the parties in a suit to have a deed declared a mortgage, the plaintiff may show the assignment to the defendant, prior to the execution of the deed in issue, of a judgment against the plaintiff, thereby establishing the existence of a debt that might have been secured. Rees *v.* Rhodes, 3 Ariz. 235, 73 Pac. 446.

13. *Alabama.* — Reeves *v.* Abercrombie, 108 Ala. 535, 19 So. 41.

Illinois. — Ewart *v.* Walling, 42 Ill. 453; Darst *v.* Murphy, 119 Ill. 343, 9 N. E. 847.

Iowa. — Conlee *v.* Heying, 94 Iowa 734, 62 N. W. 678; Froud *v.* Merritt, 99 Iowa 410, 68 N. W. 728.

Kentucky. — Timmons *v.* Center, 19 Ky. L. Rep. 1424, 43 S. W. 437.

Maine. — Jameson *v.* Emerson, 82 Me. 359, 19 Atl. 831.

Maryland. — Hopper *v.* Smyser, 90 Md. 363, 45 Atl. 206.

Missouri. — Cobb *v.* Day, 106 Mo. 278, 17 S. W. 323.

New Jersey. — Lashley *v.* Souder (N. J. Eq.), 24 Atl. 919.

North Carolina. — Blackwell *v.* Overby, 41 N. C. 38; Porter *v.* White, 128 N. C. 42, 38 S. E. 24.

Pennsylvania. — Pancake *v.* Cauffman, 114 Pa. St. 113, 7 Atl. 67.

Tennessee. — Maney *v.* Morris, 57 S. W. 442.

West Virginia. — Hoffman *v.* Ryan, 21 W. Va. 415.

Where a grantee under a deed in form absolute, in ignorance of a provision therein that he assumed another incumbrance on the property, paid interest on such other incumbrance and collected rents from the property, such acts do not prevent the instrument being given the character of a mortgage. Keller *v.* Ashford, 3 Mack. (D. C.) 444.

b. *Possession and Control of Premises.* — The retention of possession of the premises by the grantor, or the surrender thereof to the grantee, is a circumstance to be considered in arriving at the nature of the transaction.[14] The retention of possession by the mortgagor, especially when accompanied by circumstances corroborating the theory of mortgage, is an important fact.[15] The possession of the

14. Retention of Possession by Vendor. — *United States.* — Richmond *v.* Richmond, 4 Chicago Leg. News 41, 20 Fed. Cas. No. 11,801.

Alabama. — Crews *v.* Threadgill, 35 Ala. 334.

California. — Daubenspeck *v.* Platt, 22 Cal. 330.

Illinois. — Clark *v.* Finlon, 90 Ill. 245; Rubo *v.* Bennett, 85 Ill. App. 473; Strong *v.* Shea, 83 Ill. 575.

Indiana. — Gibson *v.* Eller, 13 Ind. 124.

Maryland. — Thompson *v.* Banks, 2 Md. Ch. 430.

Michigan. — Stevens *v.* Hulin, 53 Mich. 93, 18 N. W. 569.

North Carolina. — Steel *v.* Black, 56 N. C. 427; Kemp *v.* Earp, 42 N. C. 167; Streator *v.* Jones, 10 N. C. 423.

North Dakota. — O'Toole *v.* Omlie, 8 N. D. 444, 79 N. W. 849.

Texas. — Gray *v.* Shelby, 83 Tex. 405, 18 S. W. 809; Ruffier *v.* Womack, 30 Tex. 332.

Vermont. — Wright *v.* Bates, 13 Vt. 341.

Virginia. — Ransone *v.* Frayser, 10 Leigh 592; Edwards *v.* Hall, 79 Va. 321.

West Virginia. — Ogle *v.* Adams, 12 W. Va. 213; Hoffman *v.* Ryan, 21 W. Va. 415; Lawrence *v.* Du Bois, 16 W. Va. 443; Vangilder *v.* Hoffman, 22 W. Va. 1; Kerr *v.* Hill, 27 W. Va. 576; Gilchrist *v.* Beswick, 33 W. Va. 168, 10 S. E. 371.

Possession by Grantee. — That the grantee took possession of the premises and made improvements thereon and did other acts ordinarily accompanying ownership are circumstances in favor of the nature of the instrument as written, just as the mortgagor's retention of the possession has the contrary effect. Woodworth *v.* Carman, 43 Iowa 504.

15. *United States.* — Cowell *v.* Craig, 79 Fed. 685.

Alabama. — Parks *v.* Parks, 66 Ala. 326; Crews *v.* Threadgill, 35 Ala. 334; Williams *v.* Reggan, 111 Ala. 621, 20 So. 614; Danner Land & Lumb. Co. *v.* Stonewall Ins. Co., 77 Ala. 184.

California. — Fletcher *v.* Northcross, 32 Pac. 328; Baker *v.* Firemen's Fund Ins. Co., 79 Cal. 34, 21 Pac. 357.

Connecticut. — Reading *v.* Weston, 7 Conn. 143, 18 Am. Dec. 89.

Illinois. — Rubo *v.* Bennett, 85 Ill. App. 473; Ewart *v.* Walling, 42 Ill. 453.

Iowa. — Wilson *v.* Patrick, 34 Iowa 370; Rogers *v.* Davis, 91 Iowa 730, 59 N. W. 265; Haggerty *v.* Brower, 105 Iowa 395, 75 N. W. 321.

Kentucky. — Timmons *v.* Center, 19 Ky. L. Rep. 1424, 43 S. W. 437.

Maine. — Jameson *v.* Emerson, 82 Me. 359, 19 Atl. 831.

Maryland. — Hopper *v.* Smyser, 90 Md. 363, 45 Atl. 206.

Massachusetts. — Campbell *v.* Dearborn, 109 Mass. 130, 12 Am. Rep. 671.

Missouri. — Cobb *v.* Day, 106 Mo. 278, 17 S. W. 323; Book *v.* Beasly, 138 Mo. 455, 40 S. W. 101; Chance *v.* Jennings, 159 Mo. 544, 61 S. W. 177.

New Jersey. — Rempt *v.* Geyer (N. J. Eq.), 32 Atl. 266.

North Carolina. — Sellers *v.* Stalcup, 42 N. C. 13; Kelly *v.* Bryan, 41 N. C. 283; Robinson *v.* Willoughby, 65 N. C. 520; Porter *v.* White, 128 N. C. 42, 38 S. E. 24.

Pennsylvania. — Pancake *v.* Cauffman, 114 Pa. St. 113, 7 Atl. 67.

South Carolina. — Campbell *v.* Linder, 50 S. C. 169, 27 S. E. 648; Lewie *v.* Hallman, 53 S. C. 18, 27 S. E. 601.

Tennessee. — Bennet *v.* Holt, 2 Yerg. 6, 24 Am. Dec. 455; Maney *v.* Morris, 57 S. W. 442.

Texas. — Ruffier *v.* Womack, 30 Tex. 332; Loving *v.* Milliken, 59 Tex. 423; Hubby *v.* Harris, 68 Tex. 91, 3 S. W. 558; Williams *v.* Chambers (Tex. Civ. App.), 26 S. W. 270.

premises by the grantor under a lease from the grantee may still be evidence tending to show the character of the instrument as a mortgage,[16] especially when the rental paid just equals the interest on the consideration named in the deed or on a debt existing between the parties.[17]

c. *As to Taxation.* — As against the grantee in a formal conveyance, asserted to be a mortgage, it may be shown that he did not list the property for taxation as his own, and paid no taxes on it, but that the grantor did.[18]

d. *Recording as a Mortgage.* — The fact that a formal conveyance is recorded as a mortgage tends to show that a mortgage was intended by the parties,[19] though, as between the parties to it, it is not conclusive of the character of the instrument.[20]

e. *Grantee's Previous Refusal To Accept a Mortgage.* — As corroborative of the character of a transaction as a conditional sale, where the grantor asserts that it is a mortgage, the grantee may show that in the negotiations preceding the execution of the controverted instrument he refused to accept a mortgage from the grantor.[21] To corroborate the grantee that he purchased the premises absolutely, evidence may be received to show that the grantee had stated that he would reject a particular form of conveyance leading up to and preceding the transaction which is the subject of inquiry, because amounting to a mortgage only.[22]

H. Negotiations of Parties. — In ascertaining the character of the consummated act of the parties, prior negotiations tending to

Vermont. — Graham *v.* Stevens, 34 Vt. 166, 80 Am. Dec. 675; Rich *v.* Doane, 35 Vt. 125.

Virginia. — Ross *v.* Norvell, 1 Wash. 14, 1 Am. Dec. 422; Thompson *v.* Davenport, 1 Wash. 125.

West Virginia. — Hoffman *v.* Ryan, 21 W. Va. 415.

16. Danner Land & Lumb. Co. *v.* Stonewall Ins. Co., 77 Ala. 184; Rogers *v.* Davis, 91 Iowa 730, 59 N. W. 265; Haggerty *v.* Brower, 105 Iowa 395, 75 N. W. 321; Pancake *v.* Cauffman, 114 Pa. St. 113, 7 Atl. 67; Maney *v.* Morris (Tenn.), 57 S. W. 442.

17. Cowell *v.* Craig, 79 Fed. 685.

18. *Alabama.* — Reeves *v.* Abercrombie, 108 Ala. 535, 19 So. 41.

Iowa. — Froud *v.* Merritt, 99 Iowa 410, 68 N. W. 728.

Kentucky. — Alderson *v.* Caskey, 15 Ky. L. Rep. 589, 24 S. W. 629.

Maryland. — Hopper *v.* Smyser, 90 Md. 363, 45 Atl. 206.

Michigan. — Stevens *v.* Hulin, 53 Mich. 93, 18 N. W. 569.

New York. — Bocock *v.* Phipard, 24 N. Y. St. 267, 5 N. Y. Supp. 228.

North Dakota. — O'Toole *v.* Omlie, 8 N. D. 444, 79 N. W. 849.

South Carolina. — Campbell *v.* Linder, 50 S. C. 169, 27 S. E. 648.

South Dakota. — Larson *v.* Dutiel, 14 S. D. 476, 85 N. W. 1006.

It may be shown as against the grantor that he held other real estate by absolute deed, which he returned for taxation, but that the particular property, though so held, was not listed for taxation by him. Jones *v.* Grantham, 80 Ga. 472, 5 S. E. 764.

19. Morrison *v.* Brand, 5 Daly (N. Y.) 40.

20. Morrison *v.* Brand, 5 Daly (N. Y.) 40.

21. Bacon *v.* National German-American Bank, 191 Ill. 205, 60 N. E. 846.

22. Advice of Counsel and Statements in Response. — Corroborative. Where, in an action to redeem, the defendant testifies that he rejected an

show that a loan on the property subsequently conveyed was contemplated rather than a sale of the premises, and that the transaction had its inception in an application for a loan, are material to an inquiry into the nature of the controverted transaction, and may be received in evidence.[23]

I. Value of Property. — Adequacy of Consideration. — The value of the land involved and the price named in the conveyance as the consideration, or the amount required to be paid for a reconveyance, are matters entitled to consideration in determining the nature of a transaction. Indeed, inadequacy of price, while not alone sufficient to show the intention to mortgage, is, when gross or coupled with other suspicious circumstances, entitled to considerable weight, and is a proper matter for the jury's consideration.[24] The evidence

offer made by the plaintiff because it was substantially a mortgage, and that he bought the property absolutely, the testimony of the defendant's attorney that he advised the defendant that the transaction proposed was a mortgage only, and that the defendant said to him at the time such advice was given that he would have nothing to do with it, is admissible as corroborative of the defendant's testimony that a sale was intended. Dupree *v.* Estelle, 72 Tex. 575, 10 S. W. 666.

23. *United States.* — Morris *v.* Nixon, 1 How. 118; Russell *v.* Southard, 12 How. 139; Cowell *v.* Craig, 79 Fed. 685.

Alabama. — Locke *v.* Palmer, 26 Ala. 312; Crews *v.* Threadgill, 35 Ala. 334; Mobile Bldg. & Loan Ass'n *v.* Robertson, 65 Ala. 382; Turner *v.* Wilkinson, 72 Ala. 361; Williams *v.* Reggan, 111 Ala. 621, 20 So. 614.

Illinois. — Miller *v.* Thomas, 14 Ill. 428; Parmelee *v.* Lawrence, 44 Ill. 405; Hanford *v.* Blessing, 80 Ill. 188; Rubo *v.* Bennett, 85 Ill. App. 473.

Indiana. — Cross *v.* Hepner, 7 Ind. 359; Wheeler *v.* Ruston, 19 Ind. 334; Crassen *v.* Swoveland, 22 Ind. 427; Greenwood Bldg. & Loan Ass'n *v.* Stanton, 28 Ind. App. 548, 63 N. E. 574.

Iowa. — Beroud *v.* Lyons, 85 Iowa 482, 52 N. W. 486.

Kentucky. — Timmons *v.* Center, 19 Ky. L. Rep. 1424, 43 S. W. 437.

Massachusetts. — Flagg *v.* Mann, 14 Pick. 467.

Mississippi. — Freeman *v.* Wilson, 51 Miss. 329; Klein *v.* McNamara, 54 Miss. 90.

Missouri. — Holmes *v.* Fresh, 9 Mo. 201; Turner *v.* Kerr, 44 Mo. 429; Cobb *v.* Day, 106 Mo. 278, 17 S. W. 323; Book *v.* Beasly, 138 Mo. 455, 40 S. W. 101.

Montana. — Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240.

New York. — Fiedler *v.* Darrin, 50 N. Y. 437; Holmes *v.* Grant, 8 Paige 243; McSorley *v.* Hughes, 34 N. Y. St. 945, 12 N. Y. Supp. 179; Wallis *v.* Randall, 81 N. Y. 164, *affirming* 16 Hun 33.

North Carolina. — Streator *v.* Jones, 10 N. C. 423; Kimborough *v.* Smith, 17 N. C. 558; Hauser *v.* Lash, 22 N. C. 212; Howlett *v.* Thompson, 36 N. C. 369; McDonald *v.* McLeod, 36 N. C. 221.

Texas. — Loving *v.* Milliken, 59 Tex. 423; Hart *v.* Eppstein, 71 Tex. 752, 10 S. W. 85; Williams *v.* Chambers (Tex. Civ. App.), 26 S. W. 270.

Vermont. — Davis *v.* Hemenway, 27 Vt. 589.

West Virginia. — Davis *v.* Demming, 12 W. Va. 246; Ogle *v.* Adams, 12 W. Va. 213; Hoffman *v.* Ryan, 21 W. Va. 415; Kerr *v.* Hill, 27 W. Va. 576.

24. *United States.* — Morris *v.* Nixon, 1 How. 118; Russell *v.* Southard, 12 How. 139; Lewis *v.* Wells, 85 Fed. 896; Cowell *v.* Craig, 79 Fed. 685; Bentley *v.* Phelps, 2 Woodb. & M. 426, 3 Fed. Cas. No. 1331.

Alabama. — West *v.* Hendrix, 28 Ala. 226; Peagles *v.* Stabler, 91 Ala.

308, 9 So. 157; Daniels *v.* Lowrey, 92 Ala. 519, 8 So. 352; Pearson *v.* Seay, 35 Ala. 612; Vincent *v.* Walker, 86 Ala. 333, 5 So. 465; Turner *v.* Wilkinson, 72 Ala. 361; Crews *v.* Threadgill, 35 Ala. 334; Rapier *v.* Gulf City Paper Co., 77 Ala. 126; Martin *v.* Martin, 123 Ala. 191, 26 So. 525; Glass *v.* Hieronymus, 125 Ala. 140, 28 So. 71; Williams *v.* Reggan, 111 Ala. 621, 20 So. 614.

Arkansas. — Scott *v.* Henry, 13 Ark. 112.

California. — Husheon *v.* Husheon, 71 Cal. 407, 12 Pac. 410.

Delaware. — Walker *v.* Farmers Bank, 14 Atl. 819.

Florida. — Chiares *v.* Brady, 10 Fla. 133; Matthews *v.* Porter, 16 Fla. 466.

Georgia. — Pope *v.* Marshall, 78 Ga. 635, 4 S. E. 116; Rodgers *v.* Moore, 88 Ga. 88, 13 S. E. 962; Chapman *v.* Ayer, 95 Ga. 581, 23 S. E. 131.

Illinois. — Helm *v.* Boyd, 124 Ill. 370, 16 N. E. 85; Whitcomb *v.* Sutherland, 18 Ill. 578; Carr *v.* Rising, 62 Ill. 14; Rue *v.* Dole, 107 Ill. 275.

Indiana. — Davis *v.* Stonestreet, 4 Ind. 101; Turpie *v.* Lowe, 114 Ind. 37, 15 N. E. 834.

Iowa. — Trucks *v.* Lindsey, 18 Iowa 504; Bridges *v.* Linder, 60 Iowa 190, 14 N. W. 217; Wright *v.* Mahaffey, 76 Iowa 96, 40 N. W. 112; Conlee *v.* Heying, 94 Iowa 734, 62 N. W. 678; Froud *v.* Merritt, 99 Iowa 410, 68 N. W. 728; Bigler *v.* Jack, 114 Iowa 667, 87 N. W. 700.

Kentucky. — Oldham *v.* Halley, 2 J. J. Marsh. 113; Trimble *v.* McCormick, 12 Ky. L. Rep. 857, 15 S. W. 358; Gossman *v.* Gossman, 13 Ky. L. Rep. 243, 15 S. W. 1057.

Maine. — Reed *v.* Reed, 75 Me. 264.

Maryland. — Thompson *v.* Banks, 2 Md. Ch. 430.

Massachusetts. — Campbell *v.* Dearborn, 109 Mass. 130, 12 Am. Rep. 671.

Michigan. — Reilly *v.* Brown, 87 Mich. 163, 49 N. W. 557; McArthur *v.* Robinson, 104 Mich. 540, 62 N. W. 713; Carveth *v.* Winegar, 133 Mich. 34, 94 N. W. 381.

Mississippi. — Freeman *v.* Wilson, 51 Miss. 329; Klein *v.* McNamara, 54 Miss. 90.

Missouri. — Holmes *v.* Fresh, 9 Mo. 201; Brant *v.* Robertson, 16 Mo. 129; Cobb *v.* Day, 106 Mo. 278, 17 S. W. 323.

Montana. — Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240.

Nevada. — Pierce *v.* Traver, 13 Nev. 526.

New York. — Barton *v.* Lynch, 69 Hun 1, 23 N. Y. Supp. 217; Holmes *v.* Grant, 8 Paige 243; Robinson *v.* Cropsey, 6 Paige 480; Brown *v.* Dewey, 2 Barb. 28; Lawrence *v.* Farmers Loan & Trust Co., 13 N. Y. 200; Mooney *v.* Byrne, 163 N. Y. 86, 57 N. E. 163.

North Carolina. — Streator *v.* Jones, 10 N. C. 423; Kimborough *v.* Smith, 17 N. C. 558; Hauser *v.* Lash, 22 N. C. 212; Howlett *v.* Thompson, 36 N. C. 369; Sellers *v.* Stalcup, 42 N. C. 13; Kemp *v.* Earp, 42 N. C. 167; Steel *v.* Black, 56 N. C. 427; Sprague *v.* Bond, 115 N. C. 530, 20 S. E. 709.

Oregon. — Stephens *v.* Allen, 11 Or. 188, 3 Pac. 168; Swegle *v.* Belle, 20 Or. 323, 25 Pac. 633; Osgood *v.* Osgood, 35 Or. 1, 56 Pac. 1017.

Pennsylvania. — Wharf *v.* Howell, 5 Binn. 499; Wallace *v.* Smith, 155 Pa. St. 78, 25 Atl. 807, 35 Am. St. Rep. 868.

Tennessee. — Overton *v.* Bigelow, 3 Yerg. 513; Lane *v.* Dickerson, 10 Yerg. 373.

Texas. — Gibbs *v.* Penney, 43 Tex. 560; Coles *v.* Perry, 7 Tex. 109; Loving *v.* Milliken, 59 Tex. 423; Gray *v.* Shelby, 83 Tex. 405, 18 S. W. 809; Temple Nat. Bank *v.* Warner, 92 Tex. 226, 47 S. W. 515; Williams *v.* Chambers (Tex. Civ. App.), 26 S. W. 270.

West Virginia. — Davis *v.* Demming, 12 W. Va. 246; Lawrence *v.* Du Bois, 16 W. Va. 443; Vangilder *v.* Hoffman, 22 W. Va. 1; Matheney *v.* Sandford, 26 W. Va. 386; Kerr *v.* Hill, 27 W. Va. 576; Gilchrist *v.* Beswick, 33 W. Va. 168, 10 S. E. 371.

Gross inadequacy of consideration is strong evidence of a mortgage only. Wilson *v.* Patrick, 34 Iowa 362; Caldwell *v.* Meltvedt, 93 Iowa 730, 61 N. W. 1090; Forester *v.* Van Auken, 12 N. D. 175, 96 N. W. 301.

Inadequacy of consideration is admissible though not conclusive. Rubo *v.* Bennett, 85 Ill. App. 473;

must be restricted to the value of the property at the time of the conveyance, and such evidence is admissible in behalf of either party.[25] In an action by an heir, an estimate of the value of the land by his ancestor is not admissible in his behalf.[26] As the inadequacy of the price paid is a circumstance tending to show a mortgage, so the adequacy and fairness of the consideration is of like support to the absolute character of the formal conveyance.[27]

J. Pecuniary Condition of Grantor. — Evidence of the pecuniary condition of the grantor may also be competent to explain the absolute character of the transaction.[28]

K. Similar Transactions. — Similar transactions between the parties and the effect given to them may be proven to shed light on the particular transaction.[29] But evidence of transactions with other parties, even in the same form, and the effect given them is inadmissible.[30]

L. Other Writings. — Other writings of the parties may also be received. Thus where a formal conveyance is asserted to have been given as a security for the performance of the covenants of a lease, the lease may be proven.[31] Subsequent or contemporaneous writings tending to explain the transaction are likewise admissible,[32]

Story *v.* Springer, 155 Ill. 25, 39 N. E. 570; Lewis *v.* Wells, 85 Fed. 896.

A recital in a deed of a consideration for the conveyance which is greater than the debt due from the mortgagor to the mortgagee is evidence that the transaction was a conveyance and not a mortgage. Shiver *v.* Arthur, 54 S. C. 184, 32 S. E. 310.

25. Temple Nat. Bank *v.* Warner, 92 Tex. 226, 47 S. W. 515; Rodgers *v.* Moore, 88 Ga. 88, 13 S. E. 962; Wallis *v.* Randill, 81 N. Y. 164, *affirming* 16 Hun 33.

26. Action by Heir. — Estimate by Ancestor. — Pope *v.* Marshall, 78 Ga. 635, 4 S. E. 116.

27. Adequacy of Consideration Named as Showing Conveyance. Cowell *v.* Craig, 79 Fed. 685; Carr *v.* Rising, 62 Ill. 14; Wilkins *v.* Durio, 45 La. Ann. 1119, 13 So. 740; Brown *v.* Dewey, 2 Barb. 28; Greenwood Lake Imp. Co. *v.* New York & G. L. R. Co., 30 N. Y. St. 364, 8 N. Y. Supp. 711; Shiver *v.* Arthur, 54 S. C. 184, 32 S. E. 310; Calhoun *v.* Lumpkin, 60 Tex. 185.

28. Darst *v.* Murphy, 119 Ill. 343, 9 N. E. 887; Wright *v.* Mahaffey, 76 Iowa 96, 40 N. W. 112; Thompson *v.* Banks, 2 Md. Ch. 430; Streator *v.* Jones, 10 N. C. 423; Kimborough *v.* Smith, 17 N. C. 558; Howlett *v.* Thompson, 36 N. C. 369; Steel *v.* Black, 56 N. C. 427; Sellers *v.* Stalcup, 42 N. C. 13.

29. In an action by an heir to have the quit-claim deed of his ancestor declared a mortgage it is competent for him to show that his ancestor had had other transactions with the grantee in which he had executed to the grantee his quit-claim deed, and that such prior deeds were always given as securities, treated by the parties as mortgages, and reconveyances made to his ancestor. Jackson *v.* Jones, 74 Tex. 104, 11 S. W. 1061.

30. Jackson *v.* Jones, 74 Tex. 104, 11 S. W. 1061.

31. And a copy of the lease may be received where the original is destroyed and the copy proved. Augel *v.* Simmonds, 7 Tex. Civ. App. 331, 26 S. W. 910.

32. Holmes *v.* Warren, 145 Cal. 457, 78 Pac. 954; Rogers *v.* Jones, 92 Cal. 80, 28 Pac. 97; Buse *v.* Page, 32 Minn. 111, 19 N. W. 736; Littlewort *v.* Davis, 50 Miss. 403; Prewett *v.* Dobbs, 13 Smed. & M. (Miss.) 431; Cornell *v.* Hall, 22 Mich. 377; Lewie *v.* Hallman, 53 S. C. 18, 30 S. E. 601.

as well as matters of public record.[33] So, receipts, apparently for interest on the debt, are admissible to show the relation of debtor and creditor, and hence of mortgagor and mortgagee,[34] while the grantor's receipt, indicative of the character of a conveyance, would be equally admissible against him.[35]

M. Statements of Third Party to Grantor. — The statements of a third party to one of the parties to the instrument as to the character of the instrument or transaction are not admissible to vary or explain it unless the opposite party should be so connected with the person making such statements as to make the same binding on him.[36]

N. Equitable Mortgage. — Parol To Show Intention. — The intention to give an equitable mortgage may be proven by parol.[37]

O. Statutory Declaration of Character of Transaction. Effect on Rules of Evidence. — The statute providing that all deeds executed to secure the payment of a debt shall be treated as mortgages does not alter the rules of evidence obtaining in such cases.[38]

3. Burden of Proof. — A. In General. — The party asserting an instrument, in form a deed, to be a mortgage has the burden of showing that it was so intended by the parties.[39]

33. Hall *v.* Savill, 3 Greene (Iowa) 37, 54 Am. Dec. 485.

34. Bentley *v.* Phelps, 2 Woodb. & M. 426, 3 Fed. Cas. No. 1331.

35. Receipt as for Purchase Price. — On the question whether a formal deed was intended as a mortgage, a receipt given by the grantor to the grantee reciting the receipt of a sum of money as in final payment of the purchase price of the controverted premises, in accordance with the deed asserted to be a mortgage, is admissible against the grantor. Holmes *v.* Warren, 145 Cal. 457, 78 Pac. 954.

36. Notary's Statements. — The statements of the notary taking the acknowledgment made to the grantor without the knowledge of the grantee, that he could redeem from his formal deed, are not admissible in the grantor's behalf to have the instrument declared a mortgage. Miller *v.* Yturria, 69 Tex. 549, 7 S. W. 206.

But where the grantor executing an instrument absolute testifies that he did not understand its true nature, it may be shown in rebuttal that the notary taking the acknowledgment explained the instrument to the grantee, and that he seemed to understand it. Harrington *v.* H. B. Claflin Co., 28 Tex. Civ. App. 100, 66 S. W. 898.

37. Whether the purchaser of land, who gives a note to the one furnishing the purchase money reciting a promise to pay such amount for the purchase price of the land, intended to give an equitable mortgage to the vendor is to be determined by evidence *aliunde* the writing, and the burden of establishing such is on the one asserting the lien. Jones *v.* Kennedy, 138 Ala. 502, 35 So. 465.

38. Chiares *v.* Brady, 10 Fla. 133.

39. *United States.* — Bogk *v.* Gassert, 149 U. S. 17; Wallace *v.* Johnson, 129 U. S. 58.

Alabama. — Rose *v.* Gandy, 137 Ala. 329, 34 So. 239.

California. — Bryant *v.* Broadwell, 140 Cal. 490, 74 Pac. 33; Woods *v.* Jensen, 130 Cal. 200, 62 Pac. 473.

Florida. — Chiares *v.* Brady, 10 Fla. 133.

Illinois. — Cassem *v.* Heustis, 201 Ill. 208, 66 N. E. 283; Gannon *v.* Moles, 209 Ill. 180, 70 N. E. 689; Keithley *v.* Wood, 151 Ill. 566, 38 N. E. 149, 42 Am. St. Rep. 265; Helm *v.* Boyd, 124 Ill. 370, 16 N. E. 85;

B. Degree of Proof Required. — a. *In General.* — The great weight of authority affirms the rule that to convert an instrument, in form a sale or conveyance of real estate absolute, into a mortgage, the evidence must be clear, satisfactory and convincing;[40] and in

Burgett *v.* Osborne, 172 Ill. 227, 50 N. E. 206.

Rule Stated. — "It is true that a deed which is absolute on its face may be shown by parol to be a mortgage. But the law will presume, in the absence of proof to the contrary, that such deed is what it purports to be — an absolute conveyance. He who claims such a conveyance to be a mortgage must sustain his claim by proof which is sufficient to overcome such presumption of the law, and by proof which is clear, satisfactory and convincing." Williams *v.* Williams, 180 Ill. 361, 54 N. E. 229.

Iowa. — Wright *v.* Wright, 122 Iowa 549, 98 N. W. 472; Baird *v.* Reininghaus, 87 Iowa 167, 54 N. W. 148.

Louisiana. — Mulhaupt *v.* Youree, 35 La. Ann. 1052.

Maine. — Cotton *v.* McKee, 68 Me. 486.

Michigan. — Kellogg *v.* Northrup, 115 Mich. 327, 73 N. W. 230.

Missouri. — Book *v.* Beasly, 138 Mo. 455, 40 S. W. 101.

New Jersey. — Winters *v.* Earl, 52 N. J. Eq. 52, 28 Atl. 15.

New York. — Braun *v.* Vollmer, 89 App. Div. 43, 85 N. Y. Supp. 319; Fullerton *v.* McCurdy, 55 N. Y. 637; Haussknecht *v.* Smith, 11 App. Div. 185, 42 N. Y. Supp. 611.

North Dakota. — Northwestern F. & M. Ins. Co. *v.* Lough, 102 N. W. 160.

Pennsylvania. — Haines *v.* Thomson, 70 Pa. St. 434; Todd *v.* Campbell, 32 Pa. St. 250.

South Carolina. — Miller *v.* Price, 66 S. C. 85, 44 S. E. 584; Shiver *v.* Arthur, 54 S. C. 184, 32 S. E. 310. See rule carefully formulated.

Texas. — Miller *v.* Yturria, 69 Tex. 549, 7 S. W. 206; McLean *v.* Ellis, 79 Tex. 398, 15 S. W. 394.

Wisconsin. — Becker *v.* Howard, 75 Wis. 415, 44 N. W. 755; McCormick *v.* Herndon, 67 Wis. 648, 31 N. W. 303; Jordan *v.* Estate of Warren, 107 Wis. 539, 83 N. W. 946.

In a suit to have a deed declared a mortgage the vendee's admission that he had agreed to permit the plaintiff to purchase the land before its sale does not relieve the plaintiff of the burden of proof in such a suit, but does relax the strict rule of proof as to the nature of the controverted instrument. Glass *v.* Hieronymus, 125 Ala. 140, 28 So. 71.

Attorney and Client. — In a controversy between parties who sustain relations of confidence, the person in whom the confidence is reposed has the burden of establishing that a deed, claimed to be a mortgage, was a mortgage in fact. Tappan *v.* Aylsworth, 13 R. I. 582. See *infra* "Degree of Proof Required."

40. *United States.* — Coyle *v.* Davis, 116 U. S. 108; Cadman *v.* Peter, 118 U. S. 73; Howland *v.* Blake, 97 U. S. 624, *affirming* 7 Biss. 40, 12 Fed. Cas. No. 6792; Satterfield *v.* Malone, 35 Fed. 445; Hayward *v.* Mayse, 1 App. D. C. 133; Andrews *v.* Hyde, 3 Cliff. 516, 1 Fed. Cas. No. 377.

Alabama. — Turner *v.* Wilkinson, 72 Ala. 361; Marsh *v.* Marsh, 74 Ala. 418; Reeves *v.* Abercrombie, 108 Ala. 535, 19 So. 41; Rose *v.* Gandy, 137 Ala. 329, 34 So. 239; Knaus *v.* Dreher, 84 Ala. 319, 4 So. 287; Parish *v.* Gates, 29 Ala. 254; Downing *v.* Woodstock Iron Co., 93 Ala. 262, 9 So. 177; Mitchell *v.* Wellman, 80 Ala. 16; Peagles *v.* Stabler, 91 Ala. 308, 9 So. 157.

Arizona. — Sullivan *v.* Woods, 5 Ariz. 196, 50 Pac. 113.

California. — Henley *v.* Hotaling, 41 Cal. 22; Hopper *v.* Jones, 29 Cal. 18; Ahern *v.* McCarthy, 107 Cal. 382, 40 Pac. 482; Mahoney *v.* Bostwick, 96 Cal. 53, 30 Pac. 1020; Ganceart *v.* Henry, 98 Cal. 281, 33 Pac. 92; Emery *v.* Lowe, 140 Cal. 379, 73 Pac. 981.

Colorado. — Whitsett *v.* Kershow, 4 Colo. 419; Townsend *v.* Petersen, 12 Colo. 491, 21 Pac. 619; Armor *v.* Spalding, 14 Colo. 302, 23 Pac. 789; Persse *v.* Atlantic Pac. Ry. Tunnel Co., 5 Colo. App. 117, 37 Pac. 951.

Delaware. — Walker *v.* Farmers Bank, 14 Atl. 819.

Florida. — Matthews *v.* Porter, 16 Fla. 466.

Illinois. — Story *v.* Springer, 155 Ill. 25, 39 N. E. 570; Rankin *v.* Rankin, 111 Ill. App. 403; Eames *v.* Hardin, 111 Ill. 634; Blake *v.* Taylor, 142 Ill. 482, 32 N. E. 401; Darst *v.* Murphy, 119 Ill. 343, 9 N. E. 887; Workman *v.* Greening, 115 Ill. 477, 4 N. E. 385; Helm *v.* Boyd, 124 Ill. 370, 16 N. E. 85; Carpenter *v.* Plagge, 93 Ill. App. 445, *modified* by Sup. Ct., 192 Ill. 82, 61 N. E. 530; Williams *v.* Williams, 180 Ill. 361, 54 N. E. 229; Heaton *v.* Gaines, 198 Ill. 479, 64 N. E. 1081.

Indiana. — Conwell *v.* Evill, 4 Blackf. 67.

Iowa. — Kibby *v.* Harsh, 61 Iowa 196, 16 N. W. 85; Allen *v.* Fogg, 66 Iowa 229, 23 N. W. 643; Sinclair *v.* Walker, 38 Iowa 575; Knight *v.* McCord, 63 Iowa 429, 19 N. W. 310; Ensminger *v.* Ensminger, 75 Iowa 89, 39 N. W. 208, 9 Am. St. Rep. 462; Langer *v.* Meservey, 80 Iowa 158, 45 N. W. 732; Baird *v.* Reininghaus, 87 Iowa 167, 54 N. W. 158; Wright *v.* Mahaffey, 76 Iowa 96, 40 N. W. 112.

Kansas. — Winston *v.* Burnell, 44 Kan. 367, 24 Pac. 477, 21 Am. St. Rep. 289; Reeder *v.* Gorsuch, 55 Kan. 553, 40 Pac. 897.

Louisiana. — Mulhaupt *v.* Youree, 35 La. Ann. 1052; Franklin *v.* Sewall, 110 La. 292, 34 So. 448.

Maine. — Cotton *v.* McKee, 68 Me. 486; Knapp *v.* Bailey, 79 Me. 195, 9 Atl. 122.

Michigan. — Tilden *v.* Streeter, 45 Mich. 533, 8 N. W. 502; Johnson *v.* Van Velsor, 43 Mich. 208, 5 N. W. 265; Etheridge *v.* Wisner, 86 Mich. 166, 48 N. W. 1087; Sowles *v.* Wilcox, 127 Mich. 166, 86 N. W. 689; McMillan *v.* Bissell, 63 Mich. 66, 29 N. W. 737.

Mississippi. — Williams *v.* Stratton, 10 Smed. & M. 418; Lipscomb *v.* Jack, 20 So. 883.

Missouri. — Ringo *v.* Richardson, 53 Mo. 385; Forrester *v.* Moore, 77 Mo. 651; Cobb *v.* Day, 106 Mo. 278, 17 S. W. 323; Jones *v.* Rush, 156 Mo. 364, 57 S. W. 118; Bobb *v.* Wolff, 148 Mo. 335, 49 S. W. 996; Worley *v.* Dryden, 57 Mo. 226; Quick *v.* Turner, 26 Mo. App. 29; Whelan *v.* Tobener, 71 Mo. App. 361.

Nebraska. — Roddy *v.* Roddy, 3 Neb. 99; Deroin *v.* Jennings, 4 Neb. 96; Wilde *v.* Homan, 58 Neb. 634, 79 N. W. 546.

Nevada. — Pierce *v.* Traver, 13 Nev. 526.

New Jersey. — Winters *v.* Earl, 52 N. J. Eq. 52, 28 Atl. 15.

New York. — *In re* Holmes, 176 N. Y. 603, 68 N. E. 1118; *In re* Holmes, 79 App. Div. 264, 79 N. Y. Supp. 592; Marks *v.* Pell, 1 Johns. Ch. 594; Haussknecht *v.* Smith, 11 App. Div. 185, 42 N. Y. Supp. 611, *affirmed* 161 N. Y. 663, 57 N. E. 1112; Erwin *v.* Curtis, 43 Hun 292; Wilson *v.* Parshall, 129 N. Y. 223, 29 N. E. 297; Sidway *v.* Sidway, 54 Hun 634, 7 N. Y. Supp. 421; Shattuck *v.* Bascom, 55 Hun 14, 9 N. Y. Supp. 934.

North Carolina. — Clement *v.* Clement, 54 N. C. 184; Lewis *v.* Owen, 36 N. C. 290; Moore *v.* Ivey, 43 N. C. 192; Leggett *v.* Leggett, 88 N. C. 108; Williams *v.* Hodges, 95 N. C. 32; Smiley *v.* Pearce, 98 N. C. 185, 3 S. E. 631; McNair *v.* Pope, 100 N. C. 404, 6 S. E. 234; Hinton *v.* Pritchard, 107 N. C. 128, 12 S. E. 242; Watkins *v.* Williams, 123 N. C. 170, 31 S. E. 388.

North Dakota. — Jasper *v.* Hazen, 4 N. D. 1, 58 N. W. 454.

Oregon. — Albany & S. W. D. Co. *v.* Crawford, 11 Or. 243, 4 Pac. 113.

Pennsylvania. — Null *v.* Fries, 110 Pa. St. 521, 1 Atl. 551; Haines *v.* Thomson, 70 Pa. St. 434; Appeal of Hartley, 103 Pa. St. 23; Logue's Appeal, 104 Pa. St. 136; Nicolls *v.* McDonald, 101 Pa. St. 514; Pancake *v.* Cauffman, 114 Pa. St. 113, 7 Atl. 67; Stewart's Appeal, 98 Pa. St. 377.

South Carolina. — Arnold *v.* Mattison, 3 Rich. Eq. 153. See the rule stated in Miller *v.* Price, 66 S. C. 85, 44 S. E. 584; Shiver *v.* Arthur, 54 S. C. 184, 32 S. E. 310.

Texas. — Brewster *v.* Davis, 56 Tex. 478. But see *contra,* or so tending, Wylie *v.* Posey, 71 Tex. 34, 9 S. W. 87; Galveston H. & S. A. R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573.

Virginia. — Edwards *v.* Wall, 79 Va. 321; Holladay *v.* Willis, 101 Va. 274, 43 S. E. 616.

West Virginia. — Vangilder *v.*

Hoffman, 22 W. Va. 1; Kerr *v.* Hill, 27 W. Va. 576.

Wisconsin. — Becker *v.* Howard, 75 Wis. 415, 44 N. W. 755; McCormick *v.* Herndon, 67 Wis. 648, 31 N. W. 303; Sable *v.* Maloney, 48 Wis. 331, 4 N. W. 479; Jordan *v.* Warner's Estate, 107 Wis. 539, 83 N. W. 946; Rockwell *v.* Humphrey, 57 Wis. 410, 15 N. W. 394; Lake *v.* Meachem, 13 Wis. 355; Hunter *v.* Maanum, 78 Wis. 656, 48 N. W. 51; Schriber *v.* Le Clair, 66 Wis. 579, 29 N. W. 570; Harrison *v.* Juneau Bank, 17 Wis. 340.

A mere preponderance is not sufficient (Sloan *v.* Becker, 34 Minn. 491, 26 N. W. 730; Case *v.* Peters, 20 Mich. 298; Bingham *v.* Thompson, 4 Nev. 224), at least where the character of the transaction as a mortgage is denied and the evidence conflicting (Perot *v.* Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258; Hone *v.* Fisher, 2 Barb. Ch. [N. Y.] 559). But see Sanborn *v.* Sanborn, 104 Mich. 180, 62 N. W. 371; Kellogg *v.* Northrup, 115 Mich. 327, 73 N. W. 230; Prather *v.* Wilkens, 68 Tex. 187, 4 S. W. 252; Smith *v.* Crosby, 47 Wis. 160, 2 N. W. 104. The evidence must be clear and convincing. But *quaere*, whether the jury should be instructed in this language. Miller *v.* Yturria, 69 Tex. 549, 7 S. W. 206.

The intention to make a mortgage must be "clear and conclusive." Farmers & Merchants Bank *v.* Smith, 61 App. Div. 315, 70 N. Y. Supp. 536.

The evidence must be clear, specific, satisfactory and of such a nature as to leave in the mind of the chancellor no hesitation of substantial doubt. McGuin *v.* Lee, 10 N. D. 160, 86 N. W. 714. In the absence of clear proof, a deed absolute on its face will not be adjudged to be a mortgage upon inferences and arguments drawn from other evidence in the case. Falk *v.* Wittram, 120 Cal. 479, 52 Pac. 707.

Variability of Rule. — "Under some circumstances the evidence must be more convincing than in others." Beebe *v.* Wisconsin Mtge. Loan Co., 117 Wis. 328, 93 N. W. 1103.

To sustain a finding declaring a deed a mortgage the evidence of the plaintiff should present a state of facts consonant with reason and consistent in its different parts, though a preponderance of evidence is all that is required. Stall *v.* Jones, 47 Neb. 706, 66 N. W. 653.

After the lapse of a considerable time clear and convincing proof is required to show that an instrument in form a deed was intended to be a mortgage. Hancock *v.* Harper, 86 Ill. 445.

The evidence must be clear, strong and reasonably conclusive. A. J. Dwyer Pine Land Co. *v.* Whiteman, 92 Minn. 55, 99 N. W. 362; Wakefield *v.* Day, 41 Minn. 344, 43 N. W. 71; Little *v.* Braun, 11 N. D. 410, 92 N. W. 800.

The testimony must be clear and specific. Appeal of Lance, 112 Pa. St. 456, 4 Atl. 375.

Clear and Satisfactory Proof Is Not Required. — Wallace *v.* Berry, 83 Tex. 328, 18 S. W. 595.

The evidence in such a case must be "clear and certain," though it is not required to be "clear and convincing." Miller *v.* Yturria, 69 Tex. 549, 7 S. W. 206.

Preponderance Is Sufficient. Prather *v.* Wilkens, 68 Tex. 187, 4 S. W. 252.

Cogent Proof Required. — Haynes *v.* Swann, 6 Heisk. (Tenn.) 560.

The evidence should be such to the court and jury as would satisfy the conscience of a chancellor. McGinity *v.* McGinity, 63 Pa. St. 38. No certain standard of evidence is required. It is sufficient if the evidence overcomes the presumption in favor of the deed. Haas *v.* Nauert, 19 N. Y. St. 472, 2 N. Y. Supp. 723.

No General Rule Obtains. — If the evidence clearly shows that the instrument was intended as a mortgage it is sufficient. Miller *v.* McGuckin, 15 Abb. N. C. (N. Y.) 204.

Trustee and Cestui Que Trust. Stewart *v.* Fellows, 128 Ill. 480, 17 N. E. 476.

In Haas *v.* Nauert, 19 N. Y. St. 472, 2 N. Y. Supp. 723, the rule and its history are stated and explained at considerable length.

Where the grantee testifies positively that an instrument was intended as a deed, the evidence for the grantor will not be sufficient if conflicting and unsatisfactory. Strong *v.* Strong, 126 Ill. 301, 18 N. E. 665, *affirming* 27 Ill. App. 148.

some cases it is said that it must appear that such was the intention of the parties by proof beyond a reasonable doubt.[41] If the evidence of the intention to make a mortgage be clear and convincing, it is not a sufficient objection to its sufficiency that it is conflicting.[42] While positive evidence of intention is not required,[43] it is not sufficient merely that the party having the burden raise a doubt where the instrument is in form absolute, as in such a case the doubt will be resolved in favor of the formal character of the transaction.[44] The rule is different, however, in the case of a conditional sale of the real estate, or where there is a contemporaneous agreement to reconvey. Here the courts incline to the theory of mortgage, and if a doubt arise whether a sale or a mortgage was intended the doubt will be resolved in favor of mortgage.[45] Of course, if the evidence

The evidence need not be clear and convincing, but a preponderance only is required, consonant to the rule generally obtaining in civil actions. Stall *v.* Jones, 47 Neb. 706, 66 N. W. 653.

41. *Colorado.* — Townsend *v.* Petersen, 12 Colo. 491, 21 Pac. 619.

Michigan. — Case *v.* Peters, 20 Mich. 298.

Missouri. — Gerhardt *v.* Tucker, 187 Mo. 46, 85 S. W. 552.

New York. — Ensign *v.* Ensign, 120 N. Y. 655, 24 N. E. 942; Farmers & Merchants Bank *v.* Smith, 61 App. Div. 315, 70 N. Y. Supp. 536; Coburn *v.* Anderson, 62 How. Pr. 268; Shattuck *v.* Bascom, 55 Hun 14, 9 N. Y. Supp. 934.

North Dakota. — Jasper *v.* Hazen, 4 N. D. 1, 58 N. W. 454.

Wisconsin. — Sable *v.* Maloney, 48 Wis. 331, 4 N. W. 479; Butler *v.* Butler, 46 Wis. 430, 1 N. W. 70; McCormick *v.* Herndon, 67 Wis. 648, 31 N. W. 303.

The evidence must be convincing beyond a reasonable doubt. Tilden *v.* Streeter, 45 Mich. 533, 8 N. W. 502; Worley *v.* Dryden, 57 Mo. 226.

The evidence ought to be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage. Henley *v.* Hotaling, 41 Cal. 22.

A preponderance of the evidence in favor of the theory of a mortgage is not sufficient where there is a substantial conflict in the evidence. Perot *v.* Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258.

42. Sufficient if Clear Though Conflicting. — Muller *v.* Flavin, 13 S. D. 595, 83 N. W. 687; Appeal of Hartley, 103 Pa. St. 23.

43. Muller *v.* Flavin, 13 S. D. 595, 83 N. W. 687; Farmers & Merchants Bank *v.* Smith, 61 App. Div. 315, 70 N. Y. Supp. 536.

Positive evidence of intention and agreement is not necessary. McMillan *v.* Bissell, 63 Mich. 66, 29 N. W. 737.

44. Klein *v.* McNamara, 54 Miss. 90; Vincent *v.* Walker, 86 Ala. 333, 5 So. 465; Brantley *v.* West, 27 Ala. 542; Reeves *v.* Abercrombie, 108 Ala. 535, 19 So. 41.

It will not be sufficient to declare a deed a mortgage that the evidence throws doubt upon the true character of the transaction. Hayward *v.* Mayse, 1 App. D. C. 133. *Contra.* — It has been said, even in a case in which the deed was absolute, that if doubt arose from all the circumstances the deed should be declared a mortgage. Rubo *v.* Bennett, 85 Ill. App. 473.

45. *England.* — Longuet *v.* Scawen, 1 Ves. 402.

United States. — Russell *v.* Southard, 12 How. 139; Conway *v.* Alexander, 7 Cranch 218; Flagg *v.* Mann, 2 Sumn. 486, 9 Fed. Cas. No. 4847.

Alabama. — Locke *v.* Palmer, 26 Ala. 312; Moseley *v.* Moseley, 86 Ala. 289, 5 So. 732; Daniels *v.* Lowery, 92 Ala. 519, 8 So. 352; Kramer *v.* Brown, 114 Ala. 612, 21 So. 817; Turner *v.* Wilkinson, 72 Ala. 361; Williams *v.* Reggan, 111 Ala. 621, 20 So. 614; Reeves *v.* Abercrombie, 108 Ala. 535, 19 So. 41.

Arkansas. — Bogenschultz *v.* O'Toole, 70 Ark. 253, 67 S. W. 400;

Gibson *v.* Martin, 38 Ark. 207; Scott *v.* Henry, 13 Ark. 112.

California. — Hickox *v.* Lowe, 10 Cal. 197; Sears *v.* Dixon, 33 Cal. 326; Farmer *v.* Grose, 42 Cal. 169.

Connecticut. — Bacon *v.* Brown, 19 Conn. 31.

Florida. — Franklin *v.* Ayer, 22 Fla. 654.

Illinois. — Miller *v.* Thomas, 14 Ill. 428; Williams *v.* Bishop, 15 Ill. 553; Bishop *v.* Williams, 18 Ill. 101; Pensoneau *v.* Pulliam, 47 Ill. 58.

Indiana. — Heath *v.* Williams, 30 Ind. 495.

Iowa. — Trucks *v.* Lindsey, 18 Iowa 504; Scott *v.* Mewhirter, 49 Iowa 487; Barthell *v.* Syverson, 54 Iowa 160, 6 N. W. 178; Hughes *v.* Sheaff, 19 Iowa 335; Baird *v.* Reininghaus, 87 Iowa 167, 54 N. W. 148.

Kentucky. — Honore *v.* Hutchings, 8 Bush 687; Gossman *v.* Gossman, 13 Ky. L. Rep. 243, 15 S. W. 1057; Edrington *v.* Harper, 3 J. J. Marsh. 353, 20 Am. Dec. 145; Skinner *v.* Miller, 5 Litt. 84; Jenkins *v.* Stewart, 13 Ky. L. Rep. 112, 16 S. W. 356; Alderson *v.* Caskey, 15 Ky. L. Rep. 589, 24 S. W. 629.

Maine. — Reed *v.* Reed, 75 Me. 264.

Maryland. — Artz *v.* Grove, 21 Md. 456; Baugher *v.* Merryman, 32 Md. 185; Montague *v.* Sewell, 57 Md. 407; Packard *v.* Corporation for Relief of Widows, 77 Md. 240, 26 Atl. 411.

Massachusetts. — Waite *v.* Dimick, 10 Allen 364.

Michigan. — McKinney *v.* Miller, 19 Mich. 142; Cornell *v.* Hall, 22 Mich. 377; Ferris *v.* Wilcox, 51 Mich. 105, 16 N. W. 252, 47 Am. Rep. 551.

Minnesota. — Holton *v.* Meighen, 15 Minn. 69; King *v.* McCarthy, 50 Minn. 222, 52 N. W. 648; Sloan *v.* Becker, 34 Minn. 491, 26 N. W. 730.

Mississippi. — Freeman *v.* Wilson, 51 Miss. 329; Klein *v.* McNamara, 54 Miss. 90.

Missouri. — O'Niell *v.* Capelle, 62 Mo. 202; Brant *v.* Robertson, 16 Mo. 129; King *v.* Greves, 42 Mo. App. 168; Turner *v.* Kerr, 44 Mo. 429; Desloge *v.* Ranger, 7 Mo. 327.

Montana. — Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240.

New Hampshire. — Page *v.* Foster, 7 N. H. 392.

New Jersey. — Crane *v.* Bonnell, 2 N. J. Eq. 264.

New York. — Glover *v.* Payn, 19 Wend. 518; Brown *v.* Dewey, 2 Barb. 28; Matthews *v.* Skeehan, 69 N. Y. 585; Mooney *v.* Byrne, 163 N. Y. 86, 57 N. E. 163.

North Carolina. — Poindexter *v.* McCannon, 16 N. C. 377, 18 Am. Dec. 591.

Oregon. — Stephens *v.* Allen, 11 Or. 188, 3 Pac. 168.

South Dakota. — Wilson *v.* McWilliams, 16 S. D. 96, 91 N. W. 453.

Texas. — Walker *v.* McDonald, 49 Tex. 458; DeBruhl *v.* Maas, 54 Tex. 464; Gray *v.* Shelby, 83 Tex. 405, 18 S. W. 809.

Vermont. — Rich *v.* Doane, 35 Vt. 125.

Virginia. — Robertson *v.* Campbell, 2 Call 421; King *v.* Newman, 2 Munf. 40; Snavely *v.* Pickle, 29 Gratt. 27.

West Virginia. — Hoffman *v.* Ryan, 21 W. Va. 415; Gilchrist *v.* Beswick, 33 W. Va. 168, 10 S. E. 371.

Wisconsin. — Rogers *v.* Burrus, 53 Wis. 530, 9 N. W. 786; Rockwell *v.* Humphrey, 57 Wis. 410, 15 N. W. 394.

Where the issue is whether the transaction was a mortgage or a conditional sale, the same strictness of proof is not required as where the instrument is claimed to be an absolute conveyance. Mitchell *v.* Wellman, 80 Ala. 16; Glass *v.* Hieronymus, 125 Ala. 140, 28 So. 71.

Where doubt arises whether there is a right of repurchase, the transaction will be treated as a mortgage rather than a conditional sale. Cosby *v.* Buchanan, 81 Ala. 574, 1 So. 898.

On the issue whether a transaction was a mortgage or a sale with the right of repurchase, a less degree of evidence is required to make out a case in favor of the person asserting the theory of mortgage than where the other party claims that the transaction amounted to an absolute sale. Rose *v.* Gandy, 137 Ala. 329, 34 So. 239.

Where a deed and an agreement to reconvey are executed contemporaneously, unless the character of the transaction is free from doubt it will be presumed to have been intended as a mortgage. Keithly *v.* Wood, 151 Ill. 566, 38 N. E. 149, 42 Am. St. Rep. 265, *affirming* 47 Ill. App. 102.

clearly discloses an intention to make a conditional sale of the property the character of the instrument as such will be sustained.[46]

b. *As Against Grantor's Admission.* — When the grantor has made an admission of the character of an instrument as a deed, circumstances of a considerable degree of certainty will be required to be proved to constitute the instrument a mortgage.[47]

c. *As to Third Party.* — The same strict degree of proof is not required to show a deed a mortgage where the controversy arises between a party to the instrument and a third party.[48]

d. *When Title in Redemptioner.* — Where the title rests in a party redeeming from a sale on foreclosure, which title is asserted to have been taken as security only for the amount paid to redeem, the strict rule of proof, applying where an absolute conveyance is asserted to be a mortgage, has in such circumstances no application.[49]

4. Weight and Sufficiency. — A. To Be Determined From Facts and Circumstances in the Particular Case. — No invariable rule can be formulated whereby the sufficiency of the evidence in every case may be determined, but from the very nature of things each case must largely depend upon its own circumstances.[50] There are, however, some rules of more or less general application which have been announced and applied, which will now be noticed.

B. Number of Witnesses. — Testimony of Grantor Only. The testimony of the grantor, or of one witness only, uncorroborated by any circumstance, is not sufficient to overcome the presumption

46. When Intention To Make Conditional Sale Appears. — Davis *v.* Thomas, 1 Russ. & M. (Eng.) 506; Conway *v.* Alexander, 7 Cranch (U. S.) 218; Martin *v.* Martin, 123 Ala. 191, 26 So. 525; Fleton *v.* Grier, 109 Ga. 320, 35 S. E. 175; Hopper *v.* Smyser, 90 Md. 363, 45 Atl. 206; Blumberg *v.* Beekman, 121 Mich. 647, 80 N. W. 710; Swetland *v.* Swetland, 3 Mich. 482; Bloodgood *v.* Zeily, 2 Caines Cas. (N. Y.) 124; Pennington *v.* Hanby, 4 Munf. (Va.) 140; Kunert *v.* Strong, 103 Wis. 70, 79 N. W. 32.

47. Hartnett *v.* Ball, 22 Ill. 44.

48. See Aetna Ins. Co. *v.* Jacobson, 105 Ill. App. 283.

49. Wilson *v.* McWilliams, 16 S. D. 96, 91 N. W. 453.

50. *United States.* — Horbach *v.* Hill, 112 U. S. 144.

Alabama. — Reeves *v.* Abercrombie, 108 Ala. 535, 19 So. 41.

California. — Pendergrass *v.* Burris, 19 Pac. 187.

Indiana. — Davis *v.* Stonestreet, 4 Ind. 101; Heath *v.* Williams, 30 Ind. 495; Voss *v.* Eller, 109 Ind. 260, 10 N. E. 74.

Iowa. — Hughes *v.* Sheaff, 19 Iowa 335.

Kentucky. — Trimble *v.* McCormick, 12 Ky. L. Rep. 857, 15 S. W. 358; Alderson *v.* Caskey, 15 Ky. L. Rep. 589, 24 S. W. 629; Edrington *v.* Harper, 3 J. J. Marsh. 353, 20 Am. Dec. 145.

Michigan. — Cornell *v.* Hall, 22 Mich. 377.

Minnesota. — King *v.* McCarthy, 50 Minn. 222, 52 N. W. 648.

Missouri. — Brant *v.* Robertson, 16 Mo. 129.

Montana. — Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240.

Oregon. — Stephens *v.* Allen, 11 Or. 188, 3 Pac. 168.

Pennsylvania. — Wallace *v.* Smith, 155 Pa. St. 78, 25 Atl. 807, 35 Am. St. Rep. 868.

South Dakota. — Bradley *v.* Helgerson, 14 S. D. 593, 86 N. W. 634.

Texas. — Hubby *v.* Harris, 68 Tex. 91, 3 S. W. 558; Gray *v.* Shelby, 83

that the instrument or transaction is what it purports to be,[51] though where there is some slight circumstance inhering in the transaction explanatory of its nature and corroborative of the testimony of the grantor or any other single witness it may be sufficient.[52] The grantee's own evidence, not contradicted, admitting the instrument to have been intended as a mortgage may be sufficient.[53]

C. Declarations of Parties to Instrument. — The subsequent declarations of one of the parties to the transaction are not sufficient to change the formal nature of the instrument appearing on its face,[54]

Tex. 405, 18 S. W. 809; Loving *v.* Milliken, 59 Tex. 423.

51. Andrews *v.* Hyde, 3 Cliff. 516, 1 Fed. Cas. No. 377; Howland *v.* Blake, 97 U. S. 624; Shattuck *v.* Bascom, 55 Hun 14, 9 N. Y. Supp. 934; Hamilton *v.* Flume, 2 Posey Unrep. Cas. (Tex.) 694.

That a deed was intended as a mortgage cannot be shown by the uncorroborated evidence of a single witness that it was so intended by the maker, since deceased. Muckelroy *v.* House, 21 Tex. Civ. App. 673, 52 S. W. 1038.

The testimony of a single witness is not sufficient to overcome the defendant's denial, in the absence of fraud or mistake. Arnold *v.* Mattison, 3 Rich. Eq. (S. C.) 153.

Declarations of Grantee. — The testimony of a single witness as to the declarations of the grantee is not sufficient to overcome defendant's denial. Hubbard *v.* Stetson, 3 McArthur (D. C.) 113.

The testimony of one of the parties to the instrument, without corroboration by any circumstance, the other party to the transaction being deceased, is not sufficient. Andrews *v.* Hyde, 3 Cliff. 516, 1 Fed. Cas. No. 377; Zimmerman *v.* Marchland, 23 Ind. 474; Kent *v.* Lasley, 24 Wis. 654.

The testimony of the grantor alone, without any facts or circumstances in corroboration, is not sufficient to discharge the burden resting upon the plaintiff. Barber *v.* Lefavour, 176 Pa. St. 331, 35 Atl. 202. But see *contra*, Pierce *v.* Fort, 60 Tex. 464.

52. The testimony of a single witness, when corroborated by the usual attending circumstances, is sufficient. Preschbaker *v.* Feaman, 32 Ill. 475.

53. Banta *v.* Wise, 135 Cal. 277, 67 Pac. 129.

54. *Alabama.* — Bryan *v.* Cowart, 21 Ala. 92.

Illinois. — Sutphen *v.* Cushman, 35 Ill. 186; Lindauer *v.* Cummings, 57 Ill. 195.

Indiana. — Aborn *v.* Bennett, 2 Blackf. 101.

Iowa. — Ensminger *v.* Ensminger, 75 Iowa 89, 39 N. W. 208, 9 Am. St. Rep. 462.

New York. — Gillespie *v.* Moon, 2 Johns. Ch. 585; Marks *v.* Pell, 1 Johns Ch. 594; Van Buren *v.* Olmstead, 5 Paige 10.

North Carolina. — Kelly *v.* Bryan, 41 N. C. 283; Glisson *v.* Hill, 55 N. C. 256; Watkins *v.* Williams, 123 N. C. 170, 31 So. 388; Porter *v.* White, 128 N. C. 42, 38 So. 24.

Pennsylvania. — Todd *v.* Campbell, 32 Pa. St. 250; Plumer *v.* Guthrie, 76 Pa. St. 441; Burger *v.* Dankel, 100 Pa. St. 113; Nicolls *v.* McDonald, 101 Pa. St. 514; Pearson *v.* Sharp, 115 Pa. St. 254, 9 Atl. 38.

The grantee's declarations should be received with great caution. Conwell *v.* Evill, 4 Blackf. (Ind.) 67. The statement of a mortgagee that he foreclosed to protect the title, and that he would pay the debt of the mortgagor pursuant to an agreement to that effect, is not sufficient to reduce an absolute deed to a mortgage. Howland *v.* Blake, 97 U. S. 624. Loose and random admissions made by the grantee after he has accepted the conveyance are to be received with caution. England *v.* England, 94 Iowa 716, 61 N. W. 920.

The Grantee's Declarations are not sufficient proof of intention to sustain a bill to redeem, as from a mortgage. The intention must be established by proof of the facts and circumstances, *dehors* the deed, inconsistent with the theory of an absolute conveyance. Sowell *v.* Barrett,

but, to be sufficient, must be supported by corroborating circumstances or supplemented by other evidence.[55] And parol evidence merely of an agreement at the time a conveyance was executed that it should operate as a mortgage is not alone sufficient to reduce it to a mortgage, but there must also be proof of facts and circumstances *dehors* the mere agreement of the parties.[56] It would seem, however, that the contemporaneous admissions of a party would alone be sufficient.[57]

D. Proof of Pre-Existing Debt. — Proof only of a pre-existing debt that might have been secured is not sufficient, but a continuing obligation must be shown.[58]

E. Previous Agreement in Parol. — Proof of an agreement in parol that a mortgage should be executed is not sufficient to give the character of a mortgage to a conveyance thereafter executed between the parties.[59] Though where the formal deed is executed under a previous parol agreement that it shall operate as a security only, the precedent agreement is to be admitted, not merely to shed light on the transaction, but to control it and to give to it the character of a security.[60]

F. Parol Agreement to Reconvey. — So evidence of a concurrent parol agreement for a reconveyance is not alone sufficient to convert the conveyance into a mortgage.[61]

G. Particular Evidence Considered. — a. *What Sufficient.* For cases in which the evidence has been considered and held sufficient reference is made to the notes.[62]

45 N. C. 50; Kelly *v.* Bryan, 41 N. C. 283; Todd *v.* Campbell, 32 Pa. St. 250.

Quaere, whether parol admissions made within twenty years from the transaction are sufficient. Dexter *v.* Arnold, 2 Sumn. 152, 7 Fed. Cas. No. 3859.

Contra. — Recitals in Grantee's Deed. — The grantee's solemn recital in deeds and other instruments at any time within twenty years are sufficient. Dexter *v.* Arnold, 2 Sumn. 152, 7 Fed. Cas. No. 3859.

55. Declarations When Corroborated. — The declarations of the grantee prior and subsequent to the conveyance may be sufficient, where he is deceased, to declare a deed a mortgage, where such declarations are made under circumstances strongly tending to show their truthfulness. Harp *v.* Harp, 136 Cal. 421, 69 Pac. 28.

56. Proof of Parol Agreement at Time of Execution of Mortgage. Blackwell *v.* Overby, 41 N. C. 38; Kelly *v.* Bryan, 41 N. C. 283.

57. McIntyre *v.* Humphreys, 1 Hoff. Ch. (N. Y.) 30.

58. Obligation Must Be Shown To Be Continuing. — People *v.* Irwin, 14 Cal. 428; Ruffier *v.* Womack, 30 Tex. 332; Alstin *v.* Cundiff, 52 Tex. 461; Kirby *v.* National Loan & Inv. Co., 22 Tex. Civ. App. 257, 54 S. W. 1081.

59. Blackwell *v.* Overby, 41 N. C. 38.

60. Grier *v.* Casares (Tex. Civ. App.), 76 S. W. 451.

61. Fisher *v.* Green, 142 Ill. 80, 31 N. E. 172; Batcheller *v.* Batcheller, 144 Ill. 471, 33 N. E. 24; McLaughlin *v.* Royce, 108 Iowa 254, 78 N. W. 1105.

62. In Hursey *v.* Hursey (W. Va.), 49 S. E. 367, the court held that the grantor's retention of the possession of the mortgaged premises may be so explained as to overcome the probative force of that circumstance when standing alone, but the explanation of such fact will not overcome its effect when coupled with conduct and admissions of the

b. *What Insufficient.* — Numerous cases in which the evidence has been held insufficient are cited below.[63]

5. With Deceased Person. — Under the Illinois statute the declara-

grantee pointing to the grantor's right to redeem or to repurchase.

Where the evidence shows that after a deed, given in consideration of notes of the grantor paid by the grantee, had been delivered, the notes were retained by the grantee unsatisfied, this, in connection with evidence as to the understanding between the parties, is likewise sufficient to show that the instrument was in fact a mortgage. Tannyhill *v.* Pepperl (Neb.), 96 N. W. 1005.

A subsequent writing executed by the grantee, reciting an agreement made contemporaneously with the execution of the deed, that the grantor should have a reconveyance upon the payment to the grantee of the amount of the consideration of the deed, may be sufficient when corroborated by slight circumstances. Locke *v.* Palmer, 26 Ala. 312.

If the grantor is to pay rent, which is to be applied upon the principal and interest of a debt equal to the consideration for the apparent conveyance, this, in connection with a contemporaneous agreement to reconvey, is conclusive that the transaction was a mortgage. Hickox *v.* Lowe, 10 Cal. 197.

See Mears *v.* Strobach, 12 Wash. 61, 40 Pac. 621, where the evidence showed a conveyance for a money consideration and a contemporaneous lease of the premises to the grantor, and it was held that the transaction as a mortgage only was made out, not conclusively, but *prima facie.*

If the grantor and his wife both testify that a deed was given as a security only, and the grantee testifies that the grantors were to rent the property for a term of years, with the right to purchase the property on payment of the purchase money, failing in which the property was to be his, the instrument is a mortgage. Daniels *v.* Lowery, 92 Ala. 519, 8 So. 352.

Positive parol proof of the nature of the instrument as a mortgage will overcome the recital in the agreement to reconvey that the transaction was not to be treated as a mortgage, but only as a contract to reconvey. People *v.* Irwin, 14 Cal. 428.

63. If the evidence in the grantor's behalf is unsatisfactory and conflicting, and, in a prior proceeding brought by creditors to have the conveyance set aside for fraud, the grantor appeared and answered, and on examination testified, without anything occurring on such prior trial to indicate the character of the instrument as a mortgage, the evidence will not be sufficient to show a mortgage. Nickodemus *v.* Nickodemus, 45 Mich. 385, 8 N. W. 86.

In Barton *v.* Lynch, 69 Hun 1, 23 N. Y. Supp. 217, the court held that where the evidence relating to the existence of a parol agreement for a reconveyance is conflicting, and though no consideration was paid for the conveyance the property was incumbered to the extent of its full value, the presumption in favor of the instrument as a deed will obtain.

Marriage a Good Consideration. May *v.* May, 158 Ill. 209, 42 N. E. 56, *affirming* 55 Ill. App. 488.

See Reeves *v.* Abercrombie, 108 Ala. 535, 19 So. 41, where it was held that where the grantor has paid rent for the premises for a considerable term of years, without making a claim of ownership in himself, the absolute character of the deed will not be overthrown.

Franklin *v.* Sewall, 110 La. 292, 34 So. 448. If the testimony is not otherwise conclusive as to the character of a controverted transaction, that there was no actual delivery of the property, and that the defendant, who claimed the transaction to be a conveyance absolute, had said he would not put the plaintiff out of the house on the premises, will not give to the transaction the character of a mortgage.

If the evidence does not disclose the existence of a debt to be secured, then the fact of mortgage does not exist, and the deed must be given its absolute effect appearing upon the face of the writing. In Gaines *v.* Heaton (Ill.), 64 N. E. 1081, *reversing* 100 Ill. App. 26, the court said:

tions and admissions of the grantee concerning the nature of the transaction, made in the deceased grantor's presence, may be proven against the grantee by persons not parties to the action or in interest, but the grantee may not testify as to these.[64] The grantee may not testify to a statement of the accounts between himself and the deceased grantor at the time the mortgage was executed as showing the consideration for the mortgage.[65]

II. EXECUTION AND DELIVERY.

1. Presumptions and Burden of Proof. — A. In Foreclosure. Where the execution and delivery of a mortgage are denied by the defendant in a foreclosure proceeding the plaintiff has the burden of proof as to such matters.[66] This rule is generally enforced by statute, the defendant being required, however, to verify his denial of execution.[67] If the answer admits the execution of the mortgage, but denies only that it was delivered, on the issue so joined the plaintiff takes the burden.[68] The mortgage is presumed to have been executed and delivered on the day of its date.[69] Where the officer's certificate of acknowledgment attached to the mortgage bears the same date as the mortgage note it will be presumed that the note

"In order to establish the fact that a deed absolute upon its face is a mortgage, it must appear that a debt existed, due from the person claimed to be a mortgagor to the person claimed to be a mortgagee. It is an essential element of a mortgage that some obligation should exist to be secured. Rue *v.* Dole, 107 Ill. 275; Freer *v.* Lake, 115 Ill. 662, 4 N. E. 512; McNamara *v.* Culver, 22 Kan. 661."

In Gazley *v.* Herring (Tex.), 17 S. W. 17, it was held that when the direct evidence of the intention of the parties is conflicting, and it appears that the conveyance was made in consideration of services to be rendered by the grantee, that no evidence of debt was given, and that the grantee had previously refused to take a mortgage from the grantor for the same purpose, the intention to make a mortgage is not sufficiently proven.

See also Wallace *v.* Smith, 155 Pa. St. 78, 25 Atl. 807, 35 Am. St. Rep. 868.

Lapse of Time. — Length of time, though less than the period of the statute of limitations, may afford a strong presumption against a claim set up as an equitable right of redemption, where it rests wholly in parol. Conner *v.* Chase, 15 Vt. 764.

64. Ruckman *v.* Alwood, 71 Ill. 155.

65. Transactions With Deceased Persons. — Ruckman *v.* Alwood, 71 Ill. 155.

66. Damman *v.* Vollenweider (Iowa), 101 N. W. 1130.

When execution is denied the burden is upon the plaintiff to show that the person whose name appears upon the mortgage as the mortgagor in fact executed it, and not upon the mortgagor to show that it was a forgery. Wagener *v.* Kirven, 47 S. C. 347, 25 S. E. 130.

Where the execution and genuineness of secured notes is in issue the burden is on the plaintiff to prove that the notes are in existence and that they were in fact executed by the defendant. Bruce *v.* Wanzer (S. D.), 99 N. W. 1102.

67. See cases cited note 66, *supra*. Consult also the statutes of the various states.

See article "Delivery," Vol. IV.

68. Spencer *v.* Iowa Mtge. Co., 6 Kan. App. 378, 50 Pac. 1094.

69. Lyon *v.* McIlvaine, 24 Iowa 9; Parke *v.* Neely, 90 Pa. St. 52.

and mortgage were executed and delivered contemporaneously,[70] and the mere fact that an earlier date appears at the commencement of the mortgage is immaterial and does not constitute a variance.[71]

B. In Actions To Set the Mortgage Aside. — The allegation in a verified bill to set aside a deed of trust, that it was not executed by the party appearing therein as having executed it, does not have the effect of shifting to the defendant the burden of proving the execution. The sworn allegation in such an action is not in the nature of a *non est factum*, and the burden rests with the plaintiff to establish his bill by *clear and convincing proof*.[72] In an action by an attaching creditor to remove the cloud of a recorded mortgage on the attached premises, if it be admitted that the mortgage had not been delivered at the time it was recorded, the defendant mortgagee has the burden to show that the mortgage had been delivered in fact before the plaintiff's lien attached.[73] In an action to cancel a note and mortgage in the possession of the mortgagor, on the ground of their non-delivery, the plaintiff has the burden of establishing such fact by a preponderance of the evidence.[74]

2. Admissibility. — A. Of the Mortgage and Obligation Secured. — Where the genuineness of the maker's signature to the obligation secured is denied by a plea of *non est factum* neither the note nor the mortgage will be admissible in evidence without proof of the signature to the obligation so secured,[75] though it has been held that where the statute makes the acknowledgment of the mortgage *prima facie* proof of its genuineness the mortgage may be received in evidence without further proof of its execution, where it appears regularly and formally executed and acknowledged, notwithstanding the plea of *non est factum*.[76] As between the parties to the instrument a mortgage is good, though not attested in due form, and in an action between them the instrument is admissible in evidence upon

70. Portz *v.* Schantz, 70 Wis. 497, 36 N. W. 249.

71. Portz *v.* Schantz, 70 Wis. 497, 36 N. W. 249.

72. Crutchfield *v.* Hewett, 2 App. D. C. 373.

73. Harmon *v.* Myer, 55 Wis. 85, 12 N. W. 435.

74. Kreek *v.* Pitzelberger, 64 Iowa 108, 19 N. W. 874.

75. Non Est Factum. — Proof of Execution Preliminary to Admissibility. — Under the Louisiana statute, where the signature to the note is denied, the fact that the signature to the mortgage is authenticated will not authorize its reception in evidence, together with the note and mortgage, without proof first of the signature to the note. The primary question in such a case is the signature to the note, and proof as to it must be first made. James *v.* Rand, 43 La. Ann. 179, 8 So. 623.

Execution. — When Not Required To Be Proven. — The execution of a mortgage need not of course be proven where the fact of execution is set forth in the petition and is not denied by the answer. Brewer *v.* Crow, 4 Greene (Iowa) 520.

Agency. — Ratification. — Though executed without authority by an agent, it may be shown as against the mortgagor that he subsequently ratified the act. Ralphs *v.* Hensler, 97 Cal. 296, 32 Pac. 243.

76. Anglo-American Land Mtge. & Agency Co. *v.* Hegwer, 7 Kan. App. 689, 51 Pac. 915.

proper proof of execution.[77] A note, though unsigned, attached to a mortgage given to secure it, may be read in evidence in a foreclosure suit and the mortgage foreclosed, the note in such circumstances being a part of the mortgage.[78] In a suit to foreclose, if the fact of loss and the contents of a note and mortgage are otherwise clearly established, it is immaterial that a certified copy of the record was admitted in evidence, though the mortgage had but one witness, while the statute required more than one attesting witness, and hence the mortgage was not entitled to record.[79]

B. Parol To Defeat or Show Conditional Delivery. — The presumption of the delivery of a mortgage produced from the possession of the mortgagee may be overcome by parol to show that there was no delivery in fact.[80] Parol is not admissible, however, to engraft a condition on the delivery.[81]

C. Miscellaneous Matters. — On the question whether a deed of trust was executed, evidence of the grantor's anxiety in behalf of his creditors before, and his expressions of satisfaction subsequent to, the time of the alleged execution is competent.[82] When the execution of a mortgage duly acknowledged is denied, the relations to the parties of the notary to whom the acknowledgment is made may be inquired into.[83] The true date of the execution of a mortgage may be shown by parol, notwithstanding that to do so involves a contradiction of the writing.[84] Parol is likewise admissible to show that a mortgage was acknowledged after it had been executed, though the date of the acknowledgment is anterior to the date of the instrument itself.[85] Though the wife in her answer alleges duress upon the part of the plaintiff by his agent and others in collusion with him, she will not be permitted to prove duress on the part of her husband of which the plaintiff had no knowledge.[86]

77. **Unattested Mortgage as Between Parties.** — Pulliam *v.* Hudson, 117 Ga. 127, 43 S. E. 407; Gardner *v.* Moore, 51 Ga. 268; Baker *v.* Clark, 52 Mich. 22, 17 N. W. 225; Benton *v.* Baxley, 90 Ga. 296, 15 S. E. 820; Jubb *v.* Thorpe, 1 Wyo. 356; Carrico *v.* Farmers & Merchants Nat. Bank, 33 Md. 235. But see *contra*, under the Alabama statute, Lord *v.* Folmar, 57 Ala. 615; Wilson *v.* Glenn, 62 Ala. 28; Dugger *v.* Collins, 69 Ala. 324.

78. McFadden *v.* State, 82 Ind. 558.

79. Coon *v.* Bouchard, 74 Mich. 486, 42 N. W. 72.

80. **Non-Delivery May Be Shown by Parol.** — Sargent *v.* Cooley, 12 N. D. 1, 94 N. W. 576.

81. **Proof of Condition at Delivery by Parol.** — Sargent *v.* Cooley (N. D.), 94 N. W. 576. (See Code 1899, § 3517.)

82. **Expressions of Anxiety in Behalf of Creditors.** — Gunnell *v.* Cockerill, 84 Ill. 319.

83. **Relations of Notary to Parties.** — When an acknowledged mortgage is charged to be a forgery, the relations of the notary to the mortgagor may be inquired into where the mortgage was subsequently assigned to the notary and by him assigned to the holder in the particular action. Chrimes *v.* Squier, 4 App. Div. 611, 38 N. Y. Supp. 996.

84. **Varying Date by Parol.** McFall *v.* Murray, 4 Kan. App. 554, 45 Pac. 1100; Parke *v.* Neely, 90 Pa. St. 52.

85. **Date of Acknowledgment. Varying by Parol.** — Hoit *v.* Russell, 56 N. H. 559.

86. Lord *v.* Lindsay, 18 Hun (N. Y.) 484.

Where alterations and interlineation appear upon the mortgage it may be shown by the scrivener that such changes in and additions to the mortgage were made before the instrument was executed.[87]

3. Weight and Sufficiency. — A. Attestation and Acknowledgment. — The production of the mortgage, duly witnessed and acknowledged, is *prima facie* proof of its due execution by the party therein appearing as the mortgagor.[88] To overcome the *prima facie* case so made the evidence should be clear and convincing,[89] and for this purpose the party's unsupported evidence is not generally sufficient.[90] Each case is largely to be ruled by its own circum-

87. Batchelder *v.* Blake, 70 Vt. 197, 40 Atl. 34.

88. In the case of Greeley State Bank *v.* Line, 50 Neb. 434, 69 N. W. 966, the court, considering the proposition stated in the text, said: "The note which the mortgage was given to secure was described in the mortgage, and the latter was duly witnessed and acknowledged. The mortgage, having been witnessed and acknowledged, was of itself evidence that it had been executed by Line. It was not conclusive evidence of that fact, but it was sufficient, in the absence of any evidence on the part of Line that he did not execute it, to justify a finding that he did."

The sufficiency of an acknowledgment is admitted by default. Moore *v.* Titman, 33 Ill. 357.

89. Degree of Proof To Overcome Force of Prima Facie Case. — McCardia *v.* Billings, 10 N. D. 373, 87 N. W. 1008; Smith *v.* Allis, 52 Wis. 337, 9 N. W. 155; Citizens Bank of Clinton *v.* Jones, 117 Wis. 446, 94 N. W. 329 (evidence held insufficient to overcome effect of acknowledgment).

Certified Copy of Record. — If the mortgage has been duly acknowledged so as to be entitled to be recorded, and is recorded, a certified copy of the record of such mortgage is *prima facie* evidence of its execution. McCardia *v.* Billings, 10 N. D. 373, 87 N. W. 1008.

90. Party's Unsupported Testimony Insufficient. — In the case of Smith *v.* Allis, 52 Wis. 337, 9 N. W. 155, the court, considering the testimony of the wife that she had executed and acknowledged a mortgage under the duress of her husband, said: "We do not hold that the testimony of the wife alone may not sustain the defense that her husband coerced or unduly influenced her to sign the mortgage, in any possible case, where the circumstances or the character and relations of the parties may be such as to render it very probable; and her clear and consistent statements, and her appearance and manner of testifying, may make the most convincing impressions of the truth of her evidence upon the court or jury. But we do wish to say that as a general rule her unsupported testimony alone ought not to be received as satisfactorily establishing such a defense, and especially to overcome the formal certificate of acknowledgment by the proper officer, unless beyond reasonable question. We do not wish to say that such testimony may *never* be sufficient in any case, but that such a convenient defense to a mortgage upon the homestead or the separate estate of the wife, to secure the husband's debt, as that her signature was procured by the coercion or undue influence of her husband within the privacy of home, thus defeating the rights of an innocent mortgagee, ought not to be encouraged by overestimating her testimony. The chances of collusion are great and beyond the possibility of exposure, and innocent persons who have parted with their money upon the faith of securities executed in the most solemn form, are very liable to suffer from the effect of family interviews between husband and wife, very properly guarded and closed against outside knowledge or intrusion. As there can scarcely be found a reported case where such a defense has prevailed upon such questionable testimony, very few if any will be likely to occur in the future."

stances as to the proof required to overcome the formal acknowledgment.[91] The fact of the delivery of a mortgage is made to appear *prima facie,* though not conclusively, by acknowledgment and proof of the mortgage.[92]

B. Possession of the Mortgage. — The possession by the mortgagee of the mortgage duly executed is *prima facie* evidence of the delivery of the instrument and of his acceptance of it,[93] which may, of course, be explained.[94] Conversely, the mortgagor's possession of the mortgage is strong evidence of a non-delivery of the mortgage, which also may be explained.[95] The production of the mortgage duly acknowledged is *prima facie* evidence of the genuineness of the mortgage itself,[96] and of the note or obligation recited to be thereby secured.[97]

91. Each Case Ruled by Its Own Circumstances. — McCardia *v.* Billings, 10 N. D. 373, 87 N. W. 1008.

92. Execution and Acknowledgment Presumptive of Delivery. Bell *v.* Farmers Bank of Kentucky, 11 Bush (Ky.) 34, 21 Am. Rep. 205; Wyckoff *v.* Remsen, 11 Paige (N. Y.) 564; Portz *v.* Schantz, 70 Wis. 497, 36 N. W. 249.

The fact of the acknowledgment of a mortgage as of a particular date is not of itself evidence of delivery. Freeman *v.* Schroeder, 43 Barb. (N. Y.) 618.

The denial by the mortgagor in his answer of the delivery of the mortgage sought to be foreclosed does not alone overcome the presumption of delivery arising from the execution of the mortgage, its acknowledgment and recording, and the mortgagee's possession of the instrument. Commercial Bank *v.* Reckless, 5 N. J. Eq. 650.

Testimony of Mortgagor's Wife. The testimony of the wife of the mortgagor tending to show a mistake in the certificate of acknowledgment, is entitled to little weight as against the mortgage. Augustus *v.* McPherson, 3 Ky. L. Rep. 396. See also Smith *v.* Allis, 52 Wis. 337, 9 N. W. 155.

93. Possession by Mortgagee Prima Facie Evidence of Delivery. Ray *v.* Hallenbeck, 42 Fed. 381; Wolverton *v.* Collins, 34 Iowa 238; Chandler *v.* Temple, 4 Cush. (Mass.) 285; Flint *v.* Phipps, 16 Or. 437, 19 Pac. 543; Schallehn *v.* Hibbard, 64 Kan. 601, 68 Pac. 61; Haskill *v.* Sevier, 25 Ark. 152; Carnall *v.* Duval, 22 Ark. 136; Sessions *v.* Sherwood, 78 Mich. 234, 44 N. W. 263.

The possession by a mortgagee of a mortgage duly executed and recorded is cogent evidence of delivery. Commercial Bank *v.* Reckless, 5 N. J. Eq. 650.

94. Explanation of Mortgagee's Possession. — Delivery is not proved where it appears that the possession of the mortgage was obtained from the officer with whom it had been filed, without the mortgagor's consent, and over his previous refusal to deliver the instrument which the mortgage purported to secure. Commercial Bank *v.* Reckless, 5 N. J. Eq. 650.

95. Mortgagor's Possession. The mortgagor's possession of a mortgage where delivery is denied by him is sufficiently explained by evidence that, after it had been recorded, the mortgagor procured it from the recording officer and had since retained it. Parkhurst *v.* Berdell, 52 Hun 614, 5 N. Y. Supp. 328.

96. Mixer *v.* Bennett, 70 Iowa 329, 30 N. W. 587; Borland *v.* Walrath, 33 Iowa 130.

97. In Mixer *v.* Bennett, 70 Iowa 329, 30 N. W. 587, the court says: "When the plaintiff introduced the mortgage in evidence, with the certificate of acknowledgment attached, he made a *prima facie* case upon the issue joined between the parties. In Borland *v.* Walrath, 33 Iowa 130, the execution of a mortgage was put in issue, and it was said that 'the cer-

C. Recording. — The mere fact that a mortgage, the execution and delivery of which are denied by the mortgagor, is found upon the appropriate record is not alone sufficient proof of the controverted facts,[98] though the additional circumstance of its being found in the mortgagee's possession may establish a *prima facie* case.[99] Recording with notification to the mortgagee is also sufficient to complete delivery.[1] Where a party executes his mortgage to himself in a representative capacity, doing no act whatever to effect a delivery of the instrument or to give it validity in his lifetime, the recording of it by his successor in the office or trust will not constitute a delivery.[2] The acceptance of a mortgage beneficial to the mortgagee will be *prima facie* presumed from the fact of its having been executed by the mortgagor and placed on record.[3] It has been held, however, that merely executing a mortgage, beneficial to the mortgagee named therein, and delivering it to a party other than the mortgagee or his agent, without any notice to the mortgagee of such matters, and with no circumstances tending to show acceptance of

tificate of acknowledgment, we concede, is to have weight in determining the question. It certainly makes a *prima facie* case. This is the least that can be claimed for it. At all events, a party seeking to defeat his deed because it was not acknowledged by him ought to make a clear case against the certificate of the officer in order to overthrow the instrument.'

"Now, while it may be true that the introduction of the promissory notes in evidence was no proof of their execution, yet when the acknowledged mortgage was introduced, it proved, not only its execution, but the execution of the notes, for they are fully described in the mortgage, which recites that they are executed by Julia E. Bennett [the mortgagor]."

98. Fact of Recording. — Where the mortgagee and persons claiming under him deny the delivery and acceptance of a mortgage, that the instrument was found appropriately recorded is not sufficient evidence to establish execution and delivery. Foley *v.* Howard, 8 Iowa 56.

99. Mortgagee's Possession. The execution and delivery of a mortgage are made sufficiently to appear by evidence that the mortgagor wrote and signed the instrument and filed it with the proper officer for record, and that subsequently it was found in the mortgagee's possession. Haskill *v.* Sevier, 25 Ark. 152.

1. Recording and Notice. — As to Mortgagor. — The placing of a mortgage upon the appropriate record and notifying the mortgagee of such fact is a sufficient delivery and acknowledgment of the validity of a mortgage to bind the mortgagor. Parkhurst *v.* Berdell, 52 Hun 614, 5 N. Y. Supp. 328.

2. Administrator's Mortgage to Himself. — Recording by Successor. Where an administrator executes his individual note, secured by mortgage, to himself as administrator, and, without recording the mortgage, places both the note and mortgage among his private papers, where they are found at the time of his death, the subsequent recording of the mortgage by his successor in the administration will not complete delivery, and the instruments are void. Gorham *v.* Meacham, 63 Vt. 231, 22 Atl. 572, 13 L. R. A. 676.

3. Execution and Recording of Mortgage. — Beneficial to Mortgagee. — Presumption. — This presumption will of course obtain where the instrument, though not recorded by the mortgagor, was recorded by another acting under the mortgagor's authority. Atwood *v.* Marshall, 52 Neb. 173, 71 N. W. 1064.

the mortgage, is not sufficient to establish delivery and acceptance, at least against third parties whose rights have intervened.[4]

D. Execution of Obligation Secured. — The production of the obligation described in the mortgage is *prima facie* proof of its execution when the fact of execution is not denied,[5] though it is otherwise where execution is put in issue;[6] and in such latter case the execution of the obligation secured must be proven before it may be received in evidence.[7] The recitals in the mortgage are not sufficient proof after maturity of the obligation where the notes were not produced in court nor their absence accounted for, and execution is denied.[8] Recitals in the mortgage may supply proof of the obligation secured, however, where the execution is not controverted, and where foreclosure only, and not a personal judgment, is sought.[9]

E. Recitals in Other Instruments. — The execution of a mortgage is sufficiently shown as against the grantee in a deed by a recital therein of the existence of the mortgage upon the premises described in and conveyed by such deed.[10]

F. Particular Evidence Considered. — Proof of a debt to be secured and of the execution of the mortgage is not sufficient to support an inference of its delivery.[11] Where the mortgagor executed

4. Bailey *v.* Gilliland, 2 Kan. App. 558, 44 Pac. 747; Foley *v.* Howard, 8 Iowa 56; Bell *v.* Farmers Bank, 11 Bush (Ky.) 34, 21 Am. Rep. 205.

See *contra.* — The execution and recording of a mortgage beneficial to the mortgagee will be presumed to be accepted by him, until he manifests his dissent after being duly notified, and this presumption is held to obtain against the attaching creditors of the mortgagor whose attachments were levied against the mortgaged property before the mortgagee had any knowledge of the existence of the mortgage. Ensworth *v.* King, 50 Mo. 477.

5. **Production of Obligation Secured as Proof of Execution.** Loughridge *v.* Northwestern Mut. L. Ins. Co., 79 Ill. App. 223.

6. **Production When Execution Denied.** — Stoddard *v.* Lyon (S. D.), 99 N. W. 1116.

7. Stoddard *v.* Lyon (S. D.), 99 N. W. 1116.

8. **Recitals in Mortgage. — When Insufficient.** — Bruce *v.* Wanzer (S. D.), 99 N. W. 1102.

9. **Where Foreclosure Only Is Sought and Execution Not in Issue.** Andrews *v.* Reid (Kan.), 48 Pac. 29.

10. **Recitals in Deed. — As Against Grantee.** — Cram *v.* Ingalls, 18 N. H. 613.

Corporate Records. — Upon the introduction of the record, found in an appropriate book, of a stockholders' meeting authorizing the execution of a corporate mortgage, and the production of the mortgage itself and the bonds it secures, execution will be sufficiently proved over the defendant's plea of *non est factum* where the only evidence offered in support of the plea is that of a clerk who made up the record several years subsequent to the alleged execution at the dictation of the president of the mortgagor company, who testifies that he has no recollection of such a meeting and believes none was ever held, but who was not in the employ of the mortgagor company at the time such meetings of its stockholders were alleged to have been held. McIlhenny *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705.

11. **Proof of Execution Not Presumptive of Delivery.** — Delivery was held not to be established where the evidence, in an action to foreclose, both parties to the transaction

his note and mortgage with the intention that they should be delivered to the mortgagee, leaving them in the hands of the notary taking the acknowledgment, and such officer, without special directions from the mortgagor, delivered them to the mortgagee therein named, it was held that the notary's agency would be presumed so as to effect a valid delivery of the instruments.[12] Likewise any acts of the mortgagee which presuppose an acceptance of the mortgage are sufficient to show acceptance.[13]

4. Competency of Witnesses. — An attorney preparing a mortgage is a competent witness thereto, though the mortgage provides for the payment of attorney's fees incurred in collecting the debt thereby secured.[14] The testimony of the mortgagee's representative who is present at the time a mortgage is executed by mark, and who attests its execution without request to do so by the mortgagor, may be received to establish execution, and upon such testimony alone the instrument may be received in evidence.[15] So a stockholder in a corporation to which a mortgage has been executed is a proper attesting witness to such mortgage, and is a competent witness to prove its execution.[16]

III. THE CONSIDERATION.

1. Presumptions and Burden of Proof. — A. In General. — The introduction in evidence of a mortgage and the note it purports to secure creates a *prima facie* presumption of consideration to sustain the transaction so that the party alleging the contrary has the burden

being dead, showed that the mortgage had been signed and acknowledged by the mortgagor, that the mortgagee at the time of the transaction sold the mortgaged property to the mortgagor, and that afterward the mortgagor had made a statement that he was indebted to the mortgagee, but it appeared that the mortgage had never been recorded and that no witness had ever seen it subsequent to its execution. Baker *v.* Updike, 155 Ill. 54, 39 N. E. 587. Evidence considered in detail and held to show the execution and acknowledgment of a mortgage by husband and wife. Citizens Bank of Clinton *v.* Jones, 117 Wis. 446, 94 N. W. 329.

Action To Set Aside a Mortgage as a Forgery Not Sustained. Chrimes *v.* Squier, 4 App. Div. 611, 38 N. Y. Supp. 996.

Evidence Examined and Held Insufficient To Show Execution of Mortgage. — Ann Arbor Sav. Bank *v.* Ellison, 113 Mich. 557, 71 N. W. 873.

12. Presumption of Authority of Agent To Make Delivery. — Adams *v.* Adams, 70 Iowa 253, 30 N. W. 795.

13. Renken *v.* Bellmer, 55 Cal. 466; Nazro *v.* Ware, 38 Minn. 443, 38 N. W. 359; Truman *v.* McCollum, 20 Wis. 360.

Attempting to Enforce Lien of Mortgage. — Ely *v.* Stannard, 44 Conn. 528.

Executing Deed of Release. — Aldrich *v.* Willis, 55 Cal. 81.

Under Deed of Trust. — Advertising Property. — Crocker *v.* Lowenthal, 83 Ill. 579.

14. Chastain *v.* Porter, 130 Ala. 410, 30 So. 492.

15. Attesting Witness Representing Mortgagee. — Execution by Mark. — Chastain *v.* Porter, 130 Ala. 410, 30 So. 492.

16. Read *v.* Toledo Loan Co., 23 Ohio Cir. Ct. 25.

to overcome the presumption.[17] The defense that a mortgage sought to be foreclosed was given without consideration, pursuant to a secret agreement between the parties, must be proven by evidence as clear and convincing as that required for a reformation of the instrument.[18] The party denying that a prior recorded mortgage is supported by a consideration, where it is sought to defeat the priority of the earlier mortgage, has the burden of showing no consideration.[19] If an estoppel against the mortgagor to deny consideration is relied on, the party alleging the estoppel must prove it.[20]

B. Instrument Under Seal. — A mortgage executed under the seal of the mortgagor is presumed to rest upon a consideration.[21] This presumption is only *prima facie*,[22] however, and the burden

17. Commercial Exchange Bank *v.* McLeod, 67 Iowa 718, 25 N. W. 894; Woolworth *v.* Sater, 63 Neb. 418, 88 N. W. 682; Loan & Trust Co. Sav. Bank of Concord *v.* Stoddard, 2 Neb. (Unof.) 486, 89 N. W. 301.

It will not be presumed that a mortgage given three days after the execution of a note to secure a surety thereon was without consideration. Forbes *v.* McCoy, 15 Neb. 632, 20 N. W. 17.

The presumption of consideration arising from the fact of the execution of a note and mortgage, together with positive testimony that the consideration therefor was money borrowed from an estate, is not overcome by the fact that the same were not mentioned in an inventory of the estate. Ambrose *v.* Drew, 139 Cal. 665, 73 Pac. 543.

The recital in a mortgage of a nominal consideration is *prima facie* sufficient as a consideration to validate the instrument. Bolling *v.* Munchus, 65 Ala. 558; Grinball *v.* Mastin, 77 Ala. 553.

18. Bray *v.* Comer, 82 Ala. 183, 1 So. 77.

19. As Between Successive Mortgages. — Ambrose *v.* Drew, 139 Cal. 665, 73 Pac. 543.

20. Hill *v.* Hoole, 116 N. Y. 299, 22 N. E. 547.

Where an assignee relies upon matter estopping the mortgagor from asserting that the mortgage was given without consideration, and that the assignee was a good faith purchaser for value, he has the burden of proof. Anderson *v.* Lee, 73 Minn. 397, 76 N. W. 24.

21. Consideration Presumed When Mortgage Is Under Seal. *Georgia.* — Weaver *v.* Cosby, 109 Ga. 310, 34 S. E. 680.

Kentucky. — Cotton *v.* Graham, 84 Ky. 672, 2 S. W. 647.

Minnesota. — Anderson *v.* Lee, 73 Minn. 397, 76 N. W. 24.

Nebraska. — Forbes *v.* McCoy, 15 Neb. 632, 20 N. W. 17.

New Jersey. — Feldman *v.* Gamble, 26 N. J. Eq. 494; Farnum *v.* Burnett, 21 N. J. Eq. 87; Campbell *v.* Tompkins, 32 N. J. Eq. 170.

New York. — Calkins *v.* Long, 22 Barb. 97; Best *v.* Thiel, 79 N. Y. 15; Wood *v.* Travis, 24 Misc. 589, 54 N. Y. Supp. 60.

22. Presumption Prima Facie Only. — Wearse *v.* Peirce, 24 Pick. (Mass.) 141; Devlin *v.* Quigg, 44 Minn. 534, 47 N. W. 258; Craver *v.* Wilson, 14 Abb. Pr. (N. S.) (N. Y.) 374; Hill *v.* Hoole, 116 N. Y. 299, 22 N. E. 547; Baird *v.* Baird, 145 N. Y. 659, 40 N. E. 222.

In Anderson *v.* Lee, 73 Minn. 397, 76 N. W. 24, the court thus delivered its opinion: "The appellant claims that the trial court erred in not receiving evidence to show that the note and mortgage were given without any consideration therefor, for the reason that, the mortgage being under seal, it conclusively imports a consideration. The mortgage was but an incident to the debt, as evidenced by the note it purported to secure. The note was not under

rests upon the party attacking the mortgage to prove that the instrument is without consideration.[23]

2. Admissibility. — A. Extrinsic Evidence of True Consideration. — a. *In General.* — The rule generally obtaining in the law of contracts, that the true consideration may be shown by extrinsic evidence, notwithstanding that to do so involves a contradiction of the writing, applies in the law of mortgages.[24] The consideration

seal. If there was no consideration for the note there was no debt, and the mortgage was not in fact a lien on the mortgaged premises, and, when an attempt was made to foreclose the mortgage and sell the premises to pay the supposed lien, it was entirely competent for the mortgagor to show that there was nothing due upon the mortgage because there was no consideration for the note, and to have the foreclosure restrained, and the apparent lien of the mortgage canceled as a cloud upon the title. It is always competent, in an action or proceeding to foreclose a mortgage, or in an action to restrain such foreclosure and to have the apparent lien of the mortgage canceled, to show that there is nothing due on the mortgage because there is no consideration for the note or obligation it purports to secure."

Before the modern statute changing the effect of a sealed instrument it was held that the consideration of the sealed mortgage could only be inquired into for the purpose of ascertaining the amount secured by and due under it, and not to defeat its operation as a subsisting instrument. Calkins *v.* Long, 22 Barb. (N. Y.) 97; Farnum *v.* Burnett, 21 N. J. Eq. 87.

23. Burden on Party Alleging no Consideration. — Best *v.* Thiel, 79 N. Y. 15.

Recital in Note of Ancestor. — The possession of a note reciting a valuable consideration, and a mortgage under seal purporting to secure such a note, received from one's ancestor, raises the presumption that the same was given for a valuable consideration, and the burden of proving a lack of consideration is upon the other heirs of such ancestor. Weaver *v.* Cosby, 109 Ga. 310, 34 S. E. 680. See cases cited note 21 *supra.*

24. Parol Is Admissible to Show the Real Consideration.

Alabama. — Huckaba *v.* Abbott, 87 Ala. 409, 6 So. 48.

Arkansas. — Brewster *v.* Clamfit, 33 Ark. 72.

Indiana. — Colt *v.* McConnell, 116 Ind. 249, 19 N. E. 106; Murdock *v.* Cox, 118 Ind. 266, 20 N. E. 786.

Iowa. — Shoemake *v.* Smith, 80 Iowa 655, 45 N. W. 744.

Kentucky. — Louisville Bkg. Co. *v.* Leonard, 90 Ky. 106, 13 S. W. 521.

Michigan. — Flynn *v.* Flynn, 68 Mich. 20, 35 N. W. 817; Citizens Sav. Bank *v.* Kock, 117 Mich. 225, 75 N. W. 458; Ruloff *v.* Hazen, 124 Mich. 570, 83 N. W. 370.

Minnesota. — Minor *v.* Sheehan, 30 Minn. 419, 15 N. W. 687; Berry *v.* O'Connor, 33 Minn. 29, 21 N. W. 840; Nazro *v.* Ware, 38 Minn. 443, 38 N. W. 359.

Mississippi. — Wimberly *v.* Wortham, 3 So. 459.

Missouri. — Foster *v.* Reynolds, 38 Mo. 553.

New York. — McKinster *v.* Babcock, 26 N. Y. 378; Miller *v.* Lockwood, 32 N. Y. 293; Burnett *v.* Wright, 135 N. Y. 543, 32 N. E. 253.

Pennsylvania. — Mackey *v.* Brownfield, 13 Serg. & R. 239.

South Carolina. — Moses *v.* Hatfield, 27 S. C. 324, 3 So. 538; McAteer *v.* McAteer, 31 S. C. 313, 9 S. E. 966.

Vermont. — Keyes *v.* Bump, 59 Vt. 391, 9 Atl. 598; Wheeler *v.* Campbell, 68 Vt. 98, 34 Atl. 35.

As to Third Parties. — Smith *v.* Conrad, 15 La. Ann. 579; Mossop *v.* His Creditors, 41 La. Ann. 296, 6 So. 134.

As Against Innocent Purchaser. When a mortgage under seal, duly executed, witnessed and acknowledged, recites that it is given upon a consideration fully paid, as against an innocent party purchasing the

stated in the mortgage is presumptively the true consideration, and will stand as such unless disproved.[25] But when failure of consideration is asserted by the mortgagor as a defense against the mortgage, parol is not admissible to controvert or vary the terms of the writing or to create terms or conditions not found in the instrument.[26] This rule does not, of course, operate to render parol inadmissible to show that a mortgage reciting a consideration was in fact without consideration.[27] The consideration recited in the mortgage is conclusive, however, as against the mortgagor in favor of a *bona fide* purchaser of the mortgage for a valuable consideration before the maturity of the debt secured thereby.[28]

b. *Future Advances.* — As between the parties to the mortgage, that the mortgage was given in consideration of future advances may be shown by parol or other extrinsic evidence.[29]

B. Admissions of Mortgagee. — The admissions of the mortgagee that his mortgage was without consideration are admissible against his personal representatives seeking to foreclose the mortgage.[30]

C. Want of Consideration. — Evidence of a want of consideration for the mortgage may not be rebutted by proof that the mortgage was given to defraud the creditors of the mortgagor.[31]

3. Weight and Sufficiency. — And where a mortgage executed by a married woman, sought to be foreclosed, and introduced in evidence, contains a recital of the consideration on which it is founded, with an acknowledgment of the receipt thereof, the effect of such a recital as expressing a consideration is not overcome by evidence

same for value and before maturity, it may not be shown that there was no consideration, the presumption from the recital in such case being conclusive. Maxwell *v.* Hartmann, 50 Wis. 660, 8 N. W. 103.

As to Party Assuming Mortgage. A party assuming a mortgage on land purchased by him may not show as a defense to liability under his agreement for assumption that the mortgage was given without consideration, or that an assignee of the mortgage holds under an assignment without consideration. Terry *v.* Durand Land Co., 112 Mich. 665; 71 N. W. 525; Freeman *v.* Auld, 44 N. Y. 50; Parkinson *v.* Sherman, 74 N. Y. 88, 30 Am. Rep. 268.

25. Presumption as to Consideration Recited. — "The presumption of mere fact is that the representation of the debt given in the mortgage by the parties to it was not false, but true, and nothing short of clear and cogent evidence could establish the contrary." Wiswall *v.* Ayres, 51 Mich. 324, 16 N. W. 667.

26. Failure of Consideration. Varying Terms of Writing. — Sargent *v.* Cooley, 12 N. D. 1, 94 N. W. 576.

27. Parol Admissible To Show no Consideration. — Baird *v.* Baird, 145 N. Y. 659, 40 N. E. 222.

28. Maxwell *v.* Hartmann, 50 Wis. 660, 8 N. W. 103.

29. Future Advances May Be Shown by Parol to Be Consideration. *Alabama.* — Forsyth *v.* Preer, 62 Ala. 443.

Illinois. — Collins *v.* Carble, 13 Ill. 254.

New Jersey. — Griffin *v.* New Jersey Oil Co., 11 N. J. Eq. 49; Bell *v.* Fleming, 12 N. J. Eq. 490; Reeves *v.* Evans (N. J. Eq.), 34 Atl. 477.

30. Mortgagee's Admissions Admissible Against Executrix. — Baird *v.* Baird, 145 N. Y. 659, 40 N. E. 222.

31. Clark *v.* Clark, 62 N. H. 267.

that the mortgaged property was her separate estate, and that the debt secured was that of a firm of which her husband was a partner.[32]

IV. THE PROPERTY MORTGAGED.

Identification by Parol. — As in the case of the debt secured, it is held that the description of the property mortgaged need not be complete within itself, and that, when otherwise sufficiently definite, parol may be received to identify the property covered by the mortgage and to apply the description to it.[33] The rule stated does not permit the receiving of evidence to include within the lien of the mortgage property not described therein, as being within the unexpressed or uncommunicated intention of the mortgagor.[34]

32. Schuster *v.* Sherman, 37 Neb. 842, 56 N. W. 707.

33. *United States.* — Van Valkenberg *v.* American Freehold Land Mtge. Co., 87 Fed. 617.

Alabama. — Chambers *v.* Ringstaff, 69 Ala. 140; Tranum *v.* Wilkinson, 81 Ala. 408, 1 So. 201.

California. — Colton *v.* Seavey, 22 Cal. 496; O'Farrell *v.* Harney, 51 Cal. 125; Staples *v.* May, 23 Pac. 710; Began *v.* O'Reilly, 32 Cal. 11.

Georgia. — Derrick *v.* Sams, 98 Ga. 397, 25 S. E. 509, 58 Am. St. Rep. 309.

Illinois. — McKinley *v.* Smith, 29 Ill. App. 106; Everett *v.* Boardman, 58 Ill. 429; Cornwell *v.* Cornwell, 91 Ill. 414.

Kentucky. — Starling *v.* Blair, 4 Bibb 288; Breeding *v.* Taylor, 13 B. Mon. 477.

Louisiana. — Kerman *v.* Baham, 45 La. Ann. 709, 13 So. 155.

Maine. — Madden *v.* Tucker, 46 Me. 367; Abbott *v.* Abbott, 51 Me. 575.

Maryland. — Fryer *v.* Patrick, 42 Md. 51.

Massachusetts. — Woods *v.* Sawin, 4 Gray 322; Gerrish *v.* Towne, 3 Gray 82; White *v.* Bliss, 8 Cush. 510; Bosworth *v.* Sturtevant, 2 Cush. 392; Coogan *v.* Burling Mills, 124 Mass. 390.

Michigan. — Slater *v.* Breese, 36 Mich. 77.

Mississippi. — Wilson *v.* Horne, 37 Miss. 477; Eggleston *v.* Watson, 53 Miss. 339.

New Jersey. — McLaughlin *v.* Bishop, 35 N. J. L. 512; Jackson *v.* Perrine, 35 N. J. L. 137.

New York. — Robertson *v.* McNeill, 12 Wend. 578; Pettit *v.* Shepard, 32 N. Y. 97.

Ohio. — Davenport *v.* Sovil, 6 Ohio St. 459.

Pennsylvania. — Scott *v.* Sheakly, 3 Watts 50.

Where the description of the land in the mortgage is indefinite, standing alone, extrinsic evidence may be received to show that the land was generally known in the neighborhood by the description used, and that the same description had been employed by the mortgagor's predecessors in title. Bollinger *v.* McDowell, 99 Mo. 632, 13 S. W. 100.

Nature of Question. — How Determined. — The question of the amount of property covered by a mortgage is a question of fact to be determined by the weight of the evidence, and not by the technical rules of construction. Morse *v.* Morse, 58 N. H. 391; Eason *v.* Miller, 25 S. C. 555.

Parol is admissible to show what land was intended by the term "contiguous" as used in the mortgage, where lands contiguous to land specifically described are covered by the mortgage. Bank of Mobile *v.* Planters & Merchants Bank, 8 Ala. 772.

Certified Copy of Mortgagor's Deed. — In a suit for foreclosure, a certified copy of the defendant's deed of record may be received to identify the property intended to be mortgaged. Westmoreland *v.* Carson, 70 Tex. 619, 13 S. W. 559.

34. Stewart *v.* Whitlock, 58 Cal. 2. Land not described in the mortgage

V. THE DEBT OR OBLIGATION SECURED.

1. Presumptions and Burden of Proof. — If the debt secured cannot be ascertained from the mortgage itself, the mortgagee or other holder of the mortgage has the burden of establishing the identity of the obligation secured.[35] In the absence of other evidence it may be presumed that the consideration stated in a mortgage correctly represents the sum to be secured thereby, where the debt secured is not otherwise stated in the mortgage.[36] Where, however, the amount of the debt secured is named this will be presumed to be the actual debt.[37] But this presumption is not conclusive.[38] Where a note and mortgage are executed on the same day, and the amount of the debt secured by the mortgage is recited to be the same as the note, it will be presumed that the debt evidenced by the note was intended to be secured.[39]

2. Identification by Parol. — A. When Competent. — Parol or other extrinsic evidence may be received to identify the debt or obligation secured, as between the parties[40] or as against third par-

may not be included by evidence of the expressed intention of the mortgagor to so include all his realty, that a list of all had been given to the scrivener preparing the instrument, and that there was duplication in some descriptions. Bartlett *v.* Patterson, 10 Wkly. Law Bul. (Ohio) 367.

35. Burden To Establish Identity of Debt Secured. — Pillow *v.* Sentelle, 49 Ark. 430, 5 S. W. 783; Bank of Montgomery Co.'s Appeal, 36 Pa. St. 170; Fisher *v.* Otis, 3 Chand. (Wis.) 83.

When, in a suit to foreclose, it appears that the mortgagor has absconded and the mortgagee is since deceased, and there is no direct evidence of the consideration of the mortgage, it will be presumed that the mortgage was given to secure the debt at the time existing between the parties, and such future indebtedness as in fact arose where it applied to future advances generally. Lanahan *v.* Lawton, 50 N. J. Eq. 276, 23 Atl. 476; United States Trust Co. *v.* Lanahan, 50 N. J. Eq. 796, 27 Atl. 1032.

36. Presumption From Consideration Stated. — Where the amount to be named in the defeasance clause is omitted, the omission may be supplied by the statement of the consideration in the instrument. Burnett *v.* Wright, 135 N. Y. 543, 32 N. E. 253.

Consideration in Conveyance Absolute. — Burden. — Where a conveyance in form absolute is admitted by the grantee therein to be a mortgage and the grantor testifies that the consideration named in the deed was the amount of the debt, the grantee has the burden of showing a greater debt if he claims so. Freytag *v.* Hoeland, 23 N. J. Eq. 36.

37. Debt Stated Presumed To Be Correct Amount. — Building and Loan Ass'n *v.* Cunningham, 92 Tex. 155, 47 S. W. 714.

38. A trust deed reciting the amount of the several debts it is given to secure is not conclusive, even as against the grantor, of the respective amounts of such debts; and the books of the grantor may be received after his death to show the amounts so secured. Griffin *v.* Macaulay, 7 Gratt. (Va.) 476.

39. Contemporaneous Execution of Note and Mortgage. — Identity of Amounts. — Presumption. — Bailey *v.* Fanning Orphan School, 12 Ky. L. Rep. 644, 14 S. W. 908.

40. Identification by Parol or Extrinsic Evidence.

United States. — Shirras *v.* Caig, 7 Cranch 34; Baldwin *v.* Raplee, 4 Ben. 433, 2 Fed. Cas. No. 801.

Alabama. — Duval *v.* McLaskey, 1 Ala. 708; Forsyth *v.* Preer, 62 Ala. 443.

Georgia. — Gunn *v.* Jones, 67 Ga. 398.

Illinois. — Babcock *v.* Lisk, 57 Ill. 327.

Louisiana. — Jones *v.* Elliott, 4 La. Ann. 303; Babin *v.* Winchester, 7 La. 468.

Maine. — Bourne *v.* Littlefield, 29 Me. 302; Williams *v.* Hilton, 35 Me. 547, 58 Am. Dec. 729; Partridge *v.* Swazey, 46 Me. 414; Stowe *v.* Merrill, 77 Me. 550, 1 Atl. 684.

Maryland. — Wilson *v.* Russell, 13 Md. 495, 71 Am. Dec. 645.

Massachusetts. — Goddard *v.* Sawyer, 9 Allen 78; Crafts *v.* Crafts, 13 Gray 360.

Michigan. — Albion State Bank *v.* Knickerbocker, 125 Mich. 311, 84 N. W. 311.

Minnesota. — Minor *v.* Sheehan, 30 Minn. 419, 15 N. W. 687; Berry *v.* O'Connor, 33 Minn. 29, 21 N. W. 840; Nazro *v.* Ware, 38 Minn. 443, 38 N. W. 359.

Missouri. — Aull *v.* Lee, 61 Mo. 160; Williams *v.* Moniteau Nat. Bank, 72 Mo. 292; Deuser *v.* Walkup, 43 Mo. App. 625.

New Hampshire. — New Hampshire Bank *v.* Willard, 10 N. H. 210; Somersworth Sav. Bank *v.* Roberts, 38 N. H. 22; Benton *v.* Sumner, 57 N. H. 117; Colby *v.* Dearborn, 59 N. H. 326.

New Jersey. — Bell *v.* Fleming, 12 N. J. Eq. 13.

New York. — McKuster *v.* Babcock, 26 N. Y. 378; Jackson *v.* Bowen, 7 Cow. 19; Durfee *v.* Knowles, 2 N. Y. Supp. 466.

Ohio. — Tousley *v.* Tousley, 5 Ohio St. 78; Hurd *v.* Robinson, 11 Ohio St. 232; Gill *v.* Pinney, 12 Ohio St. 38.

South Carolina. — Dial *v.* Gary, 24 S. C. 572; Moses *v.* Hatfield, 27 S. C. 324, 3 S. E. 538; Kaphan *v.* Ryan, 16 S. C. 352.

Tennessee. — Stanford *v.* Andrews, 12 Heisk. 664; First Nat. Bank *v.* Tamble, 62 S. W. 308.

Wisconsin. — Paine *v.* Benton, 32 Wis. 491.

When Mortgage Silent. — Where the mortgage does not show what it is given to secure, parol is admissible for such purpose. McAteer *v.* McAteer, 31 S. C. 313, 9 S. E. 966.

The debt intended by the parties to be secured may be identified by parol, although the actual debt differs materially from the debt described in the mortgage. Stackpole *v.* Arnold, 11 Mass. 27; Baxter *v.* McIntire, 13 Gray (Mass.) 168; Melvin *v.* Fellows, 33 N. H. 401; Bank of Utica *v.* Finch, 3 Barb. (N. Y.) 293; Hampden Cotton Mills *v.* Payson, 130 Mass. 88; Shirras *v.* Caig, 7 Cranch (U. S.) 34.

Parol To Show Date of Obligation Secured. — Hall *v.* Tufts, 18 Pick (Mass.) 455.

It may be shown that, though the mortgage recites it was given to secure a note executed by four persons, the note produced, executed by five persons, was the note actually intended to be secured. Boody *v.* Davis, 20 N. H. 140.

Where the note described in the mortgage is for $236, it may be shown by parol that a note for $256 was intended by the parties. Johns *v.* Church, 12 Pick. (Mass.) 557.

Contra. — At Law. — In an action at law, parol is not admissible to show that the note produced, differing by mistake from that described in the mortgage, was in fact the note intended to be secured. Edgell *v.* Stanford, 3 Vt. 202. See Edwards *v.* Dwight, 68 Ala. 389, where the court doubts whether the debts secured by a mortgage may be enlarged by parol proof of a contemporaneous or subsequent agreement.

To render a note admissible in evidence as one secured by a mortgage it is not necessary that it be particularly described in the mortgage, but a general description will be sufficient; and parol may be received to show the note intended to be embraced in such a description. Robertson *v.* Stark, 15 N. H. 109.

Debt of Different Person From One Named. — Griffin *v.* Macaulay, 7 Gratt. (Va.) 476.

When the mortgage recites that it is given to secure the note of an individual, parol may be received to show that the note intended to be secured thereby was the note of the partnership of which the maker, named in the mortgage, was a member. Robertson *v.* Stark, 15 N. H. 109. So where the mortgage refers

ties.[41] Thus it may be shown that a mortgage purporting to secure a note for a stated sum was intended only as a security for future advances, not to exceed in the aggregate the sum specified in the mortgage.[42] Extrinsic evidence of an intention to secure future advances other than those recited in the mortgage is not competent as against third parties who have relied on the transaction being as stated.[43] Parol is not competent to embrace within the security of the mortgage a debt entirely different from that within the contemplation of the parties to the transaction at the time the instrument

to the payee as Ebenezer Hall, 3d, parol may be received to show that a note payable to Ebenezer Hall was the note referred to in the mortgage. Hall *v.* Tufts, 18 Pick. (Mass.) 455.

Character of Debt. — Several as Well as Joint. — It may be shown by parol that a mortgage reciting its execution for the purpose of securing two or more persons in the payment of all demands due them from the mortgagor was intended to include obligations due the mortgagees severally as well as jointly. Snow *v.* Pressey, 85 Me. 408, 27 Atl. 272.

Proof of Different Note. — McCaughrin *v.* Williams, 15 S. C. 505.

It may be shown that several mortgages appearing to be for distinct debts were executed only as further security for the same debt. Anderson *v.* Davies, 6 Munf. (Va.) 484.

Company Debt Instead of Individual Debt. — Jones *v.* Guaranty and Indemnity Co., 101 U. S. 622; Hall *v.* Tay, 131 Mass. 192.

41. As Against Third Parties. Nazro *v.* Ware, 38 Minn. 443, 38 N. W. 359; Deuser *v.* Walkup, 43 Mo. App. 625; Cady *v.* Merchants Bank of Rochester, 14 N. Y. St. 99; Tousley *v.* Tousley, 5 Ohio St. 78; Hurd *v.* Robinson, 11 Ohio St. 232; Gill *v.* Pinney, 12 Ohio St. 38.

42. Future Advances.

United States. — Shirras *v.* Caig, 7 Cranch 34; Jones *v.* Guaranty & Indemnity Co., 101 U. S. 622.

Alabama. — Forsyth *v.* Preer, 62 Ala. 443; Wilkerson *v.* Tillman, 66 Ala. 532; Huckaba *v.* Abbott, 87 Ala. 409, 6 So. 48.

California. — Tapia *v.* Demartini, 77 Cal. 383, 19 Pac. 641.

Kentucky. — Louisville Bkg. Co. *v.* Leonard, 90 Ky. 106, 13 S. W. 521.

Maryland. — Cole *v.* Albers, 1 Gill 412.

Massachusetts. — Hall *v.* Tay, 131 Mass. 192.

Missouri. — Foster *v.* Reynolds, 38 Mo. 553.

New Jersey. — Bell *v.* Fleming, 12 N. J. Eq. 13.

New York. — McKinster *v.* Babcock, 26 N. Y. 378; Truscott *v.* King, 6 Barb. 346; Farr *v.* Doxtater, 29 N. Y. St. 531, 9 N. Y. Supp. 141.

Pennsylvania. — Gordon *v.* Preston, 1 Watts 385, 26 Am. Dec. 75.

South Carolina. — Fullwood *v.* Blanding, 26 S. C. 312, 2 S. E. 565; Moses *v.* Hatfield, 27 S. C. 324, 3 S. E. 538; Kaphan *v.* Ryan, 16 S. C. 352; Walker *v.* Walker, 17 S. C. 329; McAteer *v.* McAteer, 31 S. C. 313, 9 S. E. 966.

Parol is admissible to show that a mortgage, silent in such particular, was given to secure future advances as between the parties to the transaction, and as against subsequent purchasers without notice. Cady *v.* Merchants Bank of Rochester, 14 N. Y. St. 99.

Establishing Future Advances Made by Parol. — Hendon *v.* Morris, 110 Ala. 106, 20 So. 27; Wilson *v.* Russell, 13 Md. 495, 71 Am. Dec. 645; Hall *v.* Tay, 131 Mass. 192; Hall *v.* Crouse, 13 Hun (N. Y.) 557; Soule *v.* Albee, 31 Vt. 142.

Advances Made by One Not Party to Instrument. — Hall *v.* Crouse, 13 Hun (N. Y.) 557.

43. Rights of Third Parties May Not Be Prejudiced by Parol Proof of Advances Additional to Those Recited. — Murray *v.* Barney, 34 Barb. (N. Y.) 336; Truscott *v.* King, 6 N. Y. 147; Walker *v.* Snediker, 1 Hoff. Ch. (N. Y.) 145.

was executed.[44] Nor should parol be received, except in actions for reformation, to show that by mistake a debt intended by the parties to be secured was omitted.[45] It is competent for the parties, as between themselves, to extend the mortgage by parol to new obligations not mentioned in the instrument itself.[46] While the time of payment of the debt secured may be extended by a subsequent parol agreement, the time of payment may not be varied by parol of an agreement for a different time for performance made at the time of the execution of the mortgage.[47] Of course if the amount of the debt secured is left blank in the mortgage, parol may be received to supply the omission.[48] Parol is also admissible to show that several mortgages, appearing upon their face to secure distinct debts, are merely additional securities for one original debt.[49]

B. Particular Evidence Admissible. — The declarations of the mortgagor made contemporaneously with the execution of the mortgage, tending to show the indebtedness intended by the parties to be secured by the mortgage, are competent matters to be proved against him to aid in the identification of the debt secured.[50] The books of the mortgagor may be received after his death for such purpose.[51]

VI. ASSIGNMENTS.

1. Presumptions and Burden of Proof. — A. In General. — In the absence of any written evidence of an assignment there is a presumption against it, so that the party in such circumstances relying on an assignment has the burden of proving it.[52]

B. When Transfer of Debt Presumed. — Where the holder of a mortgage has paid to the mortgagee the amount of the mortgage

44. Gunn *v.* Jones, 67 Ga. 398; Dunham *v.* W. Steele Pack. & Prov. Co., 100 Mich. 75, 58 N. W. 627; Utica Bank *v.* Finch, 3 Barb. Ch. (N. Y.) 293; Walker *v.* Paine, 31 Barb. (N. Y.) 213; O'Neill *v.* Bennett, 33 S. C. 243, 11 S. E. 727.

First Nat. Bank of Langdon *v.* Prior, 10 N. D. 146, 86 N. W. 362. Thus it has been held incompetent to show by parol that a mortgage, on its face given to secure a particular number of notes, was agreed at the time to be released when a number of the notes fewer than all had been paid, such evidence having the effect to vary the writing.

45. Omission of Debt by Mistake. Wilkerson *v.* Tillman, 66 Ala. 532.

46. Extending to Additional Obligation by Parol. — Walker *v.* Walker, 17 S. C. 329.

Parol may not be received to show that a mortgage securing advances for the year 1886 was intended and agreed to be extended to advances for the year 1887. O'Neill *v.* Bennett, 33 S. C. 243, 11 S. E. 727.

47. Varying Time of Payment by Parol. — Martin *v.* Rapelye, 3 Edw. Ch. (N. Y.) 229.

48. Burnett *v.* Wright, 135 N. Y. 543, 32 N. E. 253.

49. Several Successive Mortgages as Securities for One Original Debt. Anderson *v.* Davies, 6 Munf. (Va.) 484.

50. Mortgagor's Contemporaneous Declarations Competent. — Albion State Bank *v.* Knickerbocker, 125 Mich. 311, 84 N. W. 311; First Nat. Bank *v.* Tamble (Tenn.), 62 S. W. 308.

51. Books of Mortgagor. — Griffin *v.* Macaulay, 7 Gratt. (Va.) 476.

52. Bowers *v.* Johnson, 49 N. Y. 432.

debt as a consideration for the transfer of the mortgage to him, it will be presumed that the debt secured by the mortgage was also transferred to the holder of the mortgage.[53]

C. Successive Assignees. — Recording. — To render a prior assignment of a mortgage void as against a party claiming under a later assignment of the same mortgage, on the ground that the earlier assignment was not recorded, the subsequent assignee must show the recording of his own assignment, and that it was entitled to record.[54]

D. Bona Fides of Assignee. — Where the assignee's right to foreclose is dependent upon the consideration whether he is a *bona fide* holder of the mortgage, the assignor not being entitled to foreclosure, the assignee has the burden of showing his *bona fides*.[55]

2. Proof of Assignment. — A party other than the mortgagee asserting title to a mortgage has the burden of proving his title.[56] The possession of the mortgage by one not the mortgagee, who seeks a foreclosure of it, is not alone sufficient proof of an assignment of the mortgage to the possessor.[57] Proof of a formal assignment is not required.[58] The production of a formal assignment of the mort-

53. Literer *v.* Huddleston (Tenn.), 52 S. W. 1003. This presumption is only *prima facie*, however.

54. The proposition stated in the text was announced by the court under a statute providing that an unrecorded conveyance should be void as against a subsequent *bona fide* purchaser, "whose conveyance shall first be duly recorded." Potter *v.* Stransky, 48 Wis. 235, 4 N. W. 95.

55. Cooper *v.* Smith, 75 Mich. 247, 42 N. W. 815.

As between the assignee of a mortgage that has been taken by the original mortgagee with notice of an outstanding vendor's lien, and the unpaid vendor holding possession at the time of the assignment, the latter seeking to foreclose his lien and to establish a charge of fraud on the part of the vendee in placing his deed on record, the assignee takes the burden of proving his good faith in taking the assignment. Seymour *v.* McKinstry, 106 N. Y. 230, 12 N. E. 348, 14 N. E. 94.

56. Burns *v.* Naughton, 24 La. Ann. 476; Tufts *v.* Beard, 9 La. Ann. 310.

A party asserting a right to a seizure and sale of mortgaged real estate, claiming as an indorsee of the note secured, by blank indorsement, must prove the transfer of title to such note and mortgage by authentic act. Miller *v.* Cappel, 36 La. Ann. 264; Van Raalte *v.* Congregation of the Mission, 39 La. Ann. 617, 2 So. 190.

57. Possession Not Evidence of Assignment. — Andrews *v.* Powers, 35 Wis. 644; Bausman *v.* Kelley, 38 Minn. 197, 36 N. W. 333; Hayward *v.* Grant, 13 Minn. 165; Strause *v.* Jesepthal, 77 N. Y. 622; Van Eman *v.* Stanchfield, 10 Minn. 255.

Possession With Proof of an Advancement of money to the mortgagee is not sufficient. Bowers *v.* Johnson, 49 N. Y. 432.

Advancement of Whole Amount. Where it was shown that the plaintiff's testator had advanced money to one who held a bond and mortgage to its whole amount at the mortgagor's request, which, though not formally assigned or discharged, were left in the custody of counsel for the holder, it was held that title in the plaintiff to the mortgage was made sufficiently to appear. Rockwell *v.* Hobby, 2 Sandf. Ch. (N. Y.) 9.

58. An assignee, suing to foreclose, need not prove a formal assignment of the note and mortgage to him in writing. It will be sufficient if he prove a sale and delivery to him of the instruments; and that

gage, accompanied by the possession of the obligation secured, is *prima facie* proof of the assignment and transfer of the note and mortgage.[59] An allegation simply of the plaintiff's ownership is sufficient to admit proof of title by assignment, without an express averment of the assignment.[60] It may of course be shown that

he is the owner of them and that the note is due and unpaid makes out a *prima facie* case. Greeley State Bank *v.* Line, 50 Neb. 434, 69 N. W. 966.

Where Assignment Not Shown. The fact that the husband pays a large part of the purchase price of real estate conveyed to his wife, and that upon a sale and conveyance of the property a mortgage is taken to secure a part of the purchase price of same, payments of interest thereon being made to the husband, is not sufficient to support a plea that the mortgage has been assigned to the husband. *In re* Clayton's Estate, 17 Civ. Proc. 68, 5 N. Y. Supp. 266.

In an action by the administrator of an assignee of a mortgage for foreclosure, where the mortgage was recorded twenty-five years previously, and the assignments were lost, the plaintiff was held to be required to establish his claim by clear proof. Eddy *v.* Campbell, 23 R. I. 192, 49 Atl. 702.

Proof of the assignment of a mortgage to a party as security for a loan is sufficient to show ownership of the mortgage in the assignee. Lawrence *v.* Johnson, 131 Cal. 175, 63 Pac. 176.

Where the mortgagee, or, in case of his death, his representative, is made a party plaintiff with the assignee of the mortgage, the original mortgage is admissible without a written transfer to the assignee, and in such circumstances a witness may testify to the declarations of the mortgagee that he had assigned the mortgage to the party seeking to enforce it as assignee. Hooks *v.* Hays, 86 Ga. 797, 13 S. E. 134.

Attestation. — When not differently provided by statute an assignment of a mortgage without an attesting witness is competent proof of a transfer of the mortgagee's right thereunder. The statute relating to deeds of real estate, requiring attestation, do not apply to assignments of mortgages. And this is true both at law and in equity. Dougherty *v.* Randall, 3 Mich. 581.

Assignment of Mortgage Only. When Debt Will Thereby Pass. Though an assignment of a mortgage merely, without the assignment or delivery of the obligation secured, will not pass title to the debt, yet where the assignment is for a consideration the debt will pass if such is the manifest intention of the parties. Fletcher *v.* Carpenter, 37 Mich. 412; Philips *v.* Bank of Lewiston, 18 Pa. St. 394.

59. Reichert *v.* Neuser, 93 Wis. 513, 67 N. W. 939; Burnett *v.* Lyford, 93 Cal. 114, 28 Pac. 855; Leary *v.* Leary, 68 Wis. 662, 32 N. W. 623; Pratt *v.* Skolfield, 45 Me. 386; Pease *v.* Warren, 29 Mich. 9, 18 Am. Rep. 58; Jackson *v.* Campbell, 5 Wend. (N. Y.) 572.

Power of Trustees of Voluntary Loan Fund Association. — An assignment of a mortgage from the trustees of a voluntary loan fund association passes the legal title to the assignee in the absence of evidence that their power of alienation is restrained by the by-laws of the association. Manahan *v.* Varnum, 11 Gray (Mass.) 405.

Representative Capacity of Assignor. — Without proof of the death of the mortgagee, or the representative capacity of the assignor, proof of ownership of a mortgage is not sufficiently shown by an assignment executed by one who purports to be the administrator of the estate of the mortgagee. La Tourette *v.* Decker, 64 Hun 632, 18 N. Y. Supp. 840.

60. Hays *v.* Lewis, 17 Wis. 210.

Assignment and Reassignment. Where the plaintiff has assigned the note and mortgage, but procures them to be reassigned to him before bringing his action to foreclose, he need not aver the facts particularly as to such assignments, and the general averment of ownership of the note and mortgage will be sufficient

a formal assignment was intended only as a collateral security.[61]

3. Consideration. — A. Admissibility in General. — Evidence of the consideration for an assignment of a mortgage is irrelevant in an action by the assignee for foreclosure, when the mortgagor does not for any reason seek to avoid his mortgage; though the rule is otherwise where it is material to inquire whether the assignee is a holder for value.[62] The mortgagor may show that the mortgage,[63] or the plaintiff's assignment and the mortgage, where the consideration for the mortgage is assailed,[64] are without consideration. Evidence of the mortgagee's knowledge of an illegal consideration for the mortgage is not admissible against his assignee.[65] An assignment under seal of a note and mortgage is, as between the parties, evidence of a sufficient consideration for the transfer.[66]

B. Declarations of Mortgagee. — The declarations of the mortgagee while the holder of the mortgage, that it was without consideration, are competent against his assignee.[67] The converse of this proposition has been held, however, in an early case in which the declarations were with reference to the usurious character of the transaction.[68]

to admit proof of the facts. Johnson *v.* White, 6 Hun (N. Y.) 587.

61. Formal Assignment May Be Shown To Be Intended as Collateral Security Only. — Pond *v.* Eddy, 113 Mass. 149; Briggs *v.* Rice, 130 Mass. 50; Wormuth *v.* Tracy, 15 Hun (N. Y.) 180.

62. *United States.* — Saenger *v.* Nightingale, 48 Fed. 708.

Alabama. — Johnson *v.* Beard, 93 Ala. 96, 9 So. 535.

Michigan. — Adair *v.* Adair, 5 Mich. 204; Terry *v.* Durand Lumb. Co., 112 Mich. 665, 71 N. W. 525.

Nebraska. — Hall *v.* Hooper, 47 Neb. 111, 66 N. W. 33.

New York. — Lovett *v.* Dimond, 4 Edw. Ch. 22.

Vermont. — Dyer *v.* Dean, 69 Vt. 370, 37 Atl. 1113.

Wisconsin. — Croft *v.* Bunster, 9 Wis. 503; Leary *v.* Leary, 68 Wis. 662, 32 N. W. 623; Whitney *v.* Traynor, 74 Wis. 289, 42 N. W. 267.

63. Sparling *v.* Wells, 24 App. Div. 584, 49 N. Y. Supp. 321; Anderson *v.* Lee, 73 Minn. 397, 76 N. W. 24; Briggs *v.* Langford, 107 N. Y. 680, 14 N. E. 502.

64. In a proceeding by an assignee for foreclosure it may be shown that the mortgage itself, the assignment to the plaintiff and prior assignments, through which he claims, were all without consideration. Sparling *v.* Wells, 24 App. Div. 584, 49 N. Y. Supp. 321.

65. Earl *v.* Clute, 2 Abb. App. Dec. (N. Y.) 1.

66. Horn *v.* Thompson, 31 N. H. 562.

Indorsement of Note Secured. The indorsement to the holder of a note secured by the mortgagee is *prima facie* evidence of a consideration for the assignment of a mortgage. Horn *v.* Thompson, 31 N. H. 562.

67. Anderson *v.* Lee, 73 Minn. 397, 76 N. W. 24.

As Against Personal Representatives of Mortgagee. — Baird *v.* Baird, 145 N. Y. 659, 40 N. E. 222.

Purchaser of Mortgaged Property. A *bona fide* purchaser of mortgaged land may show as against an assignee of the mortgage that the mortgage was given without consideration, and for this purpose the declarations of the mortgagee while the owner of the mortgage are admissible. Briggs *v.* Langford, 107 N. Y. 680, 14 N. E. 502.

68. In the case of Booth *v.* Swezey, 8 N. Y. 276, the court says: "The rule of the law of evidence which excludes hearsay testimony is too familiar to require explanation or illustration. . . . On the part of

C. Recitals as to Consideration. — The recital in an assignment of the consideration upon which it is made and the payment of the consideration stated is *prima facie* evidence of the matters recited.[69] In an action on the note secured the recitals in the mortgage

the appellant it is insisted that the rule referred to was not applicable, but that the case fell within the operation of another and very different rule, *i. e.*, the rule which allows the declarations of one whose acts may be proved to be given in evidence as a part of the act — *res gestae*. If the judgment of the court of errors in Paige *v.* Cagwin (7 Hill 361), as pronounced by Mr. Senator Lott in his opinion, is to be considered as the judgment of the members of that court who voted according to the result of that opinion, then upon the authority of that case the ruling of Mr. Justice Brown at the circuit was right and the judgment of the supreme court upon this point cannot be disturbed. The present supreme court, in Smith *v.* Webb (1 Barb. S. C. R. 230), Parker J., giving the opinion, decided the same point now under consideration, upon the authority of Paige *v.* Cagwin. The authorities are so fully reviewed, and I may add so carefully examined, in the opinion of Mr. Senator Lott, as to preclude the necessity of their re-examination. It may, however, be proper to add that upon principle the admissions of a party holding written securities for a debt made while such owner, do not necessarily fall within any just notion of the rule which permits them to be given in evidence as part of the *res gestae*. They may be given in evidence against him, and against his representatives, when parties in interest in the action, as admissions, but I apprehend not otherwise. It has been urged in the argument submitted that such an application of the rule would exclude a written receipt or discharge of debt which had been assigned by the former holder, although made at a time when he had a perfect right to give such receipt, or make such discharge. But it is apparent that such a receipt or discharge would of itself be an act between the parties to the instrument thus discharged, and a very different thing from a mere conversation or *ex parte* admission. It would be an act of the *parties* to the instrument, which would be capable of proof as such act, an entirely different thing from the mere admission of one of the parties. It would contain an admission to be sure — an admission of satisfaction — but it would be, nevertheless, an act of the *parties*, and fall within a very different rule from that which admits the declarations of a party to the action *as his admission*, and not as forming any part of such an act."

69. An assignment of a mortgage, though not under seal, reciting that it is made for value received, is *prima facie* evidence of a consideration for the assignment. It is immaterial under such circumstances that the subscribing witness saw no money paid by way of consideration. Kinna *v.* Smith, 3 N. J. Eq. 14.

After Lapse of Twenty Years. Payment of the consideration for an assignment of a mortgage is sufficiently proven after a lapse of twenty years, where payment is recited in the acknowledgment of the assignment. Pryor *v.* Wood, 31 Pa. St. 142.

Presumption of Payment From Fact of Assignment. — The fact of the assignment of an instrument of debt and the mortgage securing it is *prima facie* evidence of the payment of the consideration for the assignment. Westervelt *v.* Scott, 11 N. J Eq. 80.

Must Show Purchase in Good Faith. — An assignee of a mortgage seeking to create an estoppel against the mortgagor to deny the existence of the debt apparently secured, must prove, to establish that he is a good faith purchaser, the payment of a consideration for his assignment, and for this purpose the recitals in the assignment itself are incompetent. Anderson *v.* Lee, 73 Minn. 397, 76 N. W. 24.

securing it are competent evidence against the grantor to show the consideration for the note.[70]

4. Notice to Mortgagor of Assignee's Rights. — The fact that a bond and mortgage were not in the possession of the mortgagee at the time payments were made is not, without more, sufficient to establish notice to the mortgagor of their assignment.[71]

5. Assignment as Admission That Mortgage Is Subsisting. — The assignment of a mortgage as a security for a debt by a mortgagee in possession of the mortgaged premises is evidence in the mortgagor's behalf that the mortgage is a subsisting obligation and redeemable.[72]

6. Parol Admissible When Assignment Ambiguous. — Parol is of course admissible when the language of an assignment is ambiguous, but may not be received to vary the terms of the writing when clear and unambiguous.[73]

VII. PERSONAL LIABILITY FOR THE DEBT SECURED.

1. Of the Mortgagor. — On an application for an execution for a deficiency judgment on a mortgage foreclosure the decree and the report of the deficiency make out a *prima facie* case for the applicant.[74] It is no defense to the mortgagor's liability for a deficiency that the note secured was not produced on the trial of the foreclosure.[75] The mortgage is admissible, as corroborative of the debt, though it contains no recital of personal liability.[76] In the absence

70. Warner *v.* Brooks, 14 Gray (Mass.) 107.

71. **Notice by Letter. — Receipt.** Nor is notice of the assignment sufficiently shown where it appears that the assignee mailed a notice to an address of the mortgagor's friend, and not to the legal address of the mortgagor, and there is no evidence of the actual receipt of the notice. Barnes *v.* Long Island Real Estate Exch. & Inv. Co., 88 App. Div. 83, 84 N. Y. Supp. 951.

72. Borst *v.* Boyd, 3 Sandf. Ch. (N. Y.) 501.

73. Wormuth *v.* Tracy, 15 Hun (N. Y.) 180.

Evidence of Warranty. — In an action for a breach of warranty of a mortgage, in the absence of an averment of fraud or deceit, parol will not be received to establish a warranty of the validity of the lien of the mortgage where the written assignment, indorsed on the mortgage, contains no warranty. Nally *v.* Long, 71 Md. 585, 18 Atl. 811.

74. Ranson *v.* Sutherland, 46 Mich. 489, 9 N. W. 530.

75. Where the amount due under a mortgage is ascertained without the production of the note secured, it is no objection to the rendition of a personal decree for the balance of the amount of the decree of foreclosure remaining unpaid over and above the proceeds of the mortgaged property that the note was not produced in support of the decree in foreclosure. Such omission affects only the regularity, not the validity, of the judgment, and mere irregularities are not in such cases available. Lenfesty *v.* Coe, 26 Fla. 49, 7 So. 2.

76. Where a mortgage has been taken to secure a pre-existing debt, containing no recital of personal liability, the debt is not necessarily extinguished by the taking of the mortgage, and in an action on the debt the mortgage, so taken, is admissible as corroborative evidence of the debt. Baum *v.* Tonkin, 110 Pa. St. 569, 1 Atl. 535.

of a note or bond or covenant in the mortgage that the mortgagor shall pay, or be personally liable for, the mortgage debt, it will be presumed that the mortgagor does not intend to make himself personally liable; and the mortgagee has the burden of proving that it was the intention of the mortgagor to assume personal responsibility for the payment of the debt secured.[77] Where a deficiency judgment is sought, to show the value of the mortgaged property at the time of the foreclosure evidence relating to the income of the property and the prices for which it had been previously sold, the value of improvements and the opinions of experts may be received.[78]

2. Of Grantee by Assumption. — A. Burden of Proof. — The party asserting a personal liability against another by reason of an assumption of the mortgage debt has the burden of establishing that it has been assumed,[79] and where an assumption by deed is relied

Letters of Counsel Admitting Sale of Property. — In an action to recover a personal judgment on a debt secured by a mortgage on property in a foreign jurisdiction, where the defense is that the property was taken possession of by the mortgagee and sold for a particular sum, a letter from the general solicitors of the plaintiff advising that the property was about to be sold for the amount claimed by the defendant as a credit on the debt, and a summons issued by such solicitors, served on the defendant, to which particulars of the claim sued on were attached showing the action to be brought on the mortgage sued on, with a deduction of the amount contended for by the defendant as paid by reason of such sale, are admissible as admissions of the defendant to show the sale of the property and the amount realized from it. Hamilton Provident & Loan Soc. *v.* Northwood, 86 Mich. 315, 49 N. W. 37.

Release Reciting Payment May Be Explained. — So far as the debt is concerned, the release of the mortgage may be explained or controverted. Hughes *v.* Torrence, 111 Pa. St. 611, 4 Atl. 825; South Missouri Land Co. *v.* Rhodes, 54 Mo. App. 129. See "Payment, Release and Discharge," *infra* this article.

77. Smith *v.* Rice, 12 Daly (N. Y.) 307.

78. In Stevens *v.* Fellows, 70 N. H. 148, 47 Atl. 135, the court says: "As no sale was made on the day when the foreclosure became complete, the evidence must necessarily be circumstantial. The testimony relating to the sale of June 20th, if found not to be too remote in point of time, was competent, but not conclusive. Atlantic & St. L. R. Co. *v.* State, 60 N. H. 133, 141. Although made by an executor under a license of the probate court, it had no greater weight against the defendant than it would have had if the testator had survived and made it himself. The other evidence, except that relating to the valuation of the property for taxation (Water-Power Co. *v.* Clough, 69 N. H. 609, 45 Atl. 565) was competent. [Citing authorities.] The value was to be determined upon a consideration of all this evidence, giving to each item the weight to which it was entitled according to the judgment of the referee. There may be difficulty in determining the value of property which is rarely sold, and for which there is, strictly speaking, no market value; but if so, the difficulty is one 'for which the law is not responsible, and which is to be solved like any other difficulties in questions of fact upon diligent investigations, by candid, deliberate and sound judgment.'"

79. Insurance Co. *v.* Addicks, 12 Phila. (Pa.) 490; Merrick *v.* Leslie, 62 Ind. 459.

The burden is on the mortgagee to prove that another has agreed to pay the mortgage as a part of the consideration in another transaction.

on, proof of the delivery of the deed and its acceptance is necessary.[80] If the property conveyed is of much less value than the incumbrance assumed, clear proof of delivery and acceptance is required.[81] When the deed to the grantee recites that he assumes a mortgage incumbrance, on proof of the delivery and acceptance of the deed the burden thereupon shifts to the grantee to show that he did not assume to pay the debt as recited,[82] and in such circumstances the grantee's mere ignorance of the presence of the clause of assumption in his deed will not relieve him from liability.[83] Where a parol assumption is alleged it must be proven by the party alleging it by clear and conclusive proof.[84] If the grantee has assumed an incumbrance, on an issue between the grantor and the grantee the grantee has the burden of showing payment.[85]

B. Admissibility. — a. *Varying Recitals by Parol.* — Parol evidence is not admissible to contradict the recital of assumption in the grantee's deed where he is sought to be held personally liable for the

Thornily *v.* Prentice, 121 Iowa 89, 96 N. W. 728.

80. Blass *v.* Terry, 156 N. Y. 122, 50 N. E. 953; Shattuck *v.* Rodgers, 54 Kan. 266, 38 Pac. 280; Rutland Sav. Bank *v.* White, 4 Kan. App. 435, 46 Pac. 29.

Assumption by Deed. — Proof of Acceptance Requisite. — Baer *v.* Knewitz, 39 Ill. App. 470.

Ratification of Act of Agent. Where a deed containing an assumption clause is procured to be made by the grantee's agent without authority, a subsequent acknowledgment and recognition of the instrument as conveying title is sufficient acceptance to render the grantee liable for the debt, though he has no knowledge of the particular clause. Coolidge *v.* Smith, 129 Mass. 554.

Mistake. — Burden on Grantee. In an action for a deficiency against a vendee who had assumed a mortgage, the defendant has the burden of showing that the provision for the assumption of the debt was inserted in his deed by mistake. Wilson *v.* Randolph, 38 N. J. Eq. 287.

Actual Delivery. — When Required. — Where delivery of such deed is denied there must be proof of an actual delivery, from which acceptance may be presumed. Stuart *v.* Hervey, 36 Neb. 1, 53 N. W. 1032.

81. When Property Conveyed of Less Value Than Incumbrance. Degree of Proof Required. — Stuart *v.* Hervey, 36 Neb. 1, 53 N. W. 1032.

Direct Proof of Acceptance is not required, but it may be inferred from circumstances. Bundy *v.* Iron Co., 38 Ohio St. 300.

82. Moran *v.* Pellifant, 28 Ill. App. 278.

Admission of Deed. — The admission in the grantee's answer of the deed to him containing an assumption clause makes out a *prima facie* case against him on the debt assumed. Fitzgerald *v.* Barker, 85 Mo. 13. It has been held that proof of the record of a deed reciting the assumption of a mortgage incumbrance is alone sufficient. Lawrence *v.* Farley, 9 Abb. N. C. (N. Y.) 371.

83. Moran *v.* Pellifant, 28 Ill. App. 278.

As against an innocent purchaser for value of the mortgage notes the grantee may not show that the stipulation of assumption in his deed, upon which the purchaser relied, was inserted by mistake without his knowledge or consent, though such might be shown as against the grantor. Hayden *v.* Snow, 9 Biss. (U. S.) 511.

84. Ordway *v.* Downey, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228.

85. Grantor Against Grantee. Jewett *v.* Draper, 6 Allen (Mass.) 434.

debt,[86] except, of course, in the case of fraud, mistake or other well-recognized grounds for the admissibility of parol.[87] If the deed contains no reference to an existing incumbrance, parol is admissible to show that the grantee in fact assumed it as a part of the consideration for the conveyance.[88] If doubt arises on the face of the

86. Parol Not Admissible To Vary Recital of Assumption in Deed. Starbird *v.* Cranston, 24 Colo. 20, 48 Pac. 652; Chaplin *v.* Baker, 124 Ind. 385, 24 N. E. 233; Muhlig *v.* Fiske, 131 Mass. 110; Unger *v.* Smith, 44 Mich. 22, 5 N. W. 1069.

Such a recital operates to estop the grantee to set up the non-existence of the debt assumed. Fitzgerald *v.* Barker, 85 Mo. 13.

In an action by a grantor against a grantee for the failure of the latter to pay an incumbrance that he had assumed to pay, and which the grantor was compelled to pay, evidence that at the time the mortgage was made the grantor held the premises in trust for the grantee and others, and that the mortgage was given to take up the defendant's share of a previous mortgage, is inadmissible. Lappen *v.* Gill, 129 Mass. 349.

87. Such a recital may be varied or controlled by parol in the case of fraud, or other appropriate equitable ground warranting the admissibility of such evidence. Fuller *v.* Lamar, 53 Iowa 477, 5 N. W. 606. See articles "FRAUD" and "FRAUDULENT CONVEYANCES," Vol. VI.

On an issue whether the vendee of real estate was fraudulently induced to accept a deed assuming a mortgage incumbrance on the land conveyed, a prior written agreement providing for the conveyance of the land only subject to such mortgage is immaterial and irrelevant. Weaver *v.* McKay, 108 Cal. 546, 41 Pac. 450.

88. Admissibility of Parol To Show Assumption of Mortgage. *Connecticut.* — Tuttle *v.* Armstead, 53 Conn. 175, 22 Atl. 677.

Indiana. — McDill *v.* Gunn, 43 Ind. 315.

Kansas. — Hopper *v.* Calhoun, 52 Kan. 703, 35 Pac. 816.

Maine. — Burnham *v.* Dorr, 72 Me. 198.

Michigan. — Strohauer *v.* Voltz, 42 Mich. 444, 4 N. W. 161.

Missouri. — Bensieck *v.* Cook, 110 Mo. 173, 19 S. W. 642; Nelson *v.* Brown, 140 Mo. 580, 41 S. W. 960, 62 Am. St. Rep. 755.

Nebraska. — Reynolds *v.* Dietz, 39 Neb. 180, 58 N. W. 89.

New Jersey. — Wilson *v.* King, 23 N. J. Eq. 150; Huyler *v.* Atwood, 26 N. J. Eq. 504.

New York. — Taintor *v.* Hemingway, 18 Hun 458, *affirmed* 83 N. Y. 610.

North Dakota. — Moore *v.* Booker, 4 N. D. 543, 62 N. W. 607.

Ohio. — Society of Friends *v.* Haines, 47 Ohio St. 423, 25 N. E. 119.

Pennsylvania. — See Wunderlich *v.* Sadler, 189 Pa. St. 469, 42 Atl. 109.

South Dakota. — Miller *v.* Kennedy, 12 S. D. 478, 81 N. W. 906.

Washington. — Ordway *v.* Downey, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228.

Wisconsin. — Morgan *v.* Milwaukee Lake View Co., 97 Wis. 275, 72 N. W. 872.

Assumption May Be Proven by Parol. — Wyath *v.* Dufrene, 106 Ill. App. 214; Merriman *v.* Moore, 90 Pa. St. 78.

It has been said that the omission of a provision in a deed that the grantee assumes a mortgage incumbrance is strong evidence of non-assumption. Tillotson *v.* Boyd, 4 Sandf. (N. Y.) 516.

If the mortgagor's deed of the premises to a purchaser does not clearly set forth the contract between the parties as to the assumption of the mortgage incumbrance, parol may be received to show the assumption. And in such circumstances evidence of the value of the premises, or the agreed consideration therefor, and whether the grantee retained any of the consideration to pay the incumbrance, is admissible to aid in the construction of the deed. Winans *v.* Wilkie, 41 Mich. 264, 1 N. W. 1049.

papers whether the grantee assumed a mortgage on the premises, evidence of the value of the property conveyed, or of the consideration for the transfer, and as to whether the grantee retained any of the consideration to pay the debt, is admissible.[89]

b. *Proof of Record.* — Proof of the record of a deed reciting an assumption by the grantee of a mortgage incumbrance on the premises conveyed is competent evidence against the grantee to establish his assumption of the debt.[90]

c. *Identification by Parol of Debt or Mortgage Assumed.* — Parol is admissible to identify the mortgage assumed by the grantee.[91]

Parol Admissible To Show the Assumption of Mortgage Incumbrance as Part of Consideration. — Mahoney *v.* MacKubin, 54 Md. 268; Bowen *v.* Kurtz, 37 Iowa 239. See also Buckley's Appeal, 48 Pa. St. 491.

Written Contract To Sell. — In Lewis *v.* Day, 53 Iowa 575, 5 N. W. 753, the plaintiff sold to the defendant certain premises, by a written contract, wherein it was provided that the conveyance should be subject to an existing mortgage incumbrance on the property. The plaintiff tendered a deed containing an assumption clause, which the defendant refused to accept. In the plaintiff's action for damages for such refusal it was held that parol evidence that the purchaser agreed to assume the mortgage as a part of the purchase price was inadmissible.

Where Different Consideration Recited. — Murray *v.* Smith, 1 Duer (N. Y.) 412. But see Boozer *v.* Teague, 27 S. C. 348, 3 S. E. 551, where parol was held inadmissible to show that a deed absolute on its face was given upon condition that the grantee should assume and pay a mortgage incumbrance on the property conveyed.

Evidence of Prior Parol Agreement pursuant to which a deed is executed is inadmissible. Shattuck *v.* Rogers, 54 Kan. 266, 38 Pac. 280.

89. Parol in Case of Doubt or Ambiguity. — Winans *v.* Wilkie, 41 Mich. 264, 1 N. W. 1049.

90. Lawrence *v.* Farley, 9 Abb. N. C. (N. Y.) 371.

Certified Copy. — The certified copy of a record of a deed containing a recital that the grantee therein has assumed an existing mortgage on the premises is admissible against the grantee to show his assumption of the mortgage. Such evidence is not open to the objection that the recital concerning the assumption of the mortgage debt was not a part of the conveyance, and hence not appropriately of record or provable thereby. Weaver *v.* McKay, 108 Cal. 546, 41 Pac. 450.

91. Debt Assumed May Be Identified by Parol. — Where the deed recited that the grantee assumed a mortgage on the premises conveyed, executed by the grantor, giving the date and amount of the mortgage, it may be shown that there is one mortgage only against the premises, of the date and amount named in the deed, executed by the grantor's predecessor in title, and that such was the mortgage contemplated by the parties, and in such circumstances the reformation of the covenant in the deed is not necessary. New York L. Ins. Co. *v.* Aitkin, 125 N. Y. 660, 26 N. E. 732, *reversing* 58 N. Y. Super. Ct. 586, 11 N. Y. Supp. 349; New York L. Ins. Co. *v.* Aitkin, 57 N. Y. Super. Ct. 42, 4 N. Y. Supp. 879.

If the incumbrance assumed by a purchaser of several parcels of ground is stated in one sum it may be shown by parol that a particular mortgage on one of the parcels, securing the plaintiff's debt, was the one assumed. Webster *v.* Fleming, 178 Ill. 140, 52 N. E. 975.

It is not competent, however, to extend the assumption clause to include a mortgage not mentioned in the deed, and not within the contemplation of the parties at the time of

C. Weight and Sufficiency of Evidence. — The grantee in a deed of general warranty cannot be held to have assumed a mortgage incumbrance thereon merely because he bought the mortgaged property for less than its value, where he had no actual notice of the existence of such incumbrance.[92] Nor is the fact that the consideration named in the deed is greatly in excess of the amount paid by the grantee to the grantor for the conveyance,[93] or that the consideration stated is the value of the lands conveyed less an existing incumbrance,[94] any evidence of the assumption of a mortgage debt against the premises. But the fact of acceptance will support an inference of assent to the terms of the deed.[95]

The mortgagee's acceptance of the grantee's promise to pay his debt is sufficiently shown by his bringing an action on the promise before any change in the relations of the parties has taken place.[96] Evidence of the subsequent admissions of the grantee that he had assumed the particular debt is not sufficient to charge him without corroboration and where the evidence is conflicting.[97]

VIII. RIGHTS AND LIABILITIES OF PARTIES RESPECTING MORTGAGED PROPERTY.

1. As to Rents and Profits. — A. Entry by Mortgagee. — An entry by the mortgagee during the term of his mortgage is presumed to have been made under the mortgage.[98]

the transaction. Moore *v.* Graves, 97 Iowa 4, 65 N. W. 1008.

92. Kilborn *v.* Robbins, 8 Allen (Mass.) 466.

93. Vilas *v.* McBride, 62 Hun 324, 17 N. Y. Supp. 171.

94. Tillotson *v.* Boyd, 4 Sandf. (N. Y.) 516.

95. Assent Implied From Acceptance of Deed. — Thompson *v.* Dearborn, 107 Ill. 87.

96. Mortgagee's Acceptance of Offer of Assumption by Grantee. Bringing of Suit. — New York L. Ins. Co. *v.* Aitkin, 125 N. Y. 660, 26 N. E. 732, *reversing* 58 N. Y. Super. Ct. 586, 11 N. Y. Supp. 349; Berkshire L. Ins. Co. *v.* Hutchings, 100 Ind. 496.

97. Uncorroborated Evidence of Grantee's Admissions. — The testimony of two witnesses as to the admissions of a grantee subsequent to a conveyance, tending to show an oral assumption, is not sufficient to overcome the grantee's denial under oath of the assumption of a mortgage at the time of the sale of the premises, corroborated by the scrivener's testimony, the consideration of the deed, and the absence of an assumption clause in the deed. Conover *v.* Brown, 29 N. J. Eq. 510.

Conflicting Evidence. — The testimony of a third party that the grantee had admitted the assumption of a mortgage debt is not sufficient as against the testimony of the person negotiating the sale of the mortgaged premises that the grantee had refused to assume such debt after being requested so to do. Vilas *v.* McBride, 62 Hun 324, 17 N. Y. Supp. 171.

Evidence Held Not To Show Mortgage Debt Assumed by Grantee of Premises Mortgaged. — Offut *v.* Cooper, 136 Ind. 701, 36 N. E. 273; Head *v.* Thompson, 77 Iowa 263, 42 N. W. 188.

Evidence Held to Show Acceptance of Deed. — Coolidge *v.* Smith, 129 Mass. 554.

98. Where a creditor of the mortgagor intervenes in a foreclosure suit, alleging that plaintiff had

B. Presumption as to Continuance of Tenancy. — No presumption that the mortgaged premises continued tenanted during the time the mortgagee was in possession thereof will arise from the fact that they were tenanted when possession was delivered to him.[99]

C. Sufficiency. — The burden resting on the mortgagor to show the amount of rent for which the mortgagee is liable is not satisfied by proof merely of the rental value of the mortgaged property. The plaintiff must show the actual damage he has sustained.[1]

2. Possession of the Premises Mortgaged. — A. Burden of Proof a. *In General.* — A party who asserts a right to the possession of the mortgaged premises by virtue of a redemption has the burden of showing the making of a payment necessary to effect a redemption.[2] Proof of a consideration for the mortgage, in a controversy with a stranger over the possession, is not necessary unless it be made to appear that the stranger is a creditor of the mortgagor.[3] If the statute provides for the retention of the possession of the mortgaged premises by the mortgagor unless the mortgage otherwise provides, the mortgagee has the burden of showing a right to the

entered the premises after the assignment of the mortgage, and had cut timber and raised a crop from the mortgaged premises, and asks that the value of the same be set off against the plaintiff's claim, the plaintiff is presumed to have entered as mortgagee, and hence the burden is upon him to rebut this presumption and to show that he did not so enter. Gammon *v.* Johnson, 127 N. C. 53, 37 S. E. 75.

The presumption is not conclusive, however, and the mortgagee may show that he holds under another and different title whereby he is entitled to the rents and profits. Gaskell *v.* Viquesney, 122 Ind. 244, 23 N. E. 791, 17 Am. St. Rep. 364.

99. Maurer *v.* Grimm, 84 App. Div. 575, 82 N. Y. Supp. 760.

1. Maurer *v.* Grimm, 84 App. Div. 575, 82 N. Y. Supp. 760.

In the case of Temple Nat. Bank *v.* Warner, 92 Tex. 226, 47 S. W. 515, in which such evidence was received by the trial court, it was said: "It is, however, sought to justify its admission upon the issue above stated, of the rental value of the property down to the time of the trial, and this is the ground upon which the court of civil appeals concluded it was admissible. No authority has been cited, nor have we been able to find one upon the point. We are of opinion that upon principle the position cannot be maintained. Proof of value would not of itself have supported a verdict for rent, and such proof is not in this case shown to be a circumstance tending to establish any other fact bearing upon such issue. We do not think that from the evidence of value any reasonable inference or presumption as to the rents can be drawn or arises."

2. Jack *v.* Brown, 60 Iowa 271, 14 N. W. 304.

Tender. — When Not Sufficient. Proof merely that the mortgagor, after condition broken, made a tender of a certain amount as the sum due on the mortgage, without proof that such sum was the amount actually due, is not sufficient to terminate the mortgagee's right to possession under his mortgage. Fountain *v.* Bookstaver, 141 Ill. 461, 31 N. E. 17.

Circumstantial Evidence. — The mortgagee's right to the possession of the mortgaged premises need not be proved by positive evidence of agreement or assent, but may be implied from the circumstances. Rogers *v.* Benton, 39 Minn. 39, 38 N. W. 765.

3. Pennington *v.* Woodall, 17 Ala. 685.

possession of the premises where the mortgage does not secure such a right to him.[4]

b. *Proof of the Debt Secured.* — In an action against a stranger the mortgagee is not required to prove the amount of his debt when he is in possession of the mortgaged premises.[5] The mortgagee, in an action respecting possession, whether against the mortgagor or a third party claiming under a mortgage given to secure a particular instrument, is not required to produce the obligation secured or otherwise to establish it. Proof of his mortgage alone makes a *prima facie* case, and in the absence of countervailing evidence, will be sufficient to support a recovery.[6] If, however, in a writ of entry for the possession, the mortgagor demands a conditional judgment, or if evidence tending to show payment of the debt is introduced, the evidence of the debt must be produced.[7]

4. Mortgagor's Statutory Right to Possession. — Under the Indiana statute providing that the mortgagee shall not be entitled to the possession of the mortgaged premises, unless it shall be so provided in the mortgage, in an action by a mortgagor for possession, under an instrument not so providing, the plaintiff need not prove the payment or discharge of the mortgage. If the defendant rely upon an agreement that he shall have the possession before condition broken he has the burden of proving it. Parker *v.* Hubble, 75 Ind. 580.

Presumption as to Mortgagor's Possession. — The mortgagor's possession of the property mortgaged is presumed, in the absence of evidence to the contrary, to be in subordination to the mortgagee's rights under his mortgage. Maxwell *v.* Hartmann, 50 Wis. 660, 8 N. W. 103.

In an action in ejectment by the mortgagee it was held that proof of the plaintiff's mortgage and the mortgagor's possession at the time the mortgage was executed, continuing to the time of the action, would support a verdict for the mortgagee. Wakeman *v.* Banks, 2 Conn. 445.

5. Hull *v.* Fuller, 7 Vt. 100.

6. Production of Obligation Not Necessary. — Morse *v.* Stafford, 95 Me. 31, 49 Atl. 45; Smith *v.* Johns, 3 Gray (Mass.) 517; Den *v.* Wade, 20 N. J. L. 291.

7. When Obligation Secured Must Be Produced. — In Morse *v.* Stafford, 95 Me. 31, 49 Atl. 45, the court, on this question, reviewing the cases, said: "The only question necessary to a decision of this case is whether the assignee of a mortgage may maintain a real action against a person in possession of the mortgaged premises, and obtain a common-law judgment for possession, without the production of the notes referred to in the mortgage, or other evidence, except the mortgage itself, of the existence of some part of the mortgage indebtedness, where there is no evidence to the contrary, and no circumstances from which a payment of the indebtedness may be inferred.

"We have no doubt that such action may be maintained, and such judgment recovered. It would be otherwise if either party that was entitled to do so should ask for a conditional judgment. In that case the plaintiff would be compelled to introduce evidence showing that something, and how much, was due upon the mortgage debt. Blethen *v.* Dwinal, 35 Me. 556. Or, if there was evidence tending to show that the debt had been fully satisfied, then it would become a question to be determined; and, if the debt should be found to be paid, the holder of the mortgage would not be entitled to judgment for possession. Hadlock *v.* Bulfinch, 31 Me. 246; Williams *v.* Thurlow, 31 Me. 392; Day *v.* Philbrook, 85 Me. 90. But in all these cases the debt had been paid, as was found by the court, and the question was not involved as to what evidence was necessary to prove either the ex-

c. *Fraudulent Character of Mortgage as Against Creditors no Defense.* — In a mortgagee's action for the possession of the premises, that the mortgage under which he claims was executed in fraud of the mortgagor's creditors is no defense.[8]

d. *Conclusiveness of Consideration Stated.* — The consideration of the mortgage upon which the plaintiff in ejectment relies is not open to inquiry.[9]

B. Actions by Purchaser at Foreclosure. — a. *Invalidity of Mortgage.* — In an action for possession by a purchaser of the mortgaged premises at a sale under foreclosure, or under a deed of trust or power of sale mortgage, evidence of the invalidity of the instrument of mortgage is incompetent.[10]

istence or payment of the debt secured by the mortgage.

"Upon the other hand, in Powers *v.* Patten, 71 Me. 583, this court said: 'The mortgage itself is a conveyance of the estate, and the recital of the notes in the condition of the mortgage is an admission of their existence and of the existence of the debt. For the purpose of establishing the defendant's right of possession, the mortgage alone, without the notes, is admissible as evidence of title and the mortgage debt.' In that case the mortgage was relied upon by the defendant in possession, and the court said, referring to the contention that the mortgage, without the production of the notes, was insufficient for the purpose of proving a right of possession: 'If the present defendant were in the position of a demandant, and a conditional judgment was demanded by either side entitled to it, in such case she could not recover without producing the notes, or accounting for their non-production.'

"In Smith *v.* Johns, 3 Gray, 517, cited with approval in Powers *v.* Patten, *supra,* the court held that a mortgage was not merely a conveyance of the estate, but a direct admission of the existence of the notes described in the condition, and that such mortgage, without the production of the notes, was *prima facie* evidence in support of the defendant's right of possession.

"These rules are logically deducible from the rights and obligations of the mortgagor and mortgagee, and are supported by the authorities. A mortgagee, or assignee of a mortgage, is not entitled to a conditional judgment as of mortgage, unless he proves in some way the existence of some part of the mortgage debt. If he does not move for such conditional judgment, but the defendant does, and is entitled to do so under R. S. c. 90, § 8, then the plaintiff must prove that some part of such debt remains unsatisfied. A mortgagee out of possession is not entitled to a common-law judgment for possession if upon the whole evidence it appears that the debt secured by the mortgage has been fully paid. But, in the absence of all other evidence upon the question of payment, the mortgage itself, without the production of the notes, or any evidence accounting for their non-production, is *prima facie* evidence of the existence of the debt at that time, and is sufficient to entitle the plaintiff to possession of the mortgaged premises and to a common-law judgment therefor, when neither party entitled to do so moves for a conditional judgment."

8. Brookover *v.* Hurst, 1 Metc. (Ky.) 665.

9. Raguet *v.* Roll, 7 Ohio 76; Jackson *v.* Jackson, 5 Cow. (N. Y.) 173.

10. **Evidence as to Invalidity of Mortgage.** — In an action of forcible entry and detainer by a purchaser under a trust deed, evidence of invalidity of the deed of trust is inadmissible, and *a fortiori* is this true under a mere general denial. Smith *v.* Soper, 12 Colo. App. 264, 55 Pac. 195.

Evidence as to the mortgaged property being the homestead of the

b. *Proof Required.* — In an action by a purchaser at a foreclosure sale to recover the mortgaged property he must, of course, show a valid foreclosure.[11]

c. *Writs of Assistance.* — To support the granting of a writ of assistance to put the purchaser in possession it must be proved that the deed executed to the purchaser, together with the certified copy of the order of the court confirming it, where such confirming order is required to validate the deed, was exhibited to the occupant of the premises, and that demand was made for possession, and that defendant refused to deliver possession.[12]

3. Damaging Property Mortgaged. — A. Proof Required as to Mortgagee. — In an action by the mortgagee against a third party for injury to his security by damaging the mortgaged property, proof of the wrongful act, the resulting damage to and insufficiency of the security, and the insolvency of the mortgagor, is sufficient to make out the plaintiff's case.[13]

B. Mortgagor's Action for Wrongful Conveyance. — In an action by a mortgagor against a mortgagee for damages for conveying the mortgaged premises, where the mortgage was evidenced by

mortgagor is likewise inadmissible against the purchaser. Such an issue must be determined in the foreclosure proceeding. Haynes *v.* Meek, 14 Iowa 320.

In ejectment by a purchaser under a decree of foreclosure against a subsequent lessee of the mortgagee, the defendant can raise no question as to the due execution of the mortgage, the decree being conclusive of the issue. Hayes *v.* Shattuck, 21 Cal. 52.

11. In an action for possession the purchaser claiming under a statutory foreclosure out of court must show a valid foreclosure, including, among other essentials, notice of the foreclosure to the mortgagor, where he claims against a third party purchasing from the mortgagor. Dwight *v.* Phillips, 48 Barb. (N. Y.) 116.

Burden of Proof. — The plaintiff has the burden of proving the judgment and decree of foreclosure, the order of sale and sheriff's deed. Heyman *v.* Babcock, 30 Cal. 367.

12. Proof Required. — Hart *v.* Lindsay, Walk. Ch. (Mich.) 144; Fackler *v.* Worth, 12 N. J. Eq. 395.

13. Robinson *v.* Russell, 24 Cal. 467; Chelton *v.* Green, 65 Md. 272, 4 Atl. 271; Lane *v.* Hitchcock, 14 Johns. (N. Y.) 213; Gardner *v.* Heartt, 3 Denio (N. Y.) 232. See also Lavenson *v.* Standard Soap Co., 80 Cal. 245, 22 Pac. 184.

Motive of Defendant to Injure Security. — In Van Pelt *v.* McGraw, 4 N. Y. 110, the court said: "The defendant's counsel also asked the court to charge that, the plaintiff having alleged in his declaration that the defendants did the acts fraudulently and with a design to injure the plaintiff, he was bound to prove the allegations by evidence other than the mere act of removing the timber for the emolument of the defendants. The court refused so to charge, to which there was an exception. This proposition is somewhat obscure, but I understand it to mean that the plaintiff should prove that the primary motive of the defendants was to cheat the plaintiff. If the defendants knew that by taking off the timber the value of the plaintiff's mortgage would be impaired they would be legally chargeable with a design to effect that object, although their leading motive may have been their own gain. A man must be deemed to design the necessary consequences of his acts. If, therefore, he does a wrongful act, knowing that his neighbor will be thereby injured, he is liable. It is upon this principle that persons are often chargeable with the intent to defraud creditors, or to

a formal deed, evidence of the price received for the mortgaged premises by the mortgagee is admissible.[14]

C. Damages for Wrongful Retention of Possession. — Where a mortgagee has wrongfully held, and kept a purchaser out of, the possession of the premises, evidence of the rental value of the property is admissible on the question of the amount of damages for which he is liable.[15]

D. Injury to Property by Third Party. — Former Recovery by the Mortgagee. — In an action by the mortgagor or other owner of the fee against a trespasser for damage to the mortgaged property, in mitigation of damages the defendant may give in evidence the amount of a former recovery against him by the mortgagee for the same acts of trespass.[16]

commit any other fraud. The immediate motive is oftentimes self-interest, but if the necessary consequence is a fraud upon his neighbor, the actor is legally chargeable with a design to effect that result."

Evidence of Insolvency is not admissible unless the insolvency is pleaded. Gardner *v.* Heartt, 3 Denio (N. Y.) 232.

14. Haussknecht *v.* Smith, 11 App. Div. 185, 42 N. Y. Supp. 611.

15. Reed *v.* Ward, 51 Ind. 215.

16. In the case of Elvins *v.* Delaware & A. Tel. & Tel. Co., 63 N. J. L. 243, 43 Atl. 903, 76 Am. St. Rep. 217, where this question was considered, the court, in a lucid opinion, says: "When the mortgagee has instituted the prior suit and recovered his damages, as he may, there is no difficulty about the rule. The owner may still maintain an action for the injury, and the trespasser can protect himself by giving in evidence the recovery by the mortgagee in mitigation of damages. The owner has suffered damage to the full extent of the injury, but his claim has been satisfied *protanto* by payment to the mortgagee for his loss. But when the owner alone sues, and the case goes to trial upon the issue therein joined, the damages must be commensurate with the loss which falls upon the land by reason of the wrongful act. The damage committed upon the *locus in quo* is none the less because it is incumbered by a mortgage. The owner suffers to the extent of the entire loss. His premises are diminished in value to the full amount that will compensate for the injury. He is entitled to redeem the mortgage, and he may compel the wrongdoer to restore to him all that he has destroyed and deprived him of. In Massachusetts, by force and effect of the mortgage the legal estate vests at once in the mortgagee, and there the mortgagee recovers the full amount of damages done to the mortgaged premises. Gooding *v.* Shea, 103 Mass. 360; Byrom *v.* Chapin, 113 Mass. 308; Page *v.* Robinson, 10 Cush. 99. The damages must be a recompense for the injury done to the property. Thompson *v.* Banking Co., 17 N. J. Law 480; Berry *v.* Vreeland, 21 N. J. Law 183. When the owner sues, the property injured is the tract of land; and when the mortgagee is the plaintiff, the property injured is his mortgage. In either case the entire injury to the property of the plaintiff is recovered. When the mortgagor of chattels prosecutes a stranger for taking the mortgaged goods, the established rule of this court is that he is entitled to recover their full value, without regard to the mortgage. He must recover all the damages that both mortgagor and mortgagee can claim, and it necessarily constitutes a legal bar to further recovery by either. Luse *v.* Jones, 39 N. J. Law 707. No reason appears why a different rule shall prevail when the action is for trespass upon lands. The right both of the mortgagor and mortgagee to seek redress in a court of law being conceded, the equitable power must reside in the court, in a just administration of the law, to control the judgment and proceedings in such a

IX. PAYMENT, RELEASE AND DISCHARGE.

1. Payment. — A. Presumptions. — a. *From Lapse of Time.* **(1.) In General.** — The rule obtains at common law that after the lapse of twenty years from the maturity of a mortgage debt, the mortgagor continuing in the possession of the mortgaged premises, it will be presumed, in the absence of evidence to the contrary, that the debt has been paid and the mortgage satisfied.[17] This presump-

way that the amount recovered shall be appropriated to satisfy the demands of each in accordance with their respective rights, and with the rights of the defendant wrongdoer."

17. *England.* — Hillary *v.* Waller, 12 Ves. Jr. 239; Christophers *v.* Sparks, 2 Jac. & W. 223; Sibson *v.* Fletcher, 1 Ch. Rep. 59.

United States. — Hughes *v.* Edwards, 9 Wheat. 489; Brobst *v.* Brock, 10 Wall. 519.

Alabama. — Goodwyn *v.* Baldwin, 59 Ala. 127.

Arkansas. — Duke *v.* State, 56 Ark. 485, 20 S. W. 600.

Illinois. — Locke *v.* Caldwell, 91 Ill. 417.

Kansas. — Pattie *v.* Wilson, 25 Kan. 326; Courtney *v.* Staudenmayer, 56 Kan. 392, 43 Pac. 758, 54 Am. St. Rep. 592.

Kentucky. — Murray *v.* Fishback, 5 B. Mon. 403.

Maine. — Joy *v.* Adams, 26 Me. 330; Sweetser *v.* Lowell, 33 Me. 446; Blethen *v.* Dwinal, 35 Me. 556; Jarvis *v.* Albro, 67 Me. 310; Knight *v.* McKinney, 84 Me. 107, 24 Atl. 744.

Maryland. — Boyd *v.* Harris, 2 Md. Ch. 210; Owings *v.* Norwood, 2 Har. & J. 96.

Massachusetts. — Ayres *v.* Waite, 10 Cush. 72; Howland *v.* Shurtleff, 2 Metc. 26, 35 Am. Dec. 384; Andrews *v.* Sparhawk, 13 Pick. 393; Creighton *v.* Proctor, 12 Cush. 433; Cheever *v.* Perley, 11 Allen 584; Inches *v.* Leonard, 12 Mass. 379; Kellogg *v.* Dickinson, 147 Mass. 432, 18 N. E. 223, 1 L. R. A. 346; Anthony *v.* Anthony, 161 Mass. 343, 37 N. E. 386.

Michigan. — Abbott *v.* Godfroy, 1 Mich. 178; Baent *v.* Kennicutt, 57 Mich. 268, 23 N. W. 808.

Missouri. — Lewis *v.* Schwenn, 15 Mo. App. 342; Moreau *v.* Detchemendy, 18 Mo. 522; Wilson *v.* Albert, 89 Mo. 537, 1 S. W. 209.

New Hampshire. — Barker *v.* Jones, 62 N. H. 497, 13 Am. St. Rep. 586.

New Jersey. — Hayes *v.* Whitall, 13 N. J. Eq. 241; Wanmaker *v.* Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748; Evans *v.* Huffman, 5 N. J. Eq. 354; Barned *v.* Barned, 21 N. J. Eq. 245; Rockhill *v.* Rockhill (N. J. Eq.), 14 Atl. 760; Magee *v.* Bradley, 54 N. J. Eq. 326, 35 Atl. 103; Blue *v.* Everett, 55 N. J. Eq. 329, 36 Atl. 960; Stimis *v.* Stimis, 54 N. J. Eq. 17, 33 Atl. 468.

New York. — Kellogg *v.* Wood, 4 Paige 578; Belmont *v.* O'Brien, 12 N. Y. 394; Dunham *v.* Minard, 4 Paige 441; Ingrahm *v.* Baldwin, 9 N. Y. 45; Giles *v.* Baremore, 5 Johns. Ch. 545; Jackson *v.* Hudson, 3 Johns. 375, 3 Am. Dec. 500; Collins *v.* Torrey, 7 Johns. 278, 5 Am. Dec. 273; Jackson *v.* Pratt, 10 Johns. 381; Jackson *v.* DeLancey, 11 Johns. 365; Jackson *v.* Pierce, 10 Johns. 414; Jackson *v.* Wood, 12 Johns. 242, 7 Am. Dec. 315; Martin *v.* Stoddard, 127 N. Y. 61, 27 N. E. 285.

North Carolina. — Brown *v.* Becknall, 58 N. C. 423; Roberts *v.* Welch, 43 N. C. 287; Fowler *v.* Osborne, 111 N. C. 404, 16 S. E. 470.

Ohio. — Allen *v.* Everly, 24 Ohio St. 97.

Pennsylvania. — Brock *v.* Savage, 31 Pa. St. 410; Gregory *v.* Com., 121 Pa. St. 611, 15 Atl. 452; Hart *v.* Bucher, 182 Pa. St. 604, 38 Atl. 472; Sawyer *v.* Link, 193 Pa. St. 424, 44 Atl. 457; *In re* McCrudden's Estate, 12 Phila. 153.

Rhode Island. — Staples *v.* Staples, 20 R. I. 264, 38 Atl. 498.

South Carolina. — Butler *v.* Washington, 28 S. C. 607, 5 S. E. 601.

Texas. — Fessenden *v.* Barrett, 9 Tex. 475; Foot *v.* Silliman, 77 Tex. 268, 13 S. W. 1032.

Vermont. — Atkinson *v.* Patterson, 46 Vt. 750.

tion, however, is one of fact only, and is not conclusive.[18] Payment

Virginia. — Bell *v.* Wood, 94 Va. 677, 27 S. E. 504.

West Virginia. — Edwards *v.* Chilton, 4 W. Va. 352; Criss *v.* Criss, 28 W. Va. 388; Pickens *v.* Love, 44 W. Va. 725, 29 S. E. 1018.

Payment is presumed after thirty years with a reconveyance to the mortgagor, even if the mortgagee retains the mortgage and the evidence of the debt. Ray *v.* Pearce, 84 N. C. 485.

Where the existence of a debt has not been recognized by either party, and no proceedings for foreclosure have been instituted within a period of thirty years, payment will be presumed. Downs *v.* Sooy, 28 N. J. Eq. 55.

After a lapse of nearly fifty years a mortgage, though appearing unsatisfied of record, will be presumed paid where the party suing on it does not have possession of it or explain its absence. Lammer *v.* Stoddard, 103 N. Y. 672, 9 N. E. 328.

When the payment of a mortgage debt appears on the suit in chancery to foreclose, with no action on the debt and no entry upon the lands mortgaged, the release of the mortgage is made sufficiently to appear. Morgan *v.* Davis, 2 Har. & M. (Md.) 9.

Though for some reason inoperative, a release, when coupled with a great lapse of time, may warrant an inference that a mortgage has been discharged. Lynch *v.* Pfeiffer, 110 N. Y. 33, 17 N. E. 402.

If the fact that the mortgagor has been in possession for more than twenty years is not met by some fact or circumstance showing that the debt is a subsisting one there can be no foreclosure. Chick *v.* Rollins, 44 Me. 104.

A mortgage will be presumed to be satisfied where the mortgagee has for a long time acquiesced in the dismissal for want of prosecution of his suit for a foreclosure. Nelson *v.* Lee, 10 B. Mon. (Ky.) 495.

Statutory Presumptions. — The statutory presumption of the payment of a mortgage from lapse of time precludes the holder of the mortgage from claiming under it as a lienor when made a defendant in another action affecting the property. Townshend *v.* Townshend, 1 Abb. N. C. (N. Y.) 81.

The statutory presumption of the payment of a mortgage after twenty years is not available to the owner of the equity of redemption in a suit for foreclosure if payments have been made by the mortgagor upon the debt within the twenty year period. New York L. Ins. & Trust Co. *v.* Covert, 3 Abb. Dec. (N. Y.) 350, 6 Abb. Pr. (N. S.) 154.

18. Presumption Not Conclusive. Cook *v.* Parham, 63 Ala. 456; Coldcleugh *v.* Johnson, 34 Ark. 312; Barron *v.* Kennedy, 17 Cal. 574; Allen *v.* Everly, 24 Ohio St. 97; Locke *v.* Caldwell, 91 Ill. 417; Brown *v.* Hardcastle, 63 Md. 484; Jackson *v.* Wood, 12 Johns. (N. Y.) 242, 7 Am. Dec. 315; Philbrook *v.* Clark, 77 Me. 176; Jackson *v.* Pierce, 10 Johns. (N. Y.) 414; Abbott *v.* Godfroy, 1 Mich. 178; Brown *v.* Wagner (Pa.), 16 Atl. 834; Barker *v.* Jones, 62 N. H. 497, 13 Am. St. Rep. 586; Wanmaker *v.* Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 586; Bowie *v.* Poor School Soc. of Westmoreland, 75 Va. 300; Snavely *v.* Pickle, 29 Gratt. (Va.) 27; Newcomb *v.* St. Peters Church, 2 Sandf. Ch. (N. Y.) 636; Barned *v.* Barned, 21 N. J. Eq. 245.

The presumption of payment from lapse of time will not be overcome by evidence that a party, thirteen years after its execution, took an assignment of the mortgage in writing, the assignment having in the meantime been destroyed, especially where the assignee is shown to be a business man of large experience. Ward *v.* Greinlds (N. J. Eq.), 10 Atl. 374.

The presumption after a lapse of fifty years may be overcome by evidence of non-payment, even where the mortgagor is in possession, if he be shown always to have regarded the mortgage to be outstanding. Burnham *v.* Hewey, 1 Hask. 372, 4 Fed. Cas. No. 2175.

The lapse of twenty years, while not conclusive, can be overcome only by some act unequivocally recognizing the debt. Cheever *v.* Perley, 11 Allen (Mass.) 584.

may be presumed, or rather inferred, so as to warrant a submission of the case to the jury, from a lapse of time less than twenty years, when the accompanying circumstances are corroborative of the theory of payment,[19] though the legal presumption will not earlier arise.[20] The statute authorizing the discharge of a mortgage after twenty years from the day of its performance, as having been presumptively paid, and the common-law presumption alike operate as well on a deed absolute with a separate defeasance as on a formal mortgage.[21]

As against a purchaser at a foreclosure sale, a mortgage is not necessarily presumed from mere lapse of time to have been paid, where the right to foreclose was asserted in due season, and where there is no adverse holding of the mortgaged premises under the mortgagor.[22] So long as an action on the debt is not barred by the statute of limitations a presumption of payment and discharge of the mortgage will not arise from mere lapse of time.[23] Nor will lapse of time give rise to a presumption where foreclosure proceed-

It does not affect the presumption from lapse of time that the mortgagee and his administrator first appointed were dead when the debt matured. Smith *v.* Nevin, 31 Pa. St. 238.

After a lapse of twenty years, during which time the mortgagor has been in possession, a mortgage will be presumed to have been discharged or released, but this presumption may be overcome by evidence of circumstances indicating the contrary, as by proof of payment of interest, a promise to pay, or an acknowledgment of the mortgage as a subsisting instrument. Hughes *v.* Edwards, 9 Wheat. (U. S.) 489.

19. Less Than Twenty Years. Corroborating Circumstances. — Oswald *v.* Legh, 1 T. R. 270; Buckmaster *v.* Kelly, 15 Fla. 180; Jackson *v.* Pratt, 10 Johns. (N. Y.) 381.

A lapse of fourteen years between the day of the last payment on a mortgage and the bringing of a suit for foreclosure is sufficient, in connection with other circumstances, to support a presumption of payment. Bander *v.* Snyder, 5 Barb. (N. Y.) 63.

Slight Evidence Required. — Slight evidence of payment will be required where the debt has long been allowed to remain unpaid (twenty-two years). Pattie *v.* Wilson, 25 Kan. 326.

Where the mortgagor has had unexplained possession of the mortgaged premises for less than twenty years, and partial payments and other slight evidence of the discharge of the debt are shown, the question is one for the jury. Gould *v.* White, 26 N. H. 178.

A mortgage will be presumed to have been satisfied where during a period of fifteen years, and to the time of his death, the mortgagor remained in possession of the mortgage and of the instrument it secured, and where, though solvent, no effort was made to enforce payment of the debt in the lifetime of the mortgagor. McMurray *v.* McMurray, 63 Hun 183, 17 N. Y. Supp. 657.

The mortgagee's failure to foreclose his mortgage for a period of four years from the maturity of the debt will not create a presumption of payment in favor of a purchaser of the mortgaged premises. Ware *v.* Bennett, 18 Tex. 794.

20. Peck *v.* Mallams, 10 N. Y. 509.

21. Presumption Applies to Conveyance With Defeasance. — Short *v.* Caldwell, 155 Mass. 57, 28 N. E. 1124.

Lapse of time may operate to create a presumption of payment where an instrument in form a deed is shown to be in fact a mortgage. Swart *v.* Service, 21 Wend. (N. Y.) 36, 24 Am. Dec. 211, *overruled* in Webb *v.* Rice, 6 Hill (N. Y.) 219, but not on this proposition.

22. Baldwin *v.* Cullen, 51 Mich. 33, 16 N. W. 191.

23. Locke *v.* Caldwell, 91 Ill. 417.

ings have been had[24] or where the mortgagor has always resided in another jurisdiction.[25] The presumption is not interrupted by a succession of rights in the mortgage.[26] It will be observed that the presumption of payment does not arise where the mortgagee or other persons claiming through or under him have during or within the period been in possession of the mortgaged premises.[27]

(2.) In Rebuttal of Presumption. — (A.) Degree of Proof Required. It is generally held that to overcome the presumption of payment from lapse of time clear proof to the contrary will be required.[28]

(B.) Declarations and Admissions. — The presumption of payment arising from mere lapse of time may be overcome by the admissions and declarations of the mortgagor recognizing the debt as a subsisting one.[29] The declarations of the mortgagor's widow, who

24. Kibbe *v.* Thompson, 5 Biss. 226, 14 Fed. Cas. No. 7754.

25. Kibbe *v.* Thompson, 5 Biss. 226, 14 Fed. Cas. No. 7754.

Lapse of time raises no presumption of payment where the mortgagor became insolvent and died before the maturity of the debt, and his vendee of the equity of redemption also became insolvent and a non-resident of the state before such maturity and remained a non-resident. Brobst *v.* Brock, 10 Wall. (U. S.) 519.

26. Whitney *v.* French, 25 Vt. 663.

The statutory presumption of payment, or abandonment of the right of redemption, arising within a given period after forfeiture, has no relation to the equitable interests of legatees and other persons entitled to distribution. McCraw *v.* Fleming, 40 N. C. 348.

27. Where Mortgagee Has Been in Possession. — Brobst *v.* Brock, 10 Wall. (U. S.) 519; Crooker *v.* Jewell, 31 Me. 306.

28. Rockhill *v.* Rockhill (N. J. Eq.), 14 Atl. 760; Wanmaker *v.* Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748; Howland *v.* Shurtleff, 2 Metc. (Mass.) 26, 35 Am. Dec. 384; Kane *v.* Bloodgood, 7 Johns. Ch. 90, 11 Am. Dec. 417; Jarvis *v.* Albro, 67 Me. 310; Gregory *v.* Com., 121 Pa. St. 611, 15 Atl. 452; Levers *v.* Van Buskirk, 4 Pa. St. 309.

When the presumption of payment from lapse of time is one of law it can only be overcome by strict proof of countervailing matters. Whitney *v.* French, 25 Vt. 663.

After the lapse of fifty years it has been held that there must be decisive proof of non-payment and of the continued existence of the mortgage lien. Cowie *v.* Fisher, 45 Mich. 629, 8 N. W. 586.

Evidence Held Sufficient To Rebut Presumption From Lapse of Twenty Years. — Philbrook *v.* Clark, 77 Me. 176; Rockhill *v.* Rockhill (N. J. Eq.), 14 Atl. 760; Stimis *v.* Stimis, 54 N. J. Eq. 17, 33 Atl. 468; Jackson *v.* Delancey, 11 Johns. (N. Y.) 365.

Where the presumption of payment of an unregistered mortgage is sought to be overcome by acknowledgments of subsequent purchasers of the mortgaged premises the evidence of the mortgage must be clear and specific. Jackson *v.* Wood, 12 Johns. (N. Y.) 242, 7 Am. Dec. 315.

Non-Existence and Payment. Comparative Degrees of Proof. Stronger evidence is required to establish the non-existence of a debt than to create a presumption of its payment. Wanmaker *v.* Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748.

Custom and Usage as to Enforcement. — Evidence is inadmissible that in the particular locality of the mortgagee's domicile mortgages were frequently taken payable one year after date and held for twenty years as investments, after which they were paid. Michener *v.* Michener (Pa.), 2 Atl. 508.

29. Delano *v.* Smith, 142 Mass. 490, 8 N. E. 644; Frear *v.* Drinker, 8 Pa. St. 520; Murphy *v.* Coates, 33 N. J. Eq. 424; Howard *v.* Hildreth, 18 N. H. 105.

The admissions of the mortgagor that the debt is unpaid are sufficient to overcome the presumption of pay-

remained in possession of the mortgaged premises to the time of her death, are admissible to show the character of her possession so as to overcome the presumption of payment from lapse of time.[30] The payment of interest on the mortgage debt during or after the period creating the presumption is such an admission of the continued existence of the debt, in some jurisdictions, as will rebut the presumption,[31] though the mortgagor may not prejudice the rights of innocent purchasers of the property by making payments on account of the mortgage after the lapse of the period and after having conveyed the property mortgaged.[32]

(C.) Relationship and Condition of Parties. — The relationship of the parties, while a circumstance proper for consideration in this regard, is not alone sufficient to overcome the presumption from lapse of time,[33] but, concurring with other circumstances, it may operate

ment in favor of a grantee of the mortgagor arising from such grantee's possession of the premises for more than twenty years under a deed absolute from the grantor. Wright *v.* Evens, 10 Rich. Eq. (S. C.) 582.

Where the mortgagee has always asserted the non-payment of a mortgage debt, and the mortgagor has acquiesced in the mortgagee's claims and made admissions and declarations to the mortgagee and others that the mortgage was a subsisting one, such evidence was held sufficient to show the debt unpaid. Lyon *v.* McDonald, 51 Mich. 435, 16 N. W. 800.

Where the grantee of the mortgagor holds under a deed of general warranty, without exception, and adversely to the mortgagee, the presumption of payment arising from his occupancy during the statutory period will not be overcome by the declarations of the grantor during that period that the debt was unpaid. There must be admissions from the grantee in such circumstances to overcome the presumption. Whitney *v.* French, 25 Vt. 663.

The occupancy of mortgaged premises by a possessor, neither holding nor claiming under the mortgagor, and the admissions of the mortgagor may be competent to rebut the presumption. Jackson *v.* Wood, 12 Johns. (N. Y.) 242, 7 Am. Dec. 315.

The presumption of the abandonment of a mortgage arising from lapse of time may not be overcome by loose declarations made after the presumption has arisen. Brown *v.* Becknall, 58 N. C. 423.

An Admission of Non-Payment of the mortgage made more than twenty years prior to the institution of the suit will not have that effect. Simms *v.* Kearse, 42 S. C. 43, 20 S. E. 19.

30. Anthony *v.* Anthony, 161 Mass. 343, 37 N. E. 386.

31. Hughes *v.* Blackwell, 59 N. C. 73; Hoye *v.* Burford, 68 Ark. 256, 57 S. W. 795.

Possession by the mortgagor of the mortgaged premises for more than twenty years creates no presumption of the payment of the debt as against an acknowledgment of the debt and of the payment of interest upon it within such period. Howard *v.* Hildreth, 18 N. H. 105.

Though twenty years have elapsed since the maturity of the mortgage debt, and since a conveyance of the mortgaged premises by the mortgagor to a third party, payments on account of the debt made by the mortgagor during the period will destroy the presumption otherwise arising, even as against the purchaser or his grantee. Wright *v.* Eaves, 10 Rich. Eq. (S. C.) 582.

32. New York L. Ins. & Trust Co. *v.* Covert, 29 Barb. (N. Y.) 435, *reversed* 3 Abb. Dec. 350.

33. Relationship and Solvency May Be Considered. — Rockhill *v.* Rockhill (N. J. Eq.), 14 Atl. 760.

Relationship of Brother and Sister. The relationship of brother and sister between the mortgagor and the

to defeat the presumption.[34] That there was no one who was competent to enforce and receive the mortgage debt during the lapse of time relied on as presumptive of payment is sufficient to rebut the presumption.[35]

(D.) Conduct of Parties Toward Property Mortgaged. — Evidence of actions brought by the mortgagee against the mortgagor within the twenty-year period, founded upon the mortgage and successfully maintained, is competent to explain and qualify the presumption arising from the lapse of time.[36]

(E.) The Fact of Recording. — The recording of a mortgage does not rebut a presumption of satisfaction after the lapse of twenty years where there is no subsequent admission on the record of the continuing existence of the debt.[37]

(F.) Mortgagee's Retention of Mortgage and Obligation. — The retention by the mortgagee of possession of the mortgage and the obligation it secures after the lapse of the period of presumptive payment is not sufficient to rebut the presumption. And the same

mortgagee will not overcome the presumption of payment arising from the lapse of twenty years. Magee *v.* Bradley, 54 N. J. Eq. 326, 35 Atl. 103.

Stockholder and Corporation. The presumption of payment arising from the lapse of twenty years is not overcome by the fact that the mortgagee was a stockholder in the corporation to which the mortgage was executed, and that it was understood that the dividends due him were to be applied to the payment of his interest on the mortgage debt. Michener *v.* Michener (Pa.), 2 Atl. 508.

34. Stimis *v.* Stimis, 54 N. J. Eq. 17, 33 Atl. 468; Philbrook *v.* Clark, 77 Me. 176.

The presumption of payment may be repelled by evidence of the relationship of the parties, the condition of the debtor as to solvency, the leniency of the creditor, the recognition of the debt, and other circumstances tending to show non-payment. Stanley *v.* McKinzer, 7 Lea (Tenn.) 454; Elliott *v.* Williamson, 11 Lea (Tenn.) 38; Vaughn *v.* Tate (Tenn.), 36 S. W. 748; Anderson *v.* Settle, 5 Sneed (Tenn.) 202; Yarnell *v.* Moore, 3 Cold. (Tenn.) 173.

Close Relationship and Insolvency of Mortgagor. — The fact that the mortgagor was closely related to the mortgagee and in straitened financial condition may be sufficient to overcome the presumption arising from lapse of time. Wanmaker *v.* Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748.

Insolvency Alone is insufficient. Wiley *v.* Lineberry, 89 N. C. 15.

35. Abbott *v.* Godfroy, 1 Mich. 178.

36. Statutory Foreclosure. — The presumption of payment from lapse of time is rebutted by a statutory foreclosure of the mortgage thirty-one years after the maturity of the debt thereby secured. Jackson *v.* Slater, 5 Wend. (N. Y.) 295.

Ejectment. — The presumption may be overcome by evidence of ejectment against the mortgagor for part of the lands mortgaged brought within twenty years, and proceedings thereunder resulting in a conditional verdict; but evidence of an ejectment more than twenty years before the bringing of the pending suit is not competent. Levers *v.* Van Buskirk, 7 Watts & S. (Pa.) 70.

Ineffectual Attempts To Collect. Anthony *v.* Anthony, 161 Mass. 343, 37 N. E. 386.

37. Simms *v.* Kearse, 42 S. C. 43, 20 S. E. 19.

Recording of Defeasance. — Short *v.* Caldwell, 155 Mass. 57, 28 N. E. 1124.

rule would apply as to an assignee claiming under an assignment of the mortgage.[38]

b. *From Failure To Produce Obligation Secured.* — Unless the note, bond or other evidence of debt which a mortgage is given to secure is produced or its absence accounted for, it will be presumed to have been paid as against the party seeking to foreclose or to assert any other right under it.[39]

c. *Mortgagor's Possession of Mortgage and Obligation Secured.* The mortgagor's possession of the mortgage and the obligation it secures, or the delivery of the same to him, or even his possession of the obligation alone, is presumptive evidence of the discharge of the debt and mortgage.[40] The presumption is *prima facie* only and may be overcome by proof of circumstances attending delivery or the acquiring of possession inconsistent with a discharge.[41] The

38. Ray *v.* Pearce, 84 N. C. 485.

39. Bassett *v.* Hathaway, 9 Mich. 28; Norris *v.* Kellogg, 7 Ark. 112; Field *v.* Anderson, 55 Ark. 546, 18 S. W. 1038; Bergen *v.* Urbahn, 83 N. Y. 49; Buckmaster *v.* Kelley, 15 Fla. 180; Bailey *v.* Gould, Walk. Ch. (Mich.) 28; George *v.* Ludlow, 66 Mich. 176, 33 N. W. 169; Ward *v.* Munson, 105 Mich. 647, 63 N. W. 498.

When after thirteen years of silence upon the mortgagee's part a suit to foreclose is begun upon a chance discovery of the unsatisfied mortgage record, and the mortgage is not produced, a finding against the mortgagee is warranted. Butler *v.* Washington, 28 S. C. 607, 5 S. E. 601.

The presumption of payment of the mortgage debt arising from the non-production of the note or bond secured is not overcome, in a suit to foreclose a mortgage assumed by the grantee, by the fact that the grantor agreed in the deed to warrant and defend against all incumbrances except the mortgage sought to be foreclosed. Ward *v.* Munson, 105 Mich. 647, 63 N. W. 498.

40. Allen *v.* Sawyer, 88 Ill. 414; Ormsby *v.* Barr, 21 Mich. 474; Smith *v.* Smith, 15 N. H. 55; Harrison *v.* New Jersey R. R. & Trans. Co., 19 N. J. Eq. 488; Purser *v.* Anderson, 4 Edw. Ch. (N. Y.) 17; Grey *v.* Grey, 47 N. Y. 552.

The grantee of the mortgagor has the burden of showing payment of the mortgage debt, and this burden is not satisfied by the production of the mortgagee's receipt of satisfaction or a copy of it from the records, where the mortgagee produces the note at the trial bearing indorsements showing the payment of interest subsequent to the date of such receipt. Smith *v.* Stark, 3 Colo. App. 453, 34 Pac. 258.

41. *Illinois.* — Flower *v.* Elwood, 66 Ill. 438.

Maryland. — Shipley *v.* Fox, 69 Md. 572, 16 Atl. 275.

Massachusetts. — Richardson *v.* Cambridge, 2 Allen 118; Grimes *v.* Kimball, 3 Allen 518.

Michigan. — Ormsby *v.* Barr, 21 Mich. 474.

Mississippi. — Johnson *v.* Nations, 26 Miss. 147.

New Hampshire. — Bell *v.* Woodward, 34 N. H. 90.

New Jersey. — Chapman *v.* Hunt, 18 N. J. Eq. 414.

New York. — Garlock *v.* Geortner, 7 Wend. 198; McMurray *v.* McMurray, 63 Hun 183, 17 N. Y. Supp. 657; Braman *v.* Bingham, 26 N. Y. 483; Palmer *v.* Gurnsey, 7 Wend. 248.

For a case where the production of the mortgage notes by the tenant in possession was held not to show a release of the mortgage, see Crocker *v.* Thompson, 3 Metc. (Mass.) 224.

Where the mortgagor alleges that the mortgage was taken by the consent of the owner, since deceased, from the office of record, where it had been left to be recorded and placed in the mortgagor's custody, the proof of the allegation must be of the most satisfactory nature, and the testimony of the mortgagor will not alone be sufficient unless his

mortgagor's possession of the mortgage, however, does not *per se* create a presumption that the debt has been paid.[42] Likewise, the fact that the mortgagor has possession of the mortgage note does not entitle him to a cancellation of the mortgage securing it.[43]

d. *Possession and Production by Mortgagee of Obligation Secured.* — The production by the mortgagee of the mortgage and obligation it was given to secure is *prima facie* evidence of the non-

character is entirely unimpeached and his testimony is otherwise free from suspicion. Harrison *v.* New Jersey R. R. & Trans. Co., 19 N. J. Eq. 488.

The mortgagor's possession of the evidence of the mortgage debt may be explained so as to rebut a presumption of payment. Succession of Norton, 18 La. Ann. 36.

The presumption of the payment or discharge of a mortgage by its being redelivered to, or in the possession of, the mortgagor may be explained or overcome by proof of circumstances attending the surrender tending to show that it was not satisfied. Killops *v.* Stephens, 66 Wis. 571, 29 N. W. 390.

Suspicious Circumstances Attending Possession. — The effect of the introduction by the defendant of the note or bond secured may be overcome by proof of suspicious circumstances attending his possession. Anderson *v.* Culver, 127 N. Y. 377, 28 N. E. 32, *affirming* 53 Hun 633, 6 N. Y. Supp. 181.

Possession by the mortgagor of his mortgage with an indorsement of satisfaction is only *prima facie* evidence of payment, and may be explained by parol. Also it may be shown that the mortgage and the notes it secured were sent for collection to be delivered upon payment, and that delivery was made without payment. Allen *v.* Sawyer, 88 Ill. 414.

Where the widow of the mortgagee, after his decease, finds the mortgage and note among her husband's papers, and, upon the statement of the mortgagor that the mortgage has been paid, delivers the same to him, in a suit by her to foreclose as administratrix of her husband's estate, under appointment made subsequent to such delivery, the presumption of payment will not, under the circumstances stated, arise from the mortgagor's possession of his obligation. Fitzmahony *v.* Caulfield, 87 Hun 66, 33 N. Y. Supp. 876.

Erroneous Belief of Prior Foreclosure. — The presumption arising from the mortgagor's possession of his notes may be rebutted by proof that they were delivered to him by the mortgagee in the erroneous belief that the mortgage had been foreclosed. The rule that money paid under mistake of law may not be recovered does not exclude such evidence. Smith *v.* Smith, 15 N. H. 55.

Unauthorized Delivery. — The presumption of payment does not obtain from the fact of the mortgagor's possession of the note or mortgage where delivery is admitted to have been made to the mortgagor by one not having the right. Fitzmahony *v.* Caulfield, 87 Hun 66, 33 N. Y. Supp. 876.

Where the mortgage and the instrument it secures are found among the papers of the deceased mortgagor, who had possession of the same for a long period without any claim being made that they were unpaid, the presumption of payment will prevail. Levy *v.* Merrill, 52 How. Pr. (N. Y.) 360.

42. Harrison *v.* New Jersey R. R. & Trans. Co., 19 N. J. Eq. 488.

The plaintiff's failure to produce the bonds usually accompanying a mortgage is not a defense to a suit for the foreclosure of the mortgage where the mortgage contains no recital of the existence and giving of the bonds, and the mortgagor testifies that he has them in his possession, but fails to produce them, as such evidence lends support to an inference that no bonds have ever been given. Parkhurst *v.* Berdell, 5 N. Y. Supp. 628.

43. Lemos *v.* Duralde, 3 Mart. (N. S.) (La.) 258.

payment of the debt secured.[44] So where indorsements of payments are required to be made on a mortgage given to secure a loan of public funds, the production of a mortgage bearing upon it no evidence of the payment of interest on the mortgage debt creates a presumption of the non-payment of such interest.[45]

e. *Payment of Particular Debt. — Presumption as to Earlier Debts.* — Payment of a particular debt creates a presumption that prior debts, secured by the same mortgage, have been paid.[46]

f. *Application of Payments.* — It will be presumed that payments made by a trustee are intended to be applied upon a debt which he was authorized to contract, and payments to the extent of an authorized debt will be presumed, nothing to the contrary appearing, to have been in satisfaction of such debt.[47] Payments made by the mortgagor to the mortgagee before the maturity of the debt secured will not be presumed to have been made on account of the mortgage debt, but rather upon some other obligation.[48]

g. *As to Consideration Recited. — Effect of Presumption.* — The consideration recited in the mortgage will be presumed to be the whole consideration upon which it was given, and where the recited consideration is presumed to have been paid the whole debt is operated upon by such presumption.[49]

h. *Release of Equity of Redemption.* — The satisfaction of the mortgage debt may be presumed from the execution by the mortgagor of a release of his equity of redemption to and the acceptance of the same by the mortgagee.[50]

i. *Giving of New Note and Mortgage.* — Where a note and mortgage are given for a debt evidenced by another note secured by an earlier mortgage, it will be presumed that the second note and mortgage are given as further security for the original debt.[51]

44. Deed of Trust. — Steinmetz *v.* Lang, 81 Ill. 603.

The production of the evidence of debt secured, by one to whom it was given or claiming it as a purchaser, unattended by any suspicious circumstance, is *prima facie* evidence of the existence of the debt and of its non-payment. Shippen *v.* Whittier, 117 Ill. 282, 7 N. E. 642. The production of the notes sued on is sufficient to shift to the defendant the burden of proof of payment. Schnadt *v.* Davis, 84 Ill. App. 669.

45. Olmstead *v.* Elder, 2 Sandf. (N. Y.) 325.

46. After the lapse of thirty years it will be presumed that a mortgage, given to secure three notes, falling due at different dates, the last two of which have been paid, has been satisfied. Mathews *v.* Light, 40 Me. 394.

47. *In re* Lawrence's Estate, 3 Pa. Dist. 356.

48. Tomlinson *v.* Seifert, 2 N. Y. St. 283; The Antartic, 1 Sprague 206, 1 Fed. Cas. No. 479; Pattison *v.* Hull, 9 Cow. (N. Y.) 747; Gwinn *v.* Whitaker, 1 Har. & J. (Md.) 754; Dorsey *v.* Gassaway, 2 Har. & J. (Md.) 402; Windsor *v.* Kennedy, 52 Miss. 164. But when the mortgage debt has matured it will be presumed that a payment was on account of that debt. Tharp *v.* Feltz, 6 B. Mon. (Ky.) 6. See *contra*, Field *v.* Holland, 6 Cranch (U. S.) 8.

49. Bridges *v.* Blakely, 106 Ind. 332, 6 N. E. 833.

50. Burnet *v.* Denniston, 5 Johns. Ch. (N. Y.) 35.

51. One seeking to defend against the foreclosure of a mortgage on the ground of payment and discharge by a deed of trust subsequently given

B. Burden of Proof in General as to Payment. — Consonant to the rule generally obtaining, the mortgagor or other party relying upon the payment and discharge of a mortgage has the burden to prove such payment and discharge.[52] A preponderance of the evidence is all that is required to show a release and discharge.[53] But where the mortgaged property, if of a productive nature, has been for a long time in the possession of the mortgagee, and numerous large payments on account of the mortgage have been made, the

has the burden of overcoming the presumption that the deed of trust was taken only as a further security for the debt, and not in payment and discharge of the mortgage. Schumpert *v.* Dillard, 55 Miss. 348.

If a note is secured by a deed of trust, the taking of a new note unsecured for the debt is strongly presumed not to be taken in payment of the debt, as it cannot be presumed that a secured debt would be surrendered for an unsecured one. This rule obtains, it has been held, whether the subsequent note is the party's own or the note of a third party. Saving & Loan Soc. *v.* Burnett, 106 Cal. 514, 39 Pac. 922. See also Sloan *v.* Rice, 41 Iowa 465.

52. Cox *v.* Ledward, 124 Pa. St. 435, 16 Atl. 826; Austin *v.* Downer, 25 Vt. 558; Brown *v.* Morgan, 56 Mo. App. 382; McKinney *v.* Wall, 7 Phila. (Pa.) 240; Coyle *v.* Wilkins, 57 Ala. 108; Porter *v.* Wheeler, 105 Ala. 451, 17 So. 221; Tisdale *v.* Mallett (Ark.), 84 S. W. 481; Omaha Loan & Trust Co. *v.* Luellen, 3 Neb. (Unof.) 709, 92 N. W. 734; Magenau *v.* Bell, 14 Neb. 7, 14 N. W. 664; Tootle *v.* Maben, 21 Neb. 617, 33 N. W. 264; Curtis *v.* Perry, 33 Neb. 519, 50 N. W. 426.

Payment to Agent. — Where payment is claimed to have been made to the mortgagee's agent, proof of agency is of course required. Garrels *v.* Meyer, 21 Ill. App. 381.

The party alleging payment has the burden of proving it, though the mortgagee may not have been in possession for more than twenty years after the maturity of the debt secured, if the premises have been in possession of another claiming under a superior title. Crooker *v.* Crooker, 49 Me. 416.

Where the defendant answers that a particular piece of real estate was agreed by the plaintiff to be accepted to be applied in part satisfaction of the mortgage, the plaintiff denying the agreement, evidence of a tender of a deed to the plaintiff is not admissible where an enforceable contract is not shown, nor would it be competent to show that the plaintiff had offered to sell the particular land, as evidence of his agreement to purchase it from the defendant. Westmoreland *v.* Carson, 76 Tex. 619, 13 S. W. 559.

That an advancement had been made for a considerable time without any written evidence thereof will support a presumption that the advancement was never intended to be repaid, and that it was therefore insufficient to support a mortgage; but such evidence does not give rise to a legal presumption of the satisfaction of the mortgage. McIsaacs *v.* Hobbs, 7 Dana (Ky.) 268.

The Rule Applies to Assignees. In a suit by an assignee to foreclose, the defendant has the burden of proving payment, and the assignee is not required to produce the books of the mortgagee in which the accounts of the parties to the mortgage were kept. Coon *v.* Bouchard, 74 Mich. 486, 42 N. W. 72.

53. Curtis *v.* Perry, 33 Neb. 519, 50 N. W. 426. The defense that in consideration of the conveyance of other property the mortgage sought to be foreclosed was released by an agreement in parol need not be so strictly proven as must the averments of a bill for specific performance of an oral agreement to convey, a preponderance merely being sufficient. Gould *v.* Elgin City Bkg. Co., 136 Ill. 60, 26 N. E. 497, *reversing* 36 Ill. App. 390.

mortgagee has the burden, in an action to compel a reconveyance, to show that his debt is unpaid.[54]

C. Relevancy and Admissibility. — a. *Of Parol in General.* Parol evidence may be received to establish the payment of a real estate mortgage.[55] As between the parties to a deed of trust given to secure pre-existing notes of the grantor, parol may be received to show other payments than those mentioned in the deed.[56] If a new note is given, it may be shown, by proof of a contemporaneous parol agreement, that the mortgage securing the antecedent debt should continue for the benefit of the new obligation.[57]

b. *Admissions and Declarations.* — The mortgagor's subsequent admission of the continued existence of the mortgage debt is admissible to explain the mortgagee's receipt to him in full of all demands between the parties.[58] Likewise the mortgagee's statements containing implications or statements as to the existence and value of the mortgage debt are admissible against him.[59] The admissions

54. Manaudas *v.* Heilner, 12 Or. 335, 7 Pac. 347.

And if, in a suit to redeem, a mortgagee has been in possession and is called upon to account for the rents and profits, and he fails to do so, the mortgage will be presumed to be satisfied. Morgan *v.* Morgan, 48 N. J. Eq. 399, 22 Atl. 545.

55. Mauzey *v.* Bowen, 8 Ind. 193; Thornton *v.* Wood, 42 Me. 282.

Request to Mortgagor. — Where a creditor bequeaths a legacy to his debtor without noticing the debt, and after his death the obligation is found uncanceled among the testator's property the legacy is not a *prima facie* release or extinguishment of the debt. Extrinsic evidence may be received, however, if the intention to release or extinguish the debt is not clearly expressed or implied in the will. Appeal of Peter (Pa.), 4 Atl. 727; Fleming *v.* Parry, 24 Pa. St. 47.

It may be shown by parol that a mortgage has been satisfied by a conveyance of a part of the mortgaged property to the plaintiff's wife. Banks *v.* Goodliffe, 60 Hun 586, 15 N. Y. Supp. 466.

On an issue of payment, in rebuttal of the mortgagor's testimony that he had been employed by the mortgagee for a considerable time after the mortgage was executed, thereby satisfying the mortgage, the mortgagee may show that it was his custom to pay persons in his employ at short intervals and at stated times, and that the mortgagor's pecuniary condition was such that he was dependent on his earnings for the support and maintenance of himself and his family. Waugh *v.* Riley, 8 Metc. (Mass.) 290.

Notwithstanding the giving of a negotiable promissory note may be *prima facie* payment of the debt for which it was given, it may be shown that such a note was not so intended by the parties, and for this purpose parol or other extrinsic evidence is admissible. Langley *v.* Bartlett, 33 Me. 477; Parham Sewing Mach. Co. *v.* Brock, 113 Mass. 194.

Extrinsic evidence may be received to show, though it contains no such recital, that it was in fact given in payment of a debt secured by an earlier mortgage. Blair *v.* Harris, 75 Mich. 167, 42 N. W. 790.

56. Estes *v.* Fry, 94 Mo. 266, 6 S. W. 660.

57. Port *v.* Robbins, 35 Iowa 208; Pomeroy *v.* Rice, 16 Pick. (Mass.) 22.

58. Recitals in Mortgagor's Deed. Thus a subsequent quit-claim deed of the mortgaged premises to the mortgagor, written by the mortgagor, recognizing the mortgagee's claim as a subsisting incumbrance upon the premises, is admissible to explain a receipt from the mortgagee in full of all demands. Burnham *v.* Ayer, 35 N. H. 351.

59. Mortgagee's Statements to Taxing Officers. — Whitman *v.* Fo-

of the agent in the premises may likewise be received against the principal.[60] Declarations of a former holder of a mortgage tending to show payment or part payment of his mortgage are not admissible against his assignee for value.[61]

c. *Private Writings.* — A recital in a deed from a mortgagor to a third party of the payment of the consideration for the conveyance is not evidence of such payment against the mortgagee of such grantor, or his assignee, in a suit to enforce his right to the unpaid purchase money for the conveyance.[62] The mortgagee's indorsement of the amount due is not admissible to prove the fact noted where it is not shown ever to have been brought to the mortgagor's notice until after the mortgagee's death.[63] A contemporaneous indorsement on the original mortgage of only part satisfaction is admissible to explain the record satisfaction in full.[64] So a memorandum of the transfer or payment of the mortgage debt given by the mortgagee to a third party, asserted by the mortgagor to have paid the mortgage debt for him, is admissible in the mortgagor's behalf on an issue of payment.[65]

d. *The Mortgagee's Receipt.* — As in the case of an unsecured debt, the mortgagee's receipt acknowledging payment of his debt and satisfaction of the mortgage, while evidence of payment and discharge,[66] is not conclusive of the fact recited.[67] A receipt in full

ley, 125 N. Y. 651, 26 N. E. 725, 54 Hun 634, 7 N. Y. Supp. 310.

By Implication. — Cox *v.* Ledward, 124 Pa. St. 435, 16 Atl. 826.

60. Of course the admissions of one's agent respecting the application of a payment on account of a mortgage are binding on the mortgagor. Blair *v.* Harris, 75 Mich. 167, 42 N. W. 790.

61. Schenck *v.* Warner, 37 Barb. (N. Y.) 258; Foster *v.* Beals, 21 N. Y. 247. See *supra* this article, "Assignments."

62. Ranney *v.* Hardy, 43 Ohio St. 157, 1 N. E. 523.

63. Coleman *v.* Howell (N. J. Eq.), 16 Atl. 202.

64. Burke *v.* Snell, 42 Ark. 57.

65. Phillips *v.* Sewell, 63 Ga. 649.

66. Austin *v.* Austin, 9 Vt. 420; Perkins *v.* Pitts, 11 Mass. 125; Pearce *v.* Savage, 45 Me. 90.

67. Pearce *v.* Savage, 45 Me. 90; Porter *v.* Hill, 9 Mass. 34, 6 Am. Dec. 22; Perkins *v.* Pitts, 11 Mass. 125; Parsons *v.* Welles, 17 Mass. 419.

Payment is not sufficiently shown by evidence of a statement on the back of the instrument secured that a release of the security had been made and delivered by order of the holder, which is canceled, where no release in fact is shown and the instrument of debt and the security are found among the papers of the deceased payee. Steinmetz *v.* Lang, 81 Ill. 603.

Where a receipt in full payment of a mortgage is suspicious on its face, subsequent conversations of the parties indicating the non-payment of the debt, the mortgagee's continued possession of the note and mortgage till the day of his death, his executor bringing suit to foreclose, and the fact that the mortgagor did not secure the satisfaction and cancellation of the mortgage, is sufficient to overcome the effect of the receipt as evidencing payment. Hunt *v.* Gleason, 67 Hun 649, 22 N. Y. Supp. 66, *affirmed* 141 N. Y. 552, 36 N. E. 343.

Where a note and mortgage are given in the place of a prior note of the same amount and of a prior mortgage, to secure such debt, upon the same property, the giving of a receipt for the prior debt or the releasing of the mortgage creates a presumption of payment *prima facie* which may be overcome by compe-

of all demands is not evidence of the discharge of a mortgage given to secure the future support of the mortgagee.[68]

e. *Sheriff's Return.* — The return of a sheriff of the satisfaction of a mortgage, made on a sale of the mortgaged property on decree, is *prima facie,* though not conclusive, evidence of the satisfaction recited.[69]

2. Release and Entry of Satisfaction. — A. Presumptions and Burden of Proof. — a. *Discharge of Execution on Judgment for Debt.* — The discharge of an execution issued on a judgment on a mortgage debt is not conclusive evidence of a release and discharge of a mortgage.[70]

b. *As to Consideration for Release.* — A release of a mortgage recited to have been made for the consideration of one dollar and other valuable considerations will not be assumed to have been for an insufficient consideration.[71]

c. *Degree of Proof as to Parol Release.* — The party alleging a parol release has the burden of proving it by evidence of considerable certainty and clearness.[72]

d. *Entry of Satisfaction. — Effect.* — An entry of satisfaction of a recorded mortgage is *prima facie* evidence of the payment and discharge of the note secured.[73] It is open to explanation, however,

tent evidence. New England Mtge. Security Co. *v.* Hersch, 96 Ala. 232, 11 So. 63.

Receipt on Execution on Personal Judgment. — The receipt on an execution, issued on a personal judgment for the debt, is not conclusive evidence of a discharge of the mortgage securing the debt, and the circumstances under which such receipt was given may be fully shown. Perkins *v.* Pitts, 11 Mass. 125.

68. Austin *v.* Austin, 9 Vt. 420.

69. Howell Co. *v.* Wheeler, 108 Mo. 294, 18 S. W. 1080.

70. Perkins *v.* Pitts, 11 Mass. 125.

71. Hazle *v.* Bondy, 173 Ill. 302, 50 N. E. 671.

72. The defense that a mortgage was released or the debt forgiven by the mortgagor in his lifetime, in a suit by his representatives, must be clearly and satisfactorily proven. Sanford *v.* Story, 15 Misc. 536, 38 N. Y. Supp. 104.

The release of a mortgage security by an accommodation party to a negotiable instrument will not be presumed, and before an alleged parol release will be given effect it must be clearly proven. Thornton *v.* Irwin, 43 Mo. 153.

Beyond Reasonable Doubt. — Verbal agreement to release a mortgage must be established beyond a reasonable doubt. Stevenson *v.* Adams, 50 Mo. 475.

73. Smith *v.* Lowry, 113 Ind. 37, 15 N. E. 17; Fleming *v.* Parry, 24 Pa. St. 47; Trenton Bkg. Co. *v.* Woodruff, 2 N. J. Eq. 117; Banta *v.* Vreeland, 13 N. J. Eq. 103; Middlesex *v.* Thomas, 20 N. J. Eq. 39; Ferguson *v.* Glassford, 68 Mich. 36, 35 N. W. 820; Chappel *v.* Allen, 38 Mo. 213; Winter *v.* Kansas City Cable R. Co., 160 Mo. 159, 61 S. W. 606; Burke *v.* Snell, 42 Ark. 57; Safe Deposit & Trust Co. *v.* Kelly, 159 Pa. St. 82, 28 Atl. 221; Jeordens *v.* Schrimpf, 77 Mo. 384; Lanier *v.* McIntosh, 117 Mo. 508, 23 S. W. 787, 38 Am. St. Rep. 676; Ivinson *v.* Hutton, 3 Wyo. 61, 2 Pac. 238; Van Slooten *v.* Wheeler, 140 N. Y. 624, 35 N. E. 583.

Payment is *prima facie* established by evidence of the discharge of a mortgage of record and the possession of the bond and mortgage canceled by the owner of the land who is not the mortgagor. Braman *v.* Bingham, 26 N. Y. 483.

A party defendant to a foreclosure

by parol or other extrinsic evidence.[74] But such an entry may not be varied or explained to the prejudice of innocent purchasers.[75]

e. *Effect of Release.* — **(1.) As Presumptive of Payment.** — The release of a mortgage is *prima facie* evidence of the payment of the debt which the mortgage was given to secure, and the party asserting the continued existence of the debt has, under such circumstances, the burden of proving it.[76] But the release is not in any

proceeding who sets up an earlier mortgage, which has been canceled apparently, as a subsisting lien, has the burden of showing that his mortgage has not been paid. Trenton Bkg. Co. *v.* Woodruff, 2 N. J. Eq. 117.

An acknowledgment in the satisfaction of a mortgage of the payment of the debt secured is *prima facie* evidence that the debt has been paid, and a party asserting non-payment is bound to show affirmatively that the acknowledgment is untrue. Van Slooten *v.* Wheeler, 140 N. Y. 624, 35 N. E. 583.

The satisfaction of a mortgage by a legatee who by the terms of the will is entitled only to the income of the mortgage is evidence of the payment, against such legatee, of the interest only on the debt secured, but not of the payment of the principal of the debt. Giddings *v.* Seward, 16 N. Y. 365.

74. Safe Deposit & Trust Co. *v.* Kelly, 159 Pa. St. 82, 28 Atl. 221; Jeordens *v.* Schrimpf, 77 Mo. 384; Ivinson *v.* Hutton, 3 Wyo. 61, 2 Pac. 238; Cross *v.* Stahlman, 43 Pa. St. 129.

An entry satisfying a mortgage, the mortgagee retaining the evidence of debt which is in fact unpaid, does not discharge the debt where the rights of innocent third parties have not intervened. Appeal of Peter (Pa.), 4 Atl. 727.

The satisfaction of a mortgage may be shown to have been induced by mistake, fraud or misrepresentation. Saint *v.* Cornwall, 207 Pa. St. 270, 56 Atl. 440; Valle *v.* American Iron Mt. Co., 27 Mo. 455.

An entry of satisfaction made after a sale of the premises under the foreclosure in the belief that the sale was sufficient to perfect the foreclosure, when for some informality it was not, is not conclusive on the purchaser, who may show that no title passed. Lanier *v.* McIntosh, 117 Mo. 508, 23 S. W. 787, 38 Am. St. Rep. 676.

An entry of satisfaction and release of a mortgage on the record is *prima facie* proof of payment of the debt which it was given to secure; and such presumption may be rebutted only by competent evidence admitted for that purpose. Chappel *v.* Allen, 38 Mo. 213.

An entry of satisfaction made by the mortgagee after he has made an assignment for the benefit of his creditors may be received in evidence as tending to show payment of the mortgage debt before the making of the assignment. Cox *v.* Ledward, 124 Pa. St. 435, 16 Atl. 826.

A mortgagee may show that an entry of satisfaction was a forgery or procured by fraud. Lancaster *v.* Smith, 67 Pa. St. 427.

The effect of an entry of satisfaction of a mortgage is overcome, in a suit by an assignee, by proof of an assignment to him prior to the time when such entry was made. Roberts *v.* Halstead, 9 Pa. St. 32, 49 Am. Dec. 541. *Quaere*, whether, in a suit to foreclose, a formal discharge of the mortgage, previously entered, may be shown to have been made by mistake. Stebbins *v.* Robbins, 67 N. H. 232, 38 Atl. 15.

75. Valle *v.* American Iron Mt. Co., 27 Mo. 455; Harrison *v.* Johnson, 18 N. J. Eq. 420; Ely *v.* Scofield, 35 Barb. (N. Y.) 330. See *contra*, Trenton Bkg. Co. *v.* Woodruff, 2 N. J. Eq. 117. *Obiter*, Pennington, Chancellor.

It may of course be explained as to mortgagees or purchasers taking before cancellation. Robinson *v.* Sampson, 23 Me. 388; Barnes *v.* Camack, 1 Barb. (N. Y.) 392.

76. Release of Mortgage as Prima Facie Evidence of Payment of Debt Secured. — Kuen *v.* Upmier, 98 Iowa 393, 67 N. W. 374; Chappel *v.* Allen,

sense conclusive of the issue of payment, and it may be shown, notwithstanding the release, that the mortgage debt continued undisturbed.[77]

(2.) As Extinguishment of Mortgage. — Conclusiveness. — An unambiguous discharge of a mortgage upon the margin of the mortgage record is a bar to foreclosure, and may not be varied or explained by parol or shown to be conditional when in form absolute.[78]

B. Relevancy and Admissibility. — a. *Mode of Proof. — Indirect Evidence.* — A release may be sufficiently proven by circumstances and by the acts and declarations of the parties inconsistent with the continued existence of the mortgage, as well as by direct evidence.[79]

38 Mo. 213; Robinson *v.* Sampson, 121 N. C. 99, 28 S. E. 189; Seiple *v.* Seiple, 133 Pa. St. 460, 19 Atl. 406; Fleming *v.* Parry, 24 Pa. St. 47.

Contra. — A release of lands from the lien of a mortgage is not evidence of the payment of the debt secured thereby. Appeal of Peter (Pa.), 4 Atl. 727; Edgington *v.* Hefner, 81 Ill. 341.

77. Release of Mortgage Not Conclusive as to Payment of Debt Secured. — Burke *v.* Snell, 42 Ark. 57; Patch *v.* King, 29 Me. 448; Chappel *v.* Allen, 38 Mo. 213; *In re* Gray's Estate, 13 Phila. (Pa.) 246; Fleming *v.* Parry, 24 Pa. St. 47; Robinson *v.* Sampson, 121 N. C. 99, 28 S. E. 189.

In Sherwood *v.* Dunbar, 6 Cal. 53, the court says: "On the trial the plaintiff asked the court to instruct the jury: 1st. The entering of a discharge of the mortgage, by the mortgagee, does not of itself discharge the debt, but merely the security. 2nd. . . . These instructions were pertinent and legal, and should have been given as asked. The mortgage was merely a security for the note, and there is no doubt that a party can release the security without affecting the liability of the debtor on the note.

"In the case of Fleming *v.* Parry (24 Pa. St. 47), the supreme court of Pennsylvania held that 'A bond and mortgage, taken for the same debt, though distinct securities, possessing dissimilar attributes, and subject to remedies which are as unlike as personal actions and proceedings *in rem*, are, nevertheless, so far one that payment of either discharges both, and a release or extinguishment of either, without actual payment, is a discharge of either, *unless otherwise intended by the parties.* As it is competent for the parties to adjust their securities in the first place to their mutual satisfaction, so — that they may alter and change them at pleasure — give up one and retain the other, or cancel all and substitute something new, provided no other interests have intervened to be affected by what they do."

78. Ivinson *v.* Hutton, 3 Wyo. 61, 2 Pac. 238.

Where the language of an instrument executed by the parties unequivocally shows the payment and discharge, and not the assignment, of a mortgage, parol evidence of the contemporaneous declarations of the parties to the transaction will not be received to show than an assignment was intended. Wade *v.* Howard, 6 Pick. (Mass.) 492.

Fraud or Mistake. — Of course it may be attacked for fraud or mistake, and the burden is on the one attacking. Worthington *v.* Major, 94 Mich. 325, 54 N. W. 303; Miller *v.* Wack, 1 N. J. Eq. 204; Middlesex *v.* Thomas, 20 N. J. Eq. 39; Somers *v.* Cresse (N. J. Eq.), 13 Atl. 23.

A mortgagee seeking to set aside a release on the ground of mistake and to foreclose has the burden, as against a subsequent purchaser, to show actual notice of such mistake and of the existence of his mortgage lien to such subsequent party. Wittenbrock *v.* Parker, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197.

79. Ackla *v.* Ackla, 6 Pa. St. 228.

b. *Explanation of Entry or Release.* — The declarations of the mortgagee after entering satisfaction of his mortgage are not admissible in his own behalf to contradict the entry.[80]

c. *Acts of Parties.* — The acts of either party inconsistent with the particular position assumed as to a discharge or release of a mortgage may be proven against such party. Thus it may be shown that subsequently to the making of an alleged ineffectual entry the mortgagor paid interest on the debt secured.[81]

d. *Assignment as a Discharge.* — Parol evidence is not admissible to show, in the absence of fraud or mistake, that an assignment of a mortgage was in fact a discharge of the mortgage.[82]

3. As to Merger. — When the question arises whether there has been a merger of the mortgage, to establish the intention of the parties with respect thereto evidence of the language and conduct of the parties and of the circumstances accompanying the transaction is competent.[83]

4. Discharge by Tender. — When a tender of the amount due on a debt secured by mortgage is relied on to effect the discharge of a

Where it is sought to establish the execution of a release pursuant to an executory contract therefor it is not essential to the proof of the release that the evidence should directly go to its execution so that a release may be made out *prima facie* by proof of such acts by both the parties, as would have been done under the contract. Kuen *v.* Upmier, 98 Iowa 393, 67 N. W. 374.

80. Safe Deposit & Trust Co. *v.* Kelly, 159 Pa. St. 82, 28 Atl. 221.

The parties' declarations may be received against the declarant when in the nature of an admission. The declarations of the wife of the mortgagee as to his object in entering satisfaction of the mortgage are not admissible against him without evidence of the wife's agency in the matter. Fleming *v.* Parry, 24 Pa. St. 47.

Sufficiency of Evidence To Set Aside Discharge. — Upon proof of a purchase of the mortgage at the mortgagor's request, and that the mortgagee intentionally discharged the mortgage, but that the plaintiff, upon the note and mortgage being brought to him with the expectation of receiving the money, declined to take them, saying that he only intended to purchase the mortgage, and that the assignment was as a consequence made, the plaintiff may have the discharge set aside and recover under his mortgage. Bruce *v.* Bonney, 12 Gray (Mass.) 107.

81. Fleming *v.* Parry, 24 Pa. St. 47.

Where a mortgagor fraudulently conveys the mortgaged premises to a third party, and thereafter fraudulently procures an entry to be made satisfying the mortgage, the payment of interest on the mortgage debt by the mortgagor subsequent to the making of such entry is admissible to show the fraud of the mortgagor in the making of the entry, but not to operate as a fact against the grantee. Lancaster *v.* Smith, 67 Pa. St. 427.

82. Howard *v.* Howard, 3 Metc. (Mass.) 548.

83. What Admissible on Question of Merger. — Westheimer *v.* Thompson, 2 Idaho 1137, 32 Pac. 205; Smith *v.* Roberts, 91 N. Y. 470.

Although there is no evidence of the intention of a party, or though he is *non compos* and incapable of forming an intent, it will be presumed that he did not intend that there should be a merger, if a merger would be contrary to his interest. James *v.* Morey, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475.

mortgage lien the party relying on the tender has the burden of establishing it by clear and satisfactory evidence.[84]

X. PENALTIES.

1. Burden of Proof. — The mortgagor, or other party claiming through or under him, suing for the statutory penalty for the failure of the mortgagee, or other holder of the mortgage, to enter satisfaction of a mortgage, has the burden of proving every fact entitling him to a satisfaction and to the statutory penalty for failure to enter it.[85]

2. Time of Making Entry. — It may be shown that an entry of satisfaction, appearing upon the record of the mortgage, was made after the commencement of the action.[86]

3. Proof of the Recording. — To establish the fact that the mortgage has been recorded, as an element necessary to a recovery of the statutory penalty, a transcript of the record[87] of the mortgage,

84. McLelland *v.* A. P. Cook Co., 94 Mich. 528, 54 N. W. 298; Potts *v.* Plaisted, 30 Mich. 149; Engle *v.* Hall, 45 Mich. 57, 7 N. W. 239.

When a tender is asserted to have been accepted upon the imposed condition that it was in full payment of all demands between the parties with reference to an unliquidated claim, it may be shown in corroboration that the mortgagee held possession of the premises and had come into possession of rents for which he was bound to account, which rendered the claim an unliquidated one. McDaniels *v.* Lapham, 21 Vt. 222.

Especially where statutory penalty for failure to release is sought. Engle *v.* Hall, 45 Mich. 57, 7 N. W. 239.

85. Discharge of Debt. — The burden resting on one suing for the statutory penalty for a failure to enter satisfaction of a mortgage on the margin of the record is not sustained by evidence merely that certain credits appear on the margin of the record, as such evidence does not exclude the inference that the entry of satisfaction also had been made. Thomason Grocery Co. *v.* Mitchell, 114 Ala. 315, 21 So. 461.

Knowledge of Payment of the Release Fee Essential. — A mortgagee is not liable for the statutory penalty for failure to release a mortgage unless he knew of the payment of the release fees to the recording officers; and mere information of such payment is not sufficient, but knowledge of the fact is essential. Henson *v.* Stever, 69 Mo. App. 136.

Admission of Erroneous Evidence. When Not Prejudicial. — Where the mortgagor proves notice to enter partial payments or complete satisfaction on the record, as the case may be, the burden is on the defendant to show that such entries were made as requested, and, the burden being so placed, and the defendant offering no evidence to discharge such burden, the admission of incompetent evidence for the plaintiff to negative the making of the entry is not prejudicial error. Loeb *v.* Huddleston, 105 Ala. 257, 16 So. 714.

Refusal Need Not Be Willful. Renfro *v.* Adams, 62 Ala. 302.

Where a previous demand for a release is required by the statute, proof of the making of a demand is essential to the granting of the relief demanded. Richmond *v.* Lattin, 64 Cal. 273, 30 Pac. 818.

86. Proof of Entry Subsequent to Bringing of Action. — Steiner *v.* Snow, 80 Ala. 45.

87. Proof of Transcript of Record. — The recording of the mortgage may be proved by a transcript of the

duly certified, or the record itself, where obtainable, is admissible.[88]

4. Admissibility. — A. Notice To Release. — Where the written notice to enter satisfaction is in the possession of the holder of the mortgage, who fails on notice to produce it, secondary evidence is admissible.[89]

B. Notice to Mortgagor of Assignment. — In an action by the mortgagor against the mortgagee for the statutory penalty evidence is admissible in the defendant's behalf to show the assignment of the mortgage to another before the bringing of the action and notice of the assignment to the mortgagor.[90]

C. Of the Mortgage. — In an action for the statutory penalty the mortgage is admissible in evidence where it has been attested and recorded.[91]

XI. FORECLOSURE.

1. By Entry and Possession. — A. Presumptions and Burden of Proof. — In a foreclosure by entry and possession, an entry upon the mortgaged premises by the mortgagee, after condition broken, will be presumed, nothing to the contrary appearing, to have been made for condition broken and to effect a foreclosure by such means.[92]

record, certified by the probate judge. Loeb *v.* Huddleston, 105 Ala. 257, 16 So. 714.

88. Proof by Record Itself. — The record of the mortgage is admissible to establish the fact of record, even where the probate of the mortgage is not made to appear. Steiner *v.* Snow, 80 Ala. 45.

89. Loeb *v.* Huddleston, 105 Ala. 257, 16 So. 714.

90. Record of Suit Pending by Assignee Against Mortgagor. — In an action by a mortgagor against a mortgagee to recover the statutory penalty for failure to enter satisfaction of record of a mortgage which the mortgagee has assigned, the record of a pending suit for the foreclosure brought by an assignee of the mortgage against the mortgagor is competent in the mortgagee's behalf, at least to prove notice of the transfer by the mortgagee. Harris *v.* Swanson, 67 Ala. 486.

91. Acknowledgment of Mortgage in Such Action Not Requisite to Admissibility. — Williams *v.* Bowdin, 68 Ala. 126.

92. Presumption From Fact of Entry After Condition Broken. Entry after condition broken will be presumed to be *for* condition broken, and for the purpose of foreclosure. Hadley *v.* Houghton, 7 Pick. (Mass.) 29; Skinner *v.* Brewer, 4 Pick. (Mass.) 468; Taylor *v.* Weed, 5 Mass. 109; Whitney *v.* Guild, 11 Gray (Mass.) 496; Ayres *v.* Waite, 10 Cush. (Mass.) 72; Walker *v.* Thayer, 113 Mass. 36.

Contra. — In order to foreclose by this means it has been held, though the weight of authority is to the contrary, that the mortgagee must not only show an entry after condition broken, but for condition broken, and on this issue the burden is on the mortgagee; and the statutory witnesses to the entry must be able to testify to the intent as well as to the fact of the entry, so that proof of entry merely is not sufficient. Gordon *v.* Lewis, 1 Sumn. (U. S.) 525.

No Presumption When Expressly Limited. — But an entry after condition broken will not be presumed to have been for the purpose of foreclosure where the purpose of the entry is otherwise limited by a deed of demise and lease between the parties. Ayres *v.* Waite, 10 Cush. (Mass.) 72.

B. The Certificate as Evidence and Its Effect. — It is generally provided in proceedings of this nature that an entry shall be made in the presence of a given number of witnesses, who shall duly certify the fact, and that thereupon the certificate shall be recorded. When a certificate of the proceedings of a mortgagee in effecting a foreclosure by this means is executed as required, the allegations of essential matters may not be varied or contradicted by parol; and the certificate will be taken as conclusive of the truth of the matter it is required to contain.[93]

2. By Writ of Entry. — A. Burden of Proof. — When the plaintiff in his declaration alleges the making of the mortgage sought to be foreclosed, and the assignment of it by the mortgagee to him, he has the burden of proving the signatures to the mortgage, and the assignment, though these are not denied in the plea.[94] If the tenant pleads a set-off he has, of course, the burden of proving his plea.[95] The production and proof of a mortgage of the premises is sufficient to maintain the writ without the production of other evidence of the debt.[96] The plea of *nul disseisen* so far admits the demandant's claim to have the freehold that it is not incumbent on him

93. Recitals in Certificate Conclusive as to Essential Matters. — Oakham *v.* Rutland, 4 Cush. (Mass.) 172.

Effect of Certificate as Evidence Dependent on Statute. — Bragdon *v.* Hatch, 77 Me. 433.

Certificate May Not Be Aided by Parol. — Thus if the certificate of the statutory witnesses is required to show that the entry made by the mortgagee was for condition broken and for the purpose of foreclosure, the testimony of the witnesses that such was the mortgagee's declared purpose and intent is not competent to perfect the foreclosure. Morris *v.* Day, 37 Me. 386.

Recitals in Certificate as to Breach of Condition Not Conclusive. Hill *v.* More, 40 Me. 515; Pettee *v.* Case, 11 Gray (Mass.) 478.

94. Warner *v.* Brooks, 14 Gray (Mass.) 109.

But if a mortgage be assigned to another by a writing, and such writing be followed by a written declaration that the assignee has received full payment and satisfaction of his debt, to secure which the assignment was made, the character of the assignment as a security, and of the mortgagee's right to maintain the writ for foreclosure, sufficiently appears. Coffin *v.* Loring, 9 Allen (Mass.) 154.

Where the action is prosecuted in the name of an assignee for the benefit of the assignor, the assignment of the mortgage is *prima facie* established by the production of the papers at the trial of the action by the plaintiff's attorney of record. Richardson *v.* Noble, 77 Me. 390.

95. Proof merely that the tenant had presented claims to the demandant is, of course, not sufficient to establish a set-off against the conditional judgment recoverable. Davis *v.* Thompson, 118 Mass. 497.

96. Thompson *v.* Watson, 14 Me. 316; Powers *v.* Patten, 71 Me. 583.

The plaintiff in such an action makes a *prima facie* case by proof of the execution, delivery and acknowledgment of a mortgage from a third person to the demandant. Burridge *v.* Fogg, 8 Cush. (Mass.) 183.

If a party entitled to do so should ask for a conditional judgment, the plaintiff would thereby be compelled to introduce further evidence of the debt. If evidence tending to rebut the existence of the debt or to show payment should be introduced it seems that the production of the mortgage would not alone be sufficient. Morse *v.* Stafford, 95 Me. 31, 49 Atl. 45.

Proof of the execution, delivery, acknowledgment and recording of a

to prove the tenant's possession.[97] Proof of the mortgagor's title is not required to sustain the writ as against him.[98]

B. Admissibility and Relevancy. — a. *Particular Matters Admissible.* — It may be stated that whatever is in general admissible against the plaintiff's action on the debt secured is competent also against his action for foreclosure by the writ of entry.[99] Payment of the debt secured[1] and lack of consideration are of course good

mortgage from a third person to the demandant makes out a *prima facie* case to sustain a writ for the recovery of the mortgaged premises. The demandant is not required to go further, at least in the first instance, and show possession or seisin or title in the mortgagor, or any connection between the mortgagor and the tenant. Burridge *v.* Fogg, 8 Cush. (Mass.) 183.

Where defendant defaults judgment may be entered upon the filing of an attached copy of the mortgage. Union Bank *v.* Thayer, 14 Mass. 362.

97. Burridge *v.* Fogg, 8 Cush. (Mass.) 183.

98. The production of a promissory note signed by the husband and wife, with the mortgage given to secure it, signed also by the wife, the husband joining therein to signify his assent, together with proof of a breach of the condition of the mortgage, is sufficient *prima facie* evidence to sustain a writ of entry for foreclosure without proof of the ownership of the mortgaged premises by the wife in her own right. American Mut. L. Ins. Co. *v.* Owen, 15 Gray (Mass.) 491.

99. Ladd *v.* Putnam, 79 Me. 568, 12 Atl. 628; Fuller *v.* Eastman, 81 Me. 284, 17 Atl. 67; Wearse *v.* Peirce, 24 Pick. (Mass.) 141; Vinton *v.* King, 4 Allen (Mass.) 562; Freeland *v.* Freeland, 102 Mass. 475; Davis *v.* Bean, 114 Mass. 360; Holbrook *v.* Bliss, 9 Allen (Mass.) 69; Brolley *v.* Lapham, 13 Gray (Mass.) 294; Northy *v.* Northy, 45 N. H. 141.

No Consideration. — In a suit to foreclose a mortgage, given to secure a note, where the defense is no consideration for the note, the question involved on such an issue is the same as if the note were itself in dispute, and like evidence is admissible. In a case presenting this question the court said: "The question in such a case, whether anything is due upon the note, must be conducted in nearly the same way, and depend mainly upon the same evidence, as if the note were in suit. In such an action the defendant may show the same matters in defense against the mortgage, except only the statute of limitations, that he could against the note." Hannan *v.* Hannan, 123 Mass. 441, 25 Am. Rep. 121.

Usury, if pleaded, is a defense to this form of action. Hart *v.* Goldsmith, 1 Allen (Mass.) 145; Minot *v.* Sawyer, 8 Allen (Mass.) 78; Little *v.* Riley, 43 N. H. 109. See article "Usury."

1. Vose *v.* Handy, 2 Me. 322, 11 Am. Dec. 101; Chadbourne *v.* Rackliff, 30 Me. 354; Wade *v.* Howard, 11 Pick. (Mass.) 289; Wearse *v.* Peirce, 24 Pick. (Mass.) 141; Burke *v.* Miller, 4 Gray (Mass.) 114.

Payment after condition broken is a good defense to a foreclosure. Slayton *v.* McIntyre, 11 Gray (Mass.) 271.

Where the mortgagor in support of his plea of payment gives testimony that he was employed to labor for the plaintiff, and that the wages due him were applied in reduction of the mortgage debt, the plaintiff may show that the mortgagor was poor and dependent for support upon his earnings, and that it was the practice of the plaintiff to pay all laborers in his employment at short and stated periods. Waugh *v.* Riley, 8 Metc. (Mass.) 290.

Evidence of a conversation within the twenty-year period, in which the mortgagee said to the mortgagor, in response to the statement of the latter that he had lost his note, that such fact was immaterial, and that the mortgagor could have possession at any time, is competent to show that the mortgage is not barred by the statute of limitations. Perkins *v.* Eaton, 64 N. H. 359, 10 Atl. 704.

defenses.[2] A variance between the obligation secured and that produced may, consonant to the rule generally obtaining, be explained by parol.[3] Secondary evidence of the contents of the note secured may be received if its loss or destruction is satisfactorily shown.[4] If an assignee of one of several notes brings the writ, and it appears that the mortgage has been assigned to the holders of other notes, who refuse the use of it to the plaintiff, secondary evidence of the existence and contents of the mortgage is competent.[5] And for this purpose a copy from the registry may be received.[6]

b. *Under the Issues.* — If the breach of a particular condition of the mortgage is alleged the proof must be restricted to the condition named.[7] Evidence of possession in another is not admissible in the defendant's behalf under a plea of payment and *nul disseisin* to the writ.[8] Nor on trial of the general issue would evidence be admissible that the demanded premises are subject to a superior mortgage, the holder of which had recovered judgment for possession to foreclose, and had taken possession, then held, before the demandant's action was begun.[9] But the plea of payment need not be proved by evidence of a money payment, the application of other credits being competent.[10] Where the defense alleged is that the

2. Freeland *v.* Freeland, 102 Mass. 475; Bigelow *v.* Bigelow, 93 Me. 439, 45 Atl. 513.

No Consideration. — Heirs of Mortgagor. — In a suit for foreclosure against the heirs of the mortgagor it may be shown that the mortgage was given without consideration, and parol may be received to show that no debt ever existed between the parties to the instrument. Hannan *v.* Hannan, 123 Mass. 441, 25 Am. Rep. 121.

3. Barter *v.* McIntire, 13 Gray (Mass.) 168.

4. Secondary Evidence Admissible in Case of Loss or Destruction. Grimes *v.* Kimball, 3 Allen (Mass.) 518; Ward *v.* Gunn, 12 Allen (Mass.) 81.

Inadmissibility of Copy Without Laying Proper Foundation. — Andrews *v.* Hooper, 13 Mass. 472.

5. Proof by Record. — Johnson *v.* Brown, 31 N. H. 405; Poignard *v.* Smith, 8 Pick. (Mass.) 272.

6. One of Several Assignees. Secondary Evidence. — Johnson *v.* Brown, 31 N. H. 405; Poignard *v.* Smith, 8 Pick. (Mass.) 272.

7. Where the condition of the mortgage asserted to be broken is that the mortgagor shall support and clothe the demandant, the amount of the demandant's income is immaterial on the question whether the tenant performed the condition of his mortgage. Jones *v.* Smith, 121 Mass. 15.

8. "Under the pleadings the question [of possession] was not open. The tenant's plea of *nul disseisin* admitted that he was tenant of the freehold, and there was no specification to qualify the effect of this plea." Richmond Iron Wks. *v.* Woodruff, 8 Gray (Mass.) 447.

9. Under the General Issue. Possession of Another Under Paramount Mortgage Inadmissible. Amidown *v.* Peck, 11 Metc. (Mass.) 467.

When the tenant pleads only the general issue, without any specification of defense that he was not tenant of the freehold, the demandant is not required to show the tenant's possession of the premises, nor can the tenant rely upon such a ground of defense. Devens *v.* Bower, 6 Gray (Mass.) 126.

10. What Admissible on Issue of Payment. — Under a plea that the plaintiff's mortgage has been paid and satisfied, evidence that an account due

note secured by the mortgage was given without consideration, to rebut the evidence of the defendant offered under this plea evidence that the note was given to defraud the mortgagor's creditors is inadmissible.[11]

C. Conditional Judgment as Evidence in Action to Redeem. If a conditional judgment is rendered on a writ of entry to foreclose, in the mortgagor's subsequent action to redeem from the mortgage the judgment so rendered is conclusive evidence of the amount then due on the mortgage debt.[12]

3. By Exercise of Power of Sale. — A. Presumption as to Validity of Sale. — Where a sale has been made by a trustee in a deed of trust and the property conveyed to a purchaser at the sale, the deed so executed is *prima facie* evidence of the regularity of the sale and of the validity of the title under it.[13] So the trustee's deed is

and owing from the plaintiff to the defendant was agreed to be applied in payment of the debt on the mortgage is competent. "Under the defense that 'the mortgage was paid, satisfied and extinguished,' it was competent to show that the balance due to the defendant on account, as stated in the bill of particulars, was by agreement of the parties to be applied to the payment of this note, and was in fact so applied. Although not stated in the bill of particulars as a sum actually applied to the discharge of the note, it was stated as an item in a bill of particulars ordered by the court, on the motion of the plaintiff, that 'the defendants be required to file a bill of particulars of the payments of the mortgage, stating the time and amount of said payments.' The party was therefore fully apprised by the bill of particulars filed under this order, and under the general allegation of payment of the note relied upon in defense, as to this alleged payment; and the testimony tending to prove that this sum was agreed by the parties to be applied in part payment of the note was competent evidence and properly admitted." Slayton *v.* McIntyre, 11 Gray (Mass.) 271.

11. No Consideration — Fraud as Against Creditors. — Wearse *v.* Peirce, 24 Pick. (Mass.) 141.

12. Fuller *v.* Eastman, 81 Me. 284, 17 Atl. 67; Sparhawk *v.* Wills, 5 Gray (Mass.) 423; Holbrook *v.* Bliss, 9 Allen (Mass.) 69.

As Against One Not a Party to Foreclosure. — It would not be conclusive, however, as against one who purchased the mortgagor's equity of redemption before the bringing of the foreclosure, and who was not a party to the proceeding. Dooley *v.* Potter, 140 Mass. 49, 2 N. E. 935.

13. Presumption From Sale and Execution of Deed. — Graham *v.* Fitts, 53 Miss. 307; Lunstord *v.* Speaks, 112 N. C. 608, 17 S. E. 430.

Right to Sell. — It will be presumed from the fact of a sale of the mortgaged premises that the mortgagor had made a breach of the condition in the mortgage which gave rise to the right to sell; and if he asserts the contrary he has the burden of proving it. Pope *v.* Durant, 26 Iowa 233.

A trustee's sale of property in a foreign jurisdiction, under a deed of trust executed in such jurisdiction, will be presumed, in the absence of evidence to the contrary, to be regular and valid in a controversy between claimants of the fund and under the deed of trust. Eastern Trust & Bkg. Co. *v.* American Ice Co., 14 App. D. C. 304.

Where impeaching evidence is introduced the attacking party need not show non-compliance by a preponderance of the evidence. Tyler *v.* Herring, 67 Miss. 169, 6 So. 840.

Proof of a breach of the condition authorizing sale, together with the production of the deed, executed to the purchaser, is *prima facie* evidence of title. Western Union Tel. Co. *v.*

prima facie evidence of default in the payment of the debt secured.[14] But in an action by a purchaser against the mortgagor, under a power of sale mortgage, the purchaser has the burden to show by a preponderance of the evidence that the sale was regular and fair.[15]

B. Proof of Invalidity. — Where for any reason the validity of a sale under a power is sought to be impeached, the attacking party has the burden of establishing the ground of invalidity by clear and satisfactory evidence.[16] Inadequacy merely of the price received

Hearne (Tex. Civ. App.), 40 S. W. 50.

Statutory Sale. — Possession. Burden. — Where possession is sought to be obtained under a foreclosure by advertisement the plaintiff has the burden of showing a compliance with the requirements of a valid sale under the statute. Weir *v.* Birdsall, 27 App. Div. 404, 50 N. Y. Supp. 275.

14. Hume *v.* Hopkins, 140 Mo. 65, 41 S. W. 784; Pope *v.* Durant, 26 Iowa 233.

The recital in a deed by a trustee, of a compliance with the conditions in the deed of trust, is *prima facie* evidence of the truth of the matters recited. Saving & Loan Soc. *v.* Deering, 66 Cal. 281, 5 Pac. 353.

15. McMillan *v.* Baxley, 112 N. C. 578, 16 S. E. 845.

16. *Illinois.* — Munn *v.* Burges, 70 Ill. 604; Bush *v.* Sherman, 80 Ill. 160.

Missouri. — McNew *v.* Booth, 42 Mo. 189; Forrester *v.* Scoville, 51 Mo. 268; Kennedy *v.* Kennedy, 57 Mo. 73; Forrester *v.* Moore, 77 Mo. 651; Jackson *v.* Wood, 88 Mo. 76.

Rhode Island. — Island Sav. Bank *v.* Galvin, 20 R. I. 347, 39 Atl. 196.

West Virginia. — Fulton *v.* Johnson, 24 W. Va. 95.

Wisconsin. — Hayes *v.* Frey, 54 Wis. 503, 11 N. W. 695.

Burden of Proof. — Evidence Considered. — It will be presumed that the trustee in a deed of trust performed the acts required of him as conditions precedent to a valid sale, and the party attacking the sale has the burden of showing the contrary. Graham *v.* Pitts, 53 Miss. 301.

Defect in Notice Given. — Where a sale is sought to be set aside on the ground of a defect in the notice, the party relying upon the defect has the burden of proving it. Tartt *v.* Clayton, 109 Ill. 579.

Failure of Trustee To Give Notice of Sale. — The party seeking to have a sale under a deed of trust set aside for failure to give notice of the sale has the burden of establishing his ground for relief by satisfactory evidence. Lallance *v.* Fisher, 29 W. Va. 512, 2 S. E. 775.

Departure From Terms of Power. Slight Proof Required. — Slight proof of unfairness or departure from the deed in making a sale, under a power of sale, or of a departure from the terms of the power, is required to set aside the sale. Longwith *v.* Butler, 8 Ill. 32.

Action by Second Mortgagee. — Collusion Between Mortgagor and Purchaser. — See Hardwicke *v.* Hamilton, 121 Mo. 465, 26 S. W. 342, where the evidence was held insufficient to sustain a decree in favor of a second mortgage setting aside a sale under the prior mortgage on the ground of collusion between the mortgagor and the purchaser at such sale.

Evidence Considered and Held To Show Regular Sale. — Naugher *v.* Sparks, 110 Ala. 572, 18 So. 45; Hairston *v.* Ward, 108 Ill. 87; Dryden *v.* Stephens, 19 W. Va. 1.

Collusion Among Bidders. — Evidence considered and held not to show fraud and collusion among bidders. Keiser *v.* Gammon, 95 Mo. 217, 8 S. W. 377.

Inducing Holder of One of Securities To Remain From Sale. — For a case where the evidence was held sufficient to warrant the setting aside of a sale, at the instance of a holder of one of the securities given under a deed of trust, on the ground of the plaintiff's fraud in keeping from him knowledge of the proceedings and

for the property is not sufficient to invalidate the sale in the absence of fraud or inference of fraud.[17] However, inadequacy, concurring with slight additional circumstances, may be sufficient to warrant the granting of relief.[18] The mortgagor may show, even as against

inducing him not to be present at the sale of the property, see Orr *v.* McKee, 134 Mo. 78, 34 S. W. 1087.

17. Inadequacy of Price.

United States. — Anderson *v.* White, 2 App. D. C. 408; Bailor *v.* Daly, 18 D. C. 175; Wheeler *v.* McBlair, 5 App. D. C. 375; Hitz *v.* Jenks, 16 App. D. C. 530; Mutual F. Ins. Co. *v.* Barker, 17 App. D. C. 205; Smith *v.* Black, 115 U. S. 308; Graffam *v.* Burgess, 117 U. S. 180; Cross *v.* Allen, 141 U. S. 528.

Alabama. — Ward *v.* Ward, 108 Ala. 278, 19 So. 354.

Arkansas. — Hudgins *v.* Morrow, 47 Ark. 515, 2 S. W. 104.

California. — Kennedy *v.* Dunn, 58 Cal. 339.

Colorado. — Scott *v.* Wood, 4 Colo. App. 341, 59 Pac. 844; Martin *v.* Barth, 14 Colo. App. 346, 36 Pac. 72; Washburn *v.* Williams, 10 Colo. App. 153, 50 Pac. 223; Loveland *v.* Clark, 11 Colo. 265, 18 Pac. 544; Lathrop *v.* Tracy, 24 Colo. 382, 51 Pac. 486, 65 Am. St. Rep. 229.

Illinois. — Weld *v.* Rees, 48 Ill. 428; Jenkins *v.* Pierce, 98 Ill. 646; Parmly *v.* Walker, 102 Ill. 617; Burns *v.* Middleton, 104 Ill. 411; Cleover *v.* Green, 107 Ill. 67; Laclede Bank *v.* Keeler, 109 Ill. 385; Hoyt *v.* Pawtuckett Sav. Inst., 110 Ill. 390; Hoodless *v.* Reid, 112 Ill. 105; Kerfoot *v.* Billings, 160 Ill. 563, 43 N. E. 804.

Kansas. — Means *v.* Rosevear, 42 Kan. 377, 22 Pac. 319.

Maryland. — Harnickell *v.* Orndorff, 35 Md. 341; Horsey *v.* Hough, 38 Md. 130; Loeber *v.* Eckes, 55 Md. 1; Chilton *v.* Brooks, 71 Md. 445, 18 Atl. 868; Condon *v.* Maynard, 71 Md. 601, 18 Atl. 957; Carroll *v.* Hutton, 91 Md. 379, 46 Atl. 967.

Massachusetts. — King *v.* Bronson, 122 Mass. 122; Wing *v.* Hayford, 124 Mass. 249; Learned *v.* Geer, 139 Mass. 31, 29 N. E. 215; Clark *v.* Simmons, 150 Mass. 357, 23 N. E. 108; Austin *v.* Hatch, 159 Mass. 198, 34 N. E. 95; Stevenson *v.* Dana, 166 Mass. 163, 44 N. E. 128; Fennyery *v.* Ransom, 170 Mass. 303, 49 N. E. 620.

Mississippi. — Newman *v.* Meek, Freeman Ch. 441.

Missouri. — Landrum *v.* Union Bank, 63 Mo. 48; Keiser *v.* Gammon, 95 Mo. 217, 8 S. W. 377; Maloney *v.* Webb, 112 Mo. 575, 20 S. W. 683; Hardwicke *v.* Hamilton, 121 Mo. 465, 26 S. W. 342; Harlin *v.* Nation, 126 Mo. 97, 27 S. W. 330; Keith *v.* Browning, 139 Mo. 190, 40 S. W. 764; Reynolds *v.* Kroff, 144 Mo. 433, 46 S. W. 424; Markwell *v.* Markwell, 157 Mo. 326, 51 S. W. 1078.

New York. — Coudert *v.* DeLogerot, 62 N. Y. St. 26, 30 N. Y. Supp. 114.

North Carolina. — McNair *v.* Pope, 100 N. C. 404, 6 S. E. 234; Monroe *v.* Fuchtler, 121 N. C. 101, 28 S. E. 63.

Rhode Island. — Nichols *v.* Flagg, 24 R. I. 30, 51 Atl. 1039; Galvin *v.* Newton, 19 R. I. 176, 36 Atl. 3.

South Carolina. — Robinson *v.* Amateur Ass'n, 14 S. C. 148; Mills *v.* Williams, 16 S. C. 593; *Ex parte* Alexander, 35 S. C. 409, 14 S. E. 854.

South Dakota. — Trenery *v.* American Mtge. Co., 11 S. D. 506, 78 N. W. 991.

Texas. — Klein *v.* Glass, 53 Tex. 37; Seip *v.* Grinnan (Tex. Civ. App.), 36 S. W. 349.

West Virginia. — Bradford *v.* McConihay, 15 W. Va. 732; Dryden *v.* Stephens, 19 W. Va. 1; Corrothers *v.* Harris, 23 W. Va. 177; Hope *v.* Valley City Salt Co., 25 W. Va. 789; Lallance *v.* Fisher, 29 W. Va. 512, 2 S. E. 775.

Wisconsin. — Maxwell *v.* Newton, 65 Wis. 261, 27 N. W. 31.

18. Inadequacy With Attending Circumstances.

United States. — Hitz *v.* Jenks, 16 App. D. C. 530; Graffam *v.* Burgess, 117 U. S. 180.

Arkansas. — Fry *v.* Sweet, 44 Ark. 502; Hudgins *v.* Morrow, 47 Ark. 515, 2 S. W. 104.

Illinois. — Mapps *v.* Sharpe, 32 Ill. 13; Ventres *v.* Cobb, 105 Ill. 33; Equitable Trust Co. *v.* Fisher, 106 Ill. 189; Pestel *v.* Primm, 109 Ill. 353; Hoodless *v.* Reid, 112 Ill. 105.

a *bona fide* purchaser under a regular sale, that the mortgage debt was paid prior to the sale, and therefore that the power was nullified.[19]

C. Suits to Enjoin the Exercise of the Power of Sale. One seeking to enjoin the exercise of a power of sale on any ground not appearing on the face of the papers under which the power is attempted to be exercised has the burden of establishing the grounds of his relief by a clear preponderance of the evidence.[20]

D. Effect of Recitals in Trustee's Deed. — The recitals in a deed of trust to the purchaser of the premises as to a compliance

Maryland. — Horsey *v.* Hough, 38 Md. 130; Loeber *v.* Eckes, 56 Md. 1; Chilton *v.* Brooks, 69 Md. 584, 16 Atl. 273; Condon *v.* Maynard, 71 Md. 601, 18 Atl. 957; Mahoney *v.* Mackubin, 52 Md. 357.

Massachusetts. — Briggs *v.* Briggs, 135 Mass. 306; Thompson *v.* Heywood, 129 Mass. 401; Learned *v.* Geer, 139 Mass. 31, 29 N. E. 215.

Michigan. — Bradley *v.* Tyson, 33 Mich. 337; Culbertson *v.* Young, 50 Mich. 190, 15 N. W. 77; Norton *v.* Tharp, 53 Mich. 146, 18 N. W. 601.

Minnesota. — Lalor *v.* McCarthy, 24 Minn. 417.

Mississippi. — Martin *v.* Swofford, 59 Miss. 328; Helm *v.* Yerger, 61 Miss. 44.

Missouri. — Dover *v.* Kennerly, 44 Mo. 145; Mann *v.* Best, 62 Mo. 491; Vail *v.* Jacobs, 62 Mo. 130; Stoffel *v.* Schroeder, 62 Mo. 147; Holdsworth *v.* Shannon, 113 Mo. 508, 21 S. W. 85, 35 Am. St. Rep. 719; Orr *v.* McKee, 134 Mo. 78, 34 S. W. 1087; Keiser *v.* Gammon, 95 Mo. 217, 8 S. W. 377.

Nevada. — Runkle *v.* Gaylord, 1 Nev. 100.

New York. — Jencks *v.* Alexander, 11 Paige 619; Leet *v.* McMaster, 51 Barb. 236; Jackson *v.* Crafts, 18 Johns. 110; Murdock *v.* Empie, 19 How. Pr. 79; Caserly *v.* Witherbee, 119 N. Y. 522, 23 N. E. 1000.

Rhode Island. — Fenner *v.* Tucker, 6 R. I. 551; Galvin *v.* Newton, 19 R. I. 176, 36 Atl. 3; Babcock *v.* Wells, 25 R. I. 23, 54 Atl. 596, 599.

South Dakota. — Stacy *v.* Smith, 9 S. D. 137, 68 N. W. 198.

Tennessee. — Meath *v.* Porter, 9 Heisk. 224.

Texas. — Klein *v.* Glass, 53 Tex. 37.

West Virginia. — Hope *v.* Valley City Salt Co., 25 W. Va. 789.

Wisconsin. — Encking *v.* Simmons, 28 Wis. 272; Maxwell *v.* Newton, 65 Wis. 261, 27 N. W. 31; Newman *v.* Ogden, 82 Wis. 53, 51 N. W. 1091.

19. Cameron *v.* Irwin, 5 Hill (N. Y.) 272.

In an action by a purchaser to recover land bought at a mortgage sale, the mortgagor may show that payments made reduced the sum collectible so that money realized from a sale of other portions of the land, previously sold, was in excess of the amount due, and hence that the property in controversy was sold under an invalid power. Kirby *v.* Howie, 9 S. D. 471, 70 N. W. 640.

20. **Burden of Proof.** — Before the grantor can set aside a deed of trust or enjoin a sale thereunder on the ground that the consideration has failed, or that it was without consideration, he must make out his case by a *clear preponderance* of the evidence. Van Meter *v.* Hamilton, 96 Mo. 654, 10 S. W. 71.

When a foreclosure is sought to be restrained on the ground of fraud, the evidence must be sufficient to overcome the presumption of honesty. Beard *v.* Bliley, 3 Colo. App. 479, 34 Pac. 271.

For evidence examined and held sufficient to warrant the enjoining of a sale under a deed of trust, as against a defense of fraud in procuring the obligations secured by such deed to be exchanged for other securities, see German Sav. Inst. *v.* Jacoby, 97 Mo. 617, 11 S. W. 256.

Legality of Action Is Presumed. Party Alleging Illegality Must Prove It. — Moore *v.* Barksdale (Va.), 25 S. E. 529; Muller *v.* Stone, 84 Va. 834, 6 S. E. 223, 10 Am. St. Rep. 889.

with the conditions requisite to a legal sale are *prima facie* evidence of the truth of the matters recited.[21] In some cases, that such recitals have any presumptive force is wholly denied,[22] and in others the instrument giving the power of sale must provide for the making of such recitals in the deed to be executed to the purchaser before they can be held presumptive of regularity.[23] If the deed of trust provides that the recitals in the trustee's deed to the purchaser shall have a particular evidentiary effect, such effect should be given to recitals in favor of purchasers.[24] The fact that the trustee's deed

21. Carico *v.* Kling, 11 Colo. App. 349, 53 Pac. 390; Ensley *v.* Page, 13 Colo. App. 452, 59 Pac. 225; Beal *v.* Blair, 33 Iowa 318; Breit *v.* Yeaton, 101 Ill. 242; Ingle *v.* Jones, 43 Iowa 286; Savings & Loan Soc. *v.* Deering, 66 Cal. 281, 5 Pac. 353; Wood *v.* Lake, 62 Ala. 489; McNeill *v.* Lee, 79 Miss. 455, 30 So. 821.

A purchaser at a trustee's sale has the burden in ejectment to establish his title, but a *prima facie* case is made out by the introduction of his deed containing recitals or regularity. The defendant's only burden is to meet this case; he does not have the burden of the whole case to show irregularity. Tyler *v.* Herring, 67 Miss. 169, 6 So. 840.

In Dryden *v.* Stephens, 19 W. Va. 1, it was said *obiter* that the deed from the trustee reciting a compliance with the terms of the deed of trust was *prima facie* evidence of such fact, and unless overcome by impeaching evidence would be conclusive; and the decision of the court was that if the grantor delays his suit to set aside the deed for four years, charging failure to give notice of the sale, which the answer denies, and no proof of the notice is given, *pro* or *con*, and the rights of third parties have intervened, who for five years since the sale have not been brought before the court, the sale will not be set aside.

Effect Limited to Parties and Privies. — Henderson *v.* Galloway, 8 Humph. (Tenn.) 691; Wood *v.* Lake, 62 Ala. 489.

Deed by Auctioneer of Property. The recital in a deed, made by an auctioneer under the terms of a power of sale mortgage, that the terms of the mortgage relating to the sale have been complied with, are *prima facie* evidence of the truth of the matters recited as against the mortgagor or parties claiming under him. Naugher *v.* Sparks, 110 Ala. 572, 18 So. 45; Tartt *v.* Clayton, 109 Ill. 579.

Disqualification of Trustee. — A recital in an instrument executed by the beneficiary in a deed of trust, substituting a trustee, that the trustee named in the deed had become disqualified to act under the same, is not to be received as evidence of such disqualification as against a stranger to the instrument. Leech *v.* Karthaus (Ala.), 37 So. 696.

No Presumptive Force Without Possession. — The burden is on the purchaser from a personal representative of the trustee in a deed of trust to show that the conditions made a prerequisite to the power of sale have been complied with. The recitals in the deed executed by such representative of a compliance with conditions prerequisite to the exercise of the power assumed are not *prima facie* evidence of such compliance where the purchaser has not had possession under his deed. Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232.

22. In Gibson *v.* Jones, 5 Leigh (Va.) 370, is a *dictum* to the effect that a party claiming under a deed with recitals must prove their truth, which is followed by Norman *v.* Hill, 2 Pat. & H. (Va.) 676.

23. Deed to Trustee Must so Recite. — Vail *v.* Jacobs, 62 Mo. 130; Neilson *v.* Chariton Co., 60 Mo. 386.

24. Effect as Provided for in Mortgage or Deed of Trust. — *California.* — Carev *v.* Brown, 62 Cal. 373.

Colorado. — Bent-Otero Imp. Co. *v.* Whitehead, 25 Colo. 354, 54 Pac. 1023, 71 Am. St. Rep. 140; Mosca Mill. & Elev. Co. *v.* Murto (Colo. App.), 72 Pac. 287.

to the purchaser recited particularly certain essentials and omitted others relating to notice does not repel the conclusion that the notice was good where the deed did not purport to set out all that the notice contained.[25]

E. Supplying Admissions by Parol. — Where the deed executed by the trustee to the purchaser fails to recite any matter required by the deed of trust to be recited the omission may be supplied by evidence *dehors* the instrument.[26]

F. Statutory Mode of Proof. — Notwithstanding the statute provides for proof by affidavit of matters relating to the sale, the statutory means of proof is not exclusive, and the same matters may be established by competent common-law evidence.[27] Nor is the affidavit conclusive of the matters stated,[28] except as against the

Missouri. — Carter *v.* Abshire, 48 Mo. 300; White *v.* Stephens, 77 Mo. 452; Wells *v.* Estes, 154 Mo. 291, 55 S. W. 255.

Texas. — Jesson *v.* Texas Land & Loan Co., 3 Tex. Civ. App. 25, 21 S. W. 624; McCreary *v.* Reliance Lumb. Co., 16 Tex. Civ. App. 45, 41 S. W. 485; Swain *v.* Mitchell, 27 Tex. Civ. App. 62, 66 S. W. 61; Allen *v.* Courtney, 24 Tex. Civ. App. 86, 58 S. W. 200.

25. Tartt *v.* Clayton, 109 Ill. 579.

26. Place of Sale. — Wilkerson *v.* Allen, 67 Mo. 502.

Extrinsic Evidence of Matters Omitted From Trustee's Deed. — If the deed fails to recite the advertisement of the property previous to a sale of it, the fact of advertisement may be established by other evidence. Allen *v.* De Groodt, 105 Mo. 442, 16 S. W. 494.

Date of Sale May Be Supplied by Parol. — Jones *v.* Hagler, 95 Ala. 529, 10 So. 345.

Place of Sale May Be Shown. Allen *v.* De Groodt, 105 Mo. 442, 16 S. W. 494, 1049.

27. Field *v.* Gooding, 106 Mass. 310; Golcher *v.* Bresbin, 20 Minn. 407; Arnot *v.* McClure, 4 Denio (N. Y.) 41.

Where title is claimed under a foreclosure by advertisement, a statutory proceeding in New York, the service of notice of the sale on the parties affected thereby may be shown in support of the purchaser's title by any common-law evidence where the statutory affidavit was not executed. Mowry *v.* Sanborn, 62 Barb. (N. Y.) 22.

In Van Vleck *v.* Enos, 88 Hun 348, 34 N. Y. Supp. 754, it was said that the time and place of the sale, the sum bid and the name of the purchaser, though provided to be shown by affidavit, could be proven by common-law evidence, though the evidence in the particular case was held insufficient.

28. Statements in Affidavit Not Conclusive. — Arnot *v.* McClure, 4 Denio (N. Y.) 41.

As to Person Making Sale. — Presumption From Affidavit Not Overcome. — Maxwell *v.* Newton, 65 Wis. 261, 27 N. W. 31.

In Sherman *v.* Willett, 43 N. Y. 147, the court said: "It is true that the affidavits of foreclosure, as filed, show a sale of the entire premises without any reservation; but these affidavits are not conclusive upon the plaintiff, who was not a party to the foreclosure. They are by statute only made presumptive evidence of the facts contained in them. Any person, unless it be the mortgagee, and those claiming under him, can controvert them by parol evidence. Arnot *v.* McClure, 4 Den. 41. In the case cited, Judge Bronson says: 'As the affidavits are an *ex parte* proceeding, and are only made presumptive evidence of the facts therein contained, there can be no doubt that they may be controverted by the mortgagor and those claiming under him. All or any of the facts stated in the affidavits may be disproved."

mortgagee, when he becomes the purchaser, and those privy to him.[29]

G. Notice of Sale. — a. *By Publication. — Affidavit of Publisher.* — The affidavit of the publisher that his paper is one of general circulation is sufficient in support of the fact that the newspaper was a legal one.[30]

b. *Best and Secondary Evidence. — Posted Notice.* — Parol evidence of the posting of notices is competent.[31]

H. Title in Trustee. — Title to the trustee in a deed of trust will be presumed to continue in him until his disqualification is shown.[32]

4. By Equitable Action. — A. Presumptions and Burden of Proof. — a. *Consideration.* — The plaintiff need not prove the consideration for his mortgage.[33] The averment, in a complaint for foreclosure, of a particular consideration does not deprive the mortgagee of the *prima facie* presumption of consideration afforded by the recitals in the mortgage itself.[34] In foreclosure by an assignee wherein the mortgagee testifies that the mortgage and the assignment both were without consideration, the assignee must thereupon prove as against a subsequent incumbrance that the mortgage was supported by a consideration.[35]

b. *Fraud and Illegality.* — Where in a foreclosure suit fraud or illegality in the debt or mortgage is averred, the burden of proof as to such matters is on the defendant.[36]

29. Arnot *v.* McClure, 4 Denio (N. Y.) 41.

30. Bourke *v.* Sommers, 3 Neb. (Unof.) 761, 92 N. W. 990.

31. McMillan *v.* Baxley, 112 N. C. 578, 16 S. E. 845.

32. And this, notwithstanding the substitution of another trustee and attempts by him to act thereunder. Leach *v.* Karthaus (Ala.), 37 So. 696.

33. Farnum *v.* Burnett, 21 N. J. Eq. 87; Ressegieu *v.* Van Wagenen, 77 Iowa 351, 42 N. W. 318; Stevens *v.* Higginbotham, 6 Utah 215, 21 Pac. 946.

34. Russell *v.* Kinney, 1 Sandf. Ch. (N. Y.) 34.

35. Bishop *v.* Felch, 7 Mich. 371.

36. Fraud. — Elphick *v.* Hoffman, 49 Conn. 331; Commercial Exch. Bank *v.* McLeod, 67 Iowa 718, 25 N. W. 894; Sloan *v.* Holcomb, 29 Mich. 153; Perrett *v.* Yardsdorfer, 37 Mich. 596.

Illegality. — Ressegieu *v.* Van Wagenen, 77 Iowa 351, 42 N. W. 318.

Lack of Consideration. — Stevens *v.* Higginbotham, 6 Utah 215, 21 Pac. 946.

Mental Incapacity of Mortgagor. The party relying upon mental incapacity at the time of executing the mortgage to defeat the instrument has the burden of proving such incapacity. Baker *v.* Clark, 52 Mich. 22, 17 N. W. 225.

In a suit by the purchaser of the mortgaged premises against an assignee of the mortgage to restrain foreclosure because of the fraud of the plaintiff's vendor and of such assignee in inducing the plaintiff to believe that the premises were not incumbered, the plaintiff may introduce evidence of the defendant's participation in such concealment of the mortgage. Briggs *v.* Langford, 59 Hun 615, 12 N. Y. Supp. 657.

It has been held that where a second mortgagee alleges, by way of answer to a bill by a prior mortgagee for foreclosure, that the prior mortgage was fraudulently given to secure a fictitious debt, the plaintiff must prove the validity of the consideration of his mortgage. De Vendal *v.* Malone, 25 Ala. 272.

c. *Payment and Discharge.* — Where payment or a discharge is pleaded, consonant to the rule generally obtained, the party so pleading has the burden of proof.[37]

d. *Action at Law on the Debt.* — In some states by statute the plaintiff in foreclosure is required to show that no action at law on the debt has been instituted previous to bringing his suit for foreclosure.[38]

e. *Proof of Default and Breach of Condition.* — Proof of default is not required in the payment of the obligation, and the burden of proving no default rests with the mortgagor.[39]

f. *The Mortgagor's Title.* — As against third persons, the mortgagee must prove title to the mortgaged premises in the mortgagor.[40]

37. Trust Deed. — Archibald *v.* Banks, 203 Ill. 380, 67 N. E. 791.

The rule placing the burden in this regard on the defendant will not be stringently enforced when the debtor has confided in the creditor, placing himself in the creditor's hands, and when for ten years neither party has taken cognizance of the debt, and the evidence relating to it is uncertain and conflicting. Lashbrooks *v.* Hatheway, 52 Mich. 124, 17 N. W. 723.

The recital in a mortgage of the existence of the debt is *prima facie* evidence that it is unpaid, which may of course be overcome by proof of payment. Graham *v.* Anderson, 42 Ill. 514, 92 Am. Dec. 89.

Further Security. — The defendant to a foreclosure who sets up the discharge of the mortgage by the giving of a deed of trust in payment of the debt has the burden of overcoming the presumption that such an instrument was only a further security. Schumpert *v.* Dillard, 55 Miss. 348. See "Payment, Release and Discharge," *supra*, this article.

38. Woolworth *v.* Sater, 63 Neb. 418, 88 N. W. 682; Jones *v.* Burtis, 57 Neb. 604, 78 N. W. 261; Miller *v.* Nicodemus, 58 Neb. 352, 78 N. W. 618.

Where Defendant Answers Generally. — Where in an action to foreclose the defendant answers generally, the plaintiff has the burden of showing that no action at law has been instituted to collect the mortgage debt. Hedbloom *v.* Pierson (Neb.), 90 N. W. 218; Omaha Sav. Bank *v.* Boonstra (Neb.), 91 N. W. 525.

The testimony of the plaintiff's attorney that the note and mortgage sued on have been in his possession since the maturity of the debt, that no proceedings at law have been had on them in the county where the property is situated and where the defendant was served with summons, nor elsewhere to his knowledge, is sufficient to support a finding that there have been no proceedings at law to recover upon the debt. And where this issue is raised, the plaintiff has the burden of showing that none of his predecessors in title have instituted such an action. Carter *v.* Leonard, 65 Neb. 670, 91 N. W. 574.

39. Sowarby *v.* Russell, 4 Abb. Pr. (N. S.) (N. Y.) 238.

Breach of Part of the Conditions. If it is averred that the mortgagee indorsed several notes for the mortgagor which he has been compelled to pay, to foreclose a mortgage given to indemnify him as such indorser, proof of the payment of any number of the notes fewer than all will nevertheless entitle the plaintiff to recover. Beckwith *v.* Windsor Mfg. Co., 14 Conn. 594.

40. But where such parties, denying the mortgagor's title, assert a present title in themselves, they have the burden of proving it. Daniel *v.* Hester, 24 S. C. 301.

Proof of Possession Under Deed. Title to the property in the mortgagor is *prima facie* shown by proof that he had possession under a deed when the mortgage was executed. Stockwell *v.* State, 101 Ind. 1.

A party setting up, in defense of a suit for foreclosure, that the mortgagor was a trustee only of the

When a foreclosure is sought against lands occupied by the mortgagor and his wife, if the wife assert that the property was her own, having been purchased with her separate funds, she will have the burden of proving such as defensive matter.[41] Where the mortgagor gives his mortgage to secure the purchase price of the real estate on which the mortgage is given, and in a suit to foreclose such mortgage relies upon the mortgagee's lack of title, and hence failure of consideration for the mortgage debt, the plaintiff must prove his title.[42]

g. *Purchase Money Mortgage. — Breach of Covenant Against Incumbrances.* — If the grantee under a warranty deed sets up, as a partial defense to a suit to foreclose a purchase money mortgage, that he has paid a prior mortgage against the premises, the payment of such incumbrance and of the particular amount thereof must be satisfactorily proven.[43]

h. *Amount of Plaintiff's Recovery.* — If the amount of the plaintiff's debt is not definitely ascertainable from the instrument on which he sues, or if it appears that the amount due was not ascertained at the time the obligation and the mortgage were given, the production of the obligation is not alone sufficient to establish the debt, and the burden in that regard is thereby cast upon the plaintiff.[44] The burden is otherwise placed, however, if on its face the

mortgaged property, and was not authorized to mortgage it, must establish such a defense by clear and satisfactory proof. Suter *v.* Ives, 47 Md. 520.

41. The oral declarations of the husband that he purchased such lands for his wife, who furnished the consideration, testified to ten years afterward, should be received in the wife's defense with caution, and such evidence will not be sufficient to overcome the mortgagee's positive evidence of a loan by him to the mortgagee to purchase the land mortgaged. Ingram *v.* Illges, 98 Ala. 511, 13 So. 548.

42. Benson *v.* Files, 70 Ark. 423, 68 S. W. 493.

43. Smith *v.* Fiting, 37 Mich. 148.

44. Brant *v.* Hutchinson, 40 Ill. App. 576.

As to Amount of Account in Controversy. — Where a mortgage is given to secure an account to be adjusted between the parties, the burden is on the plaintiff to prove the amount of his debt. DeMott *v.* Benson, 4 Edw. Ch. (N. Y.) 297.

When the amount of the debt secured is indefinite at the time the mortgage is given, but is to be determined by the subsequent payment by the mortgagee of particular debts of the mortgagor, nothwithstanding the mortgagor's note for a certain amount is given to the mortgagee at the time the mortgage is executed, the note is not sufficient evidence of the amount of the debt, which must be proved by the plaintiff. Turman *v.* Forrester, 55 Ark. 336, 18 S. W. 167.

Acceptances. — Prima Facie Case. In a suit to foreclose a mortgage given to secure future advances, acceptances or indorsements to or for the mortgagor, the plaintiff makes out a *prima facie* case by the production of acceptances corresponding to the descriptions in the mortgage without proving that they were paid out of his own funds. If the mortgagor contends that they were paid out of funds belonging to him in the mortgagee's hands he has the burden of proving it. Lewis *v.* Wayne, 25 Ga. 167.

Services of Mortgagor. — Where the value of the services of the mortgagor to the mortgagee was to be applied in reduction of the mortgage

debt appears to have been certainly determined at the time of the transaction.[45]

i. *Taxes and Special Assessments.* — A mortgagee who has paid special assessments and seeks a lien therefor has the burden of showing the validity thereof.[46]

j. *Presumption as to Unexplained Memorandum on Mortgage.* A memorandum on the back of a mortgage in no way explained or proved is no evidence of the amount due at the maturity of the debt.[47]

k. *Obligations Secured by Single Mortgage.* — The party relying on extrinsic matter to vary the priorities of several obligations secured by a single mortgage, as determined by the instrument itself, has the burden of proving the matters upon which such a change must rest.[48]

debt, and services are shown to have been rendered and accounts kept by the mortgagee, and a great lapse of time since the maturity of the debt has intervened, the mortgagee will have the burden of showing the state of the accounts between the parties and any payments made by him for the services rendered. Webber *v.* Ryan, 54 Mich. 70, 19 N. W. 751.

Future Advances. — Burden on Plaintiff. — In a suit to foreclose a mortgage given to secure future advances not to exceed, in the aggregate, the amount of the mortgagor's note given at the time the mortgage was executed, the plaintiff has the burden of showing the making of the intended advances, and this burden will not be satisfied by the introduction of the note in evidence. Pillow *v.* Sentelle, 49 Ark. 430, 5 S. W. 783.

Surety Under Indemnity Mortgage. The surety seeking relief under an indemnity mortgage has the burden of proving the fact of damage by obligatory payment and the amount of the damage he has sustained. Howe *v.* White (Ind. App.), 67 N. E. 203.

Where the parties concede that the amount of the debt as stated in the papers is not the true amount, that the liability is contingent and that the mortgage does not state the whole agreement, the plaintiff has the burden of showing what the debt actually is. McAteer *v.* McAteer, 31 S. C. 313, 9 S. E. 966.

Execution Admitted. — Amount Claimed as Due Not Denied. — Cooley *v.* Hobart, 8 Iowa 358.

45. Waln *v.* Smith, 1 Phila. (Pa.) 362.

Agreed Statement of Account. In a suit to foreclose on a bond and the mortgage given on a settlement of accounts, balances being struck and assented to at the time, the defendant has the burden of showing that such amount is erroneous. De Mott *v.* Benson, 4 Edw. Ch. (N. Y.) 297.

Where a mortgage on its face is given to secure a sum certain, a defense that the mortgage was in fact given to secure future advances, which were not made, and hence that the mortgage was without consideration, must be proved by satisfactory evidence. Gardner *v.* Winterson, 17 App. Div. 630, 45 N. Y. Supp. 590, *affirmed* 162 N. Y. 604, 57 N. E. 1110.

Where the amount of the debt is definitely stated, followed by a provision that the debtor shall have certain credits if they shall be found due, the defendant has the burden of showing that he is entitled to such credits, and it is no part of the mortgagee's case to offer any proof relating to such matters. Given *v.* Davenport, 8 Tex. 451.

46. Rule as to Regular Taxes. The burden is on the mortgagor when the recovery of regular taxes is sought. Hartsuff *v.* Hall, 58 Neb. 417, 78 N. W. 716.

47. Rose *v.* Lockerby, 116 Mich. 277, 74 N. W. 476.

48. Winters *v.* Franklin Bank, 33 Ohio St. 250.

If several obligations are secured by a single mortgage, and the time of

l. *Mortgagee's Intention Not To Enforce Lien of Mortgage.* The mortgagor has the burden of proving his defense that the mortgagee did not intend to enforce the mortgage, but meant that it should be canceled at his death.[49]

m. *Priorities.* — **(1.) Rights of Subsequent Purchasers.** — When foreclosure is sought as against lienors or purchasers, whose rights have attached subsequently in time to the plaintiff's, such subsequent parties have the burden on the issue of priorities.[50]

the maturity of the several obligations does not appear from the mortgage, the plaintiff suing on one of the notes and claiming priority has the burden of proving the subsequent maturity of the remaining notes where the time of maturity of the several obligations is held to be controlling. Roberts *v.* Halstead, 9 Pa. St. 32, 49 Am. Dec. 541.

49. Chew *v.* Chew, 23 N. J. Eq. 471.

50. Subsequent Lienors Must Establish the Priority of Their Liens. Henry *v.* Evans, 58 Iowa 560, 9 N. W. 216; Freeman *v.* Schroeder, 43 Barb. (N. Y.) 618.

Attachment Lien. — In a controversy respecting priorities between a mortgage lien holder and the holder of an attachment lien, in foreclosure, where the holder of the attachment lien admits the plaintiff's lien, but avers the priority of his own, he has the burden of proving the alleged priority. Vaughn *v.* Eckler, 69 Iowa 332, 28 N. W. 624.

In Suit by Assignee. — In a suit by an assignee of the mortgage, proof of the mortgage bond and assignment makes a *prima facie* case against subsequent incumbrances. Bishop *v.* Felch, 7 Mich. 371.

On Intervening Petition. — Where an intervenor alleges a lien prior to that of the plaintiff he has the burden of proving priority, and neither the plaintiff nor any of the intervenor's codefendants are first called on to disprove the existence of the lien by showing a release or waiver of it.

Production of Evidence of Title. Where a purchaser from the mortgagor subsequent to the execution of the plaintiff's mortgage sets up that he has received a sheriff's deed for the premises in a sale on execution under a judgment prior to the plaintiff's mortgage, such deed must be produced and proved, and to refer to it as an exhibit merely is not sufficient. White *v.* Morrison, 11 Ill. 361.

Judgment Lien Against Mortgagor's Grantee. — A defendant in a foreclosure proceeding answering a lien on the mortgaged premises by virtue of a judgment against the mortgagor's grantee has the burden of establishing such a lien. Foster *v.* Bowles, 138 Cal. 449, 71 Pac. 495.

One Who Claims Ownership Must Show That His Claim Is Superior to the Mortgage. — Henry *v.* Evans, 58 Iowa 560, 9 N. W. 216.

Judgment Lien. — After-Acquired Property. — A defendant claiming a prior judgment lien on particular property because after-acquired, has the burden of showing as against the plaintiff seeking to foreclose a mortgage covering after-acquired property, that the property on which the defendant claims a prior lien was acquired after the execution of the plaintiff's mortgage. The mere allegation in the answer does not put on the plaintiff the burden of showing that all the property claimed under the mortgage was in the mortgagor's possession at the time his mortgage was executed. New York Security & Trust Co. *v.* Saratoga Gas & Elec. Co., 88 Hun 569, 34 N. Y. Supp. 890, *affirmed* 157 N. Y. 689, 51 N. E. 1092.

A junior incumbrancer claiming against an earlier mortgage must prove a consideration for his own mortgage, and this element of proof may not be supplied by the recitals in the instrument itself. Houfes *v.* Schultze, 2 Ill. App. 196.

In an action brought by a purchaser at foreclosure against a subsequent judgment creditor of the mortgagor, purchasing at his own sale, the plaintiff need not in the first instance prove the consideration

(2.) When Plaintiff's Mortgage Is Unrecorded. — In a suit to foreclose an unrecorded mortgage against a subsequent purchaser or incumbrancer of the property, the plaintiff has the burden of proving knowledge or notice of his mortgage.[51] Notice of an unrecorded mortgage may not be imputed to a subsequent purchaser by evidence of mere loose declarations, but must be established by evidence of some degree of clearness.[52]

(3.) Single Security Securing Several Creditors. — Where a mortgage is made to secure several creditors it will be presumed that the mortgagor intended that such creditors should share *pro rata* in the benefit of the security.[53]

B. Relevancy and Admissibility. — a. *Best and Secondary Evidence.* — Secondary evidence of the contents of a note and mortgage is, of course, inadmissible without proof of loss or of the inability of the plaintiff to produce them.[54] The assignor's affidavit is not competent to prove the loss of a mortgage in favor of the assignee, but the assignor should himself be produced to testify.[55] A copy from the registry is competent secondary evidence of the mortgage.[56]

b. *Parol. — As to Stipulations of Mortgage.* — While not in itself competent, parol may be received, in connection with a written admission in the mortgage, to vary a written indorsement on the note secured whereby the liabilities of the parties thereto are sought to be fixed.[57] Also where the mortgage is silent as to a particular mat-

of the mortgage under which he claims. The creditor has the burden of showing the existence of his debt at the time of the foreclosure before the plaintiff can be called upon to prove the consideration of his mortgage on an issue of fraud. Simerson *v.* Branch Bank of Decatur, 12 Ala. 205.

51. Schoonover *v.* Foley (Iowa), 94 N. W. 492; McCormick *v.* Leonard, 38 Iowa 272; Hiatt *v.* Renk, 64 Ind. 590.

A subsequent purchaser of the mortgaged premises makes out a *prima facie* case of want of notice of a mortgage in a foreclosure suit by proof that the mortgage was not recorded, whereupon the plaintiff must prove actual notice or establish such circumstances as should have put the purchaser upon inquiry. White *v.* McGarry, 47 Fed. 420.

Contra. — In a suit to foreclose an unregistered and unrecorded mortgage, the defendant, answering that he is a purchaser for value and without notice of the plaintiff's rights, has the burden of proving such as a defense. Henderson *v.* Williams, 57 S. C. 1, 35 S. E. 261; Oak Cliff College *v.* Armstrong (Tex. Civ. App.), 50 S. W. 610.

52. Jackson *v.* Slater, 5 Wend. (N. Y.) 295.

53. Wohlgemuth *v.* Standard Drug Co., 9 O. C. D. 9. *Quaere*, whether parol is admissible to show a different intent. Adams *v.* Robertson, 37 Ill. 45.

54. Dowden *v.* Wilson, 71 Ill. 485.

55. Proof of Loss by Affidavit of Assignor. — Poignard *v.* Smith, 8 Pick. (Mass.) 272.

56. Proof by Copy From Records. Poignard *v.* Smith, 8 Pick. (Mass.) 272.

57. Commercial Exch. Bank *v.* McLeod, 67 Iowa 718, 25 N. W. 894.

Extrinsic Evidence of Extension of Time of Payment. — Extension by Parol. — Evidence is admissible in the mortgagor's behalf to show an oral agreement for an extension of the time of payment of the debt. Deshazo *v.* Lewis, 5 Stew. & P. (Ala.) 91, 24 Am. Dec. 769.

ter, the omission, it has been held, may be supplied by parol:[58] But parol relating to contemporaneous matters is not admissible to enlarge or vary the terms of the instrument,[59] although it has been held that where a sum is recited to be due absolutely it may be shown by parol that the mortgage was intended as indemnity only against a contemplated liability, and that the contingency provided against has not arisen.[60]

c. *The Existence and Amount of the Debt.* — The mortgagor's statements, prior to his death, as to the amount due on the mortgage debt are inadmissible in his administrator's behalf to foreclose, and the rule is not different because the only parties having knowledge of the facts are dead.[61] That a mortgage was assessed by the taxing authorities at its face value is of no probative force in arriving at the amount due where it is customary so to assess mortgages; and especially would this be true where the assessment is not shown to be founded upon any statement from the party against whom it is

Extension by Written Agreement. A written agreement between the mortgagor and mortgagee whereby, for a valuable consideration, the time of payment of the mortgage debt is extended is admissible in evidence to show that the action is prematurely brought. Seaton *v.* Fiske, 128 Cal. 549, 61 Pac. 666.

Subsequent Assignment of Rents. The defendant may prove a written agreement subsequent to the mortgage by which the rents are assigned until the mortgage shall be fully paid. Angier *v.* Masterson, 6 Cal. 61.

58. Where a deed of trust is silent on the question of who furnished the money secured by the instrument, and for whom the trustee was acting, these matters may be shown by parol. Charter Oak L. Ins. Co. *v.* Gisborne, 5 Utah 319, 15 Pac. 253.

59. Parol Proof of Unexpressed Condition. — Parol is not admissible to show that a mortgage and a bond for the payment of money absolute were subject to an unexpressed condition. Russell *v.* Kinney, 1 Sandf. Ch. (N. Y.) 34.

As to Taxes. — Parol is not admissible to show that, by a provision in the mortgage that the mortgagor should pay all taxes on the mortgaged property, it was intended that the mortgagor should pay the taxes against the mortgage itself. Hewitt *v.* Dean, 91 Cal. 5, 27 Pac. 423.

As to Amount Due. — Parol is inadmissible to show that the bond or note secured, though for a stated sum, absolutely and without condition, was by agreement of parties intended to cover only what should be due upon a future settlement. Moffitt *v.* Maness, 102 N. C. 457, 9 S. E. 399; Dyar *v.* Walton, 79 Ga. 466, 7 S. E. 220.

But it is competent to identify the debt secured. Kimball *v.* Myers, 21 Mich. 276. See "The Debt or Obligation Secured," *supra* this article.

60. Colman *v.* Post, 10 Mich. 422, 82 Am. Dec. 49.

61. Deceased Mortgagor's Statements as to Amount of Debt Inadmissible in Favor of His Administrator. — Rose *v.* Lockerby, 116 Mich. 277, 74 N. W. 476.

Usury. — Though the bond, to secure which the mortgage sought to be foreclosed was given, is valid on its face, the mortgagor may by parol prove an agreement for the payment, followed by actual payment, of usurious interest, notwithstanding that to do so contradicts the terms of the writing. Mudgett *v.* Goler, 18 Hun (N. Y.) 302.

A purchaser of mortgaged premises under a junior incumbrance may prove usury as a defense to a foreclosure of the senior mortgage, and in such a case evidence is also admissible in the mortgagor's behalf to show usury in the transaction as against the assignees of the mortgage, so as to protect the mortgagor

offered.[62] The mortgagor's admissions of the existence of the debt and its amount may be shown.[63] Likewise the mortgagee's admissions as to the correctness of the amount of the debt are provable against him.[64] A prior mortgage on the same property may be received in evidence to show that it remained unpaid until discharged by money borrowed on the mortgage sought to be foreclosed.

d. *Admissibility of Note. — Description.* — The note secured is not rendered inadmissible because not minutely described in the mortgage, and if different from the obligation described, but shown to be the obligation secured, it may be received.[65]

e. *As to Title to the Property. — Record and Documentary Evidence.* — Documents purporting to affect the title to the premises may be introduced under the general rules relative to the use of such evidence.[66]

in a suit on the bond accompanying the mortgage. Huckenstein *v.* Love, 98 Pa. St. 518.

62. Assessment of Mortgage for Taxation. — Rose *v.* Lockerby, 116 Mich. 277, 74 N. W. 476.

63. Mortgagor's Affidavit in Another Proceeding. — An affidavit by the defendant, made in a former suit between the parties, admitting the debt which the mortgage sought to be foreclosed was given to secure, is admissible in proof of the existence of the debt. Whitney *v.* Buckman, 13 Cal. 536.

64. Van Dusen *v.* Kelleher, 25 Wash. 315, 65 Pac. 552.

65. *Alabama.* — Cowley *v.* Shelby, 71 Ala. 122.

Connecticut. — Hough *v.* Bailey, 32 Conn. 288.

Illinois. — Benneson *v.* Savage, 130 Ill. 352, 22 N. E. 838.

Indiana. — Dorsch *v.* Rosenthal, 39 Ind. 209; Cleavenger *v.* Beath, 53 Ind. 172.

Iowa. — Mixer *v.* Bennett, 70 Iowa 329, 30 N. W. 587.

Kentucky. — Bailey *v.* Fanning Orphan School, 12 Ky. L. Rep. 644, 14 S. W. 908.

Maryland. — Boyd *v.* Parker, 43 Md. 182.

66. In a suit to foreclose against one holding the premises, asserted to have assumed the plaintiff's mortgage, the defendant may introduce a deed of the premises executed to a third party prior to the plaintiff's mortgage and the record of a judgment favorable to such purchaser against the mortgagor decreeing the title in the former. Merrick *v.* Leslie, 62 Ind. 459.

In an action by an innocent mortgagee of a party holding the mortgaged premises under an instrument in form a deed, but intended by the parties to be a mortgage, the formal deed executed to the mortgagee's grantor is admissible against the equitable owners to rebut the presumption of ownership in the grantor arising from his subsequent possession of the land. Brigham *v.* Thompson, 12 Tex. Civ. App. 562, 34 S. W. 358.

Where the grantee, under an oral agreement for a reconveyance on payment of a specified debt, mortgages the premises and afterward executes a written declaration of trust, such declaration is admissible in behalf of the beneficiary in an action by the mortgagee of his grantee for foreclosure, though not executed at the time of the creation of the trust. Sime *v.* Howard, 4 Nev. 473.

A deed dated and delivered long after the commencement of the suit is inadmissible to show title in certain of the defendants. Lemert *v.* Robinson, 7 Kan. App. 756, 53 Pac. 485.

Where the mortgagee has received a certificate of purchase from the state, and thereafter a deed of the mortgaged premises, the certificate is admissible to show the extent and character of the estate and the time of the purchase and conveyance; nor will such evidence be open to the ob-

f. *Declarations and Admissions.* — The declarations of the mortgagor before and after giving the mortgage may be proved against him to show for what purpose it, and the notes it secured, were given.[67]

g. *As to Priorities.* — On the question of the priorities of several mortgages, the admissions of an owner of one of the mortgages are admissible against him or against his successor in title, if made while the owner of the mortgage to which his admissions relate.[68] While priorities may, as between the parties, be controlled by parol agreements, evidence of such change in or control of the natural priorities of several instruments, as fixed by their terms and times of execution and recording, is incompetent to affect the rights of innocent third parties.[69]

h. *As Depending on Record.* — A mortgage without due acknowledgment may be received in evidence against a party having actual notice of it.[70] Though not required by statute, or given the effect of evidence, an indorsement of the recorder, entered on the mortgage, of the fact, time and place of record is competent to prove the recording of the mortgage, especially where not objected to, and it will be sufficient to establish notice to subsequent parties.[71]

jection that the deed is the best evidence. Henderson *v.* Williams, 57 S. C. 1, 35 S. E. 261.

Record of Suit by Third Party Against Defendant. — McMurtrie *v.* Black, 180 Pa. St. 64, 36 Atl. 405.

Suit to Enjoin Foreclosure. — Record Inadmissible. — When. — In *scire facias* on a mortgage the record of a suit by the defendant against the plaintiff to enjoin the *scire facias* proceedings is properly excluded, where such suit did not end in final judgment. McMurtrie *v.* Black, 180 Pa. St. 64, 36 Atl. 405.

Record on Foreclosure of Senior Mortgage Competent Against Junior Mortgagee. — In a suit by a junior mortgagee for foreclosure, the record of the proceedings on the foreclosure of a senior mortgage to which the junior mortgagee was not a party is nevertheless admissible against him. The Illinois court, in a case in which this question was presented, said: "It is objected that the court erred in admitting in evidence the record of the former foreclosure proceeding, to which appellants were not parties. The evidence was clearly admissible. While it could not have the effect of barring their equitable right of redemption, it was competent to show the foreclosure and the cutting off of the equity of redemption of the mortgagors." Rose *v.* Walk, 149 Ill. 60, 36 N. E. 555.

67. Randall *v.* Reynolds, 61 N. J. Eq. 334, 48 Atl. 768; Bigelow *v.* Foss, 59 Me. 162.

After Assignment. — The declarations of a mortgagee, or of his personal representatives, made after all interest in the mortgage has been parted with, are not admissible against the assignee of the mortgage. Kinna *v.* Smith, 3 N. J. Eq. 14. See *supra* this article, "Assignments."

68. Admissions of Holder of Mortgage. — Beers *v.* Hawley, 2 Conn. 467.

69. The presumption as to the priorities of several obligations secured by a single mortgage comes within the rule of the text. Wohlgemuth *v.* Standard Drug Co., 9 O. C. D. 9.

70. Brewer *v.* Crow, 4 Greene (Iowa) 520.

71. Moore *v.* Glover, 115 Ind. 367, 16 N. E. 163.

Evidence of the custom of a master commissioner to date a mortgage, given to secure the payment of the purchase price of property sold at a judicial sale, on the day of the sale of the property, though executed

i. *Application for Loan.* — The statements of the mortgagor in his application for the loan are admissible against him or persons claiming through or under him.[72]

j. *Receipts for Taxes.* — Receipts for taxes on the mortgaged premises are admissible to prove the payment of the taxes therein recited to have been paid.[73]

k. *Attorney's Fees.* — Under a stipulation in a mortgage for a reasonable attorney's fee, evidence as to what is the "usual, ordinary and customary" fee in such matters is competent.[74]

l. *Waiver of Forfeiture. — Subsequent Election.* — When a forfeiture for a particular default has been waived, evidence tending to show a subsequent forfeiture is not admissible.[75]

Usury. — As to Junior Mortgagee. — Evidence of usury in a mortgage has been held competent against the prior mortgagee and in behalf of the junior mortgagee, as showing the amount to be applied in reduction of the senior mortgage and to ascertain the balance due thereon as a prior lien against the junior mortgagee.[76]

C. Weight and Sufficiency of Evidence. — a. *Proof of Plaintiff's Title and Right to Recover.* — The plaintiff suing for foreclosure is required to produce the mortgage upon which he sues and the obligation it secures, if one appears to have been exe-

later, is incompetent to establish execution on the later day so as to show the record to have been made within the time required by the recording statute. Turpin *v.* Sudduth, 53 S. C. 295, 31 S. E. 245.

72. A declaration in an application for a loan that the land mortgaged was not used as a homestead is admissible against the heirs of the mortgagors in a foreclosure proceeding. Bowman *v.* Rutter (Tex. Civ. App.), 47 S. W. 52.

Loan Association Mortgage. Statement of Membership. — A party giving his mortgage to a loan association reciting that he is a member of the association, and agreeing to be bound by its by-laws, is estopped to deny his membership in the association unless it appear that the bond and mortgage were taken to evade a provision of the statute prohibiting loans to persons not members. Howard Mut. Loan & Fund Ass'n *v.* McIntyre, 3 Allen (Mass.) 571.

73. Receipts Found Among a Decedent's Papers Admissible. — Lloyd *v.* Davis, 123 Cal. 348, 55 Pac. 1003.

74. Nathan *v.* Brand, 67 Ill. App. 540.

Attorney's Fees. — If the allegation in the petition to foreclose, that the attorney's fees named in the mortgage are reasonable, is not denied, the amount of fees recoverable is made sufficiently to appear. Broadbent *v.* Brumback, 2 Idaho 336, 16 Pac. 555.

75. In such circumstances the indorsement of the holder of a trust deed on an interest coupon note, where forfeiture for non-payment of interest is claimed, reciting, "Paid upon the understanding that principal remains past due, as per notice" of forfeiture is not competent. Van Vlissingen *v.* Lenz, 171 Ill. 162, 49 N. E. 422.

76. Greene *v.* Tyler, 39 Pa. St. 361.

Contra. — The soundness of this position has been generally denied, however, on the ground that usury is a defense personal to the debtor himself, and unavailable to any other party. Stickney *v.* Moore, 108 Ala. 590, 19 So. 76; Loomis *v.* Eaton, 32 Conn. 550. See article "Usury."

cuted,[77] or to account for their non-production.[78] The production

77. **Where no Obligation Apart From Mortgage Appears To Have Been Given.** — Where the mortgage recites that it was given to secure a certain note, foreclosure may be decreed without requiring the plaintiff to produce the note, where the plaintiff alleges, and the defendant does not deny, that a note was not given. Moses *v.* Hatfield, 27 S. C. 324, 3 S. E. 528.

Failure to produce bonds usually accompanying a mortgage is no defense to foreclosure where no bonds are recited in the mortgage, and the mortgagor testifies that he has the bonds in his possession and fails to produce them, such facts justifying a finding that no bonds were given. Parkhurst *v.* Berdell, 52 Hun 614, 5 N. Y. Supp. 328.

The bond or note secured is required to be produced only when such is shown to have accompanied the mortgage, and to contain the only apparent evidence of the debt. The reason of the rule requiring production fails, as of course, when there has never been a note or bond given, or when the existence of the debt and the mortgagor's liability therefor are shown by the admissions and covenants contained in the mortgage itself. Munoz *v.* Wilson, 111 N. Y. 295, 18 N. E. 855; Goodhue *v.* Berrien, 2 Sandf. Ch. (N. Y.) 630.

The recital in a mortgage under seal of the indebtedness which it was given to secure is sufficient *prima facie* proof of the existence of the debt to sustain a foreclosure, upon the ground that where no other evidence of the debt appears to have accompanied the mortgage, the recital may supply the proof, as the law does not require a note, bond or other evidence of debt to accompany the mortgage. Whitney *v.* Buckman, 13 Cal. 536.

Note or Bond Presumed To Have Been Given From Recital in Mortgage. — Where the mortgage recites the execution of the note or bond it is given to secure it will be presumed that the bond was duly executed and delivered so as to require production. Moffitt *v.* Maness, 102 N. C. 457, 9 S. E. 399.

Production of Mortgage and Obligation Secured Necessary. — Pharis *v.* Surrett, 54 Mo. App. 9; Young *v.* McKee, 13 Mich. 552; Hungerford *v.* Smith, 34 Mich. 300; Moore *v.* Titman, 35 Ill. 310; Stewart *v.* Hoagland, 3 Neb. (Unof.) 142, 90 N. W. 1127; Wilkins *v.* Wilkins, 4 Port. (Ala.) 245; Singleton *v.* Gayle, 8 Port. (Ala.) 270; Munoz *v.* Wilson, 111 N. Y. 295, 18 N. E. 855; Young *v.* McKee, 13 Mich. 300; Mickle *v.* Maxfield, 42 Mich. 304, 3 N. W. 961; George *v.* Ludlow, 66 Mich. 176, 33 N. W. 169.

Production of Copy of Note Secured Not Sufficient. — Where the plaintiff sues as the owner of one of several notes secured by mortgage and his ownership is denied, proof only that the note set forth in the bill is a copy of one of the notes so secured is not sufficient. Ross *v.* Utter, 15 Ill. 402.

When the note secured is not filed as an exhibit with the bill to foreclose, and the only reference to the debt is the mortgage, which imperfectly describes the note secured, the note is not admissible without proof of its execution, and the debt secured must be proved on such a state of the pleadings and papers. Harlan *v.* Murrell, 3 Dana (Ky.) 180.

The non-production of the bond or note secured is evidence of the nonexistence or of the discharge of the mortgage debt, and when unexplained is conclusive against the plaintiff's right to recover. Langdon *v.* Buel, 9 Wend. (N. Y.) 80; Bergen *v.* Urbahn, 83 N. Y. 49.

78. **Failure to Produce Obligation Secured. — Effect.** — The non-production of the obligation secured affects only the regularity of the decree of foreclosure, and not its validity. Lenfesty *v.* Coe, 26 Fla. 49, 7 So. 2.

Lost Note. — Where the allegation of the complaint, that the note secured is lost, is denied, if the note is not produced its non-production must be explained to sustain a recovery. Field *v.* Anderson, 55 Ark. 546, 18 S. W. 1038. See article "Lost Instruments," this volume.

Production of Note Prerequisite to Proof of Mortgage. — To sustain a

of the obligation secured may not be dispensed with by reason of the fact that a judgment *in personam* is not demanded,[79] except when the mortgage contains a recital of the debt secured.[80] It has been said that where the note secured is not negotiable it need not be produced.[81] Where the execution of the note or bond secured is admitted by the defendant, this will be sufficient to dispense with its

foreclosure the debt must first be established, as the mortgage is but an incident of the debt; and until the note secured is produced or its absence accounted for the mortgage is not admissible. Bennett *v.* Taylor, 5 Cal. 502.

Infant Heirs of Mortgagor. Where the infant heirs of the mortgagor are parties defendant, the court may in its discretion withhold decree until the notes are produced. Arnold *v.* Stanfield, 8 Ind. 323.

Note Must Be Produced or Accounted for if Sum Due Is Not Admitted. — Moore *v.* Titman, 35 Ill. 310; Reavis *v.* Fielden, 18 Ill. 77; Lucas *v.* Harris, 20 Ill. 165 (especially is this true in old transactions).

Foreclosure of Deed of Trust. When Production of Bonds Required. In a suit to foreclose a trust deed the bonds need not be produced till a decree of foreclosure is rendered. Northern Trust Co. *v.* Columbia Straw-Paper Co., 75 Fed. 936.

Where Renewal Note Given. Original Must Also Be Produced. The note of the mortgagor must be produced or accounted for at the trial. And where a renewal note has been given the mortgagee must produce both notes unless it is made to appear that the first note was surrendered. Schumpert *v.* Dillard, 55 Miss. 348.

It will be presumed on appeal in favor of the judgment of foreclosure, nothing to the contrary appearing, that the original mortgage was introduced in evidence. It will not be presumed that, because a copy of the mortgage filed with the petition contained blanks, the mortgage itself was in such an imperfect condition, but rather the contrary will be presumed. Henry *v.* Evans, 58 Iowa 560, 9 N. W. 216, 12 N. W. 601.

Assignor May Not Complain of Non-Production. — In a suit for foreclosure by an assignee in which the assignor is made a party to answer as to his interest in the debt and mortgage, the assignor cannot complain because of the assignee's failure to produce or explain the non-production of the note sued on. Moreland *v.* Houghton, 94 Mich. 548, 54 N. W. 285.

The production of the note and the mortgage securing it is necessary, even where a decree *pro confesso* is entered. Wilkins *v.* Wilkins, 4 Port. (Ala.) 245.

79. Demand for Judgment In Rem Only. — Production of Note Required. — Stoddard *v.* Lyon (S. D.), 99 N. W. 1116.

80. Judgment In Rem Only. Production of Note Dispensed With Where Mortgage Describes the Debt. Lenfesty *v.* Coe, 34 Fla. 363, 16 So. 277; Roney *v.* Moss, 74 Ala. 390; Vaughn *v.* Tate (Tenn.), 36 S. W. 748.

In a suit for foreclosure only, the execution and existence of the note secured need not be proved where the mortgage contains a recital of the giving of the note and of its amount. And this is true as against the heirs of the mortgagor, as they would be estopped to deny the recitals in the mortgage. Arnold *v.* Stanfield, 8 Ind. 323.

In an action of assumpsit to recover a debt or for a foreclosure the recital of the indebtedness in the mortgage is sufficient evidence of the debt. O'Conner *v.* Nadel, 117 Ala. 595, 23 So. 532.

When Note in Mortgagor's Possession. — Where the note which the mortgage was given to secure is in the mortgagor's possession the recital of the indebtedness in the mortgage is sufficient *prima facie* proof of the debt where foreclosure only, and not a personal judgment, is sought. Hawes *v.* Rhoads, 34 Ind. 79.

81. When the note secured is not negotiable it need not be produced. Brown *v.* Sadler, 13 La. Ann. 205.

actual production.[82] The production of the mortgage and the obligation it secures makes a *prima facie* case for the plaintiff in foreclosure.[83] So in an action by an assignee, the production of the mortgage, the note or bond it was given to secure, and proof of the assignment makes out a *prima facie* case for the assignee.[84] The plaintiff will not be put upon proof of execution unless this be denied.[85] The production from the plaintiff's custody of a non-negotiable note has, however, been held not sufficient evidence of title.[86] The production in evidence of the instrument of debt secured by the mortgage is sufficient evidence of the amount of the mortgage debt where the debt does not appear to be uncertain and indefinite.[87] Proof of the original consideration is not required in a suit by an indorsee of the secured note.[88] Of course the plaintiff must identify

82. Defendant's Admission Dispenses With Production. — The actual production of the bonds sued on in a foreclosure proceeding is not required where the fact of their having been issued is admitted in the answer. Dickerman *v.* Northern Trust Co., 176 U. S. 181.

The bond or note secured need not be produced in a suit for foreclosure where execution is not denied, and where payment only is pleaded. Anderson *v.* Culver, 127 N. Y. 377, 28 N. E. 32, *affirming* 53 Hun 633, 6 N. Y. Supp. 181.

Contra. — The note and mortgage must be produced, nothwithstanding defendant admits their execution, or their absence accounted for and their contents proved. Dowden *v.* Wilson, 71 Ill. 485; Beers *v.* Hawley, 3 Conn. 110.

83. Prima Facie Case by Production of Note and Mortgage. — Boudinot *v.* Winter, 190 Ill. 394, 60 N. E. 553; Harlan *v.* Smith, 6 Cal. 173; Mixer *v.* Bennet, 70 Iowa 329, 30 N. W. 587; Borland *v.* Walrath, 33 Iowa 130; Ording *v.* Burnett, 178 Ill. 28, 52 N. E. 851; Magel *v.* Milligan, 150 Ind. 582, 50 N. E. 564.

The introduction in evidence of a trust deed presumptively establishes that it has not been released. And the introduction of the notes secured by it is presumptive evidence of non-payment. Murto *v.* Lemon, 19 Colo. App. 313, 75 Pac. 160.

Possession Not Sufficient as to Intervener. — An intervener in an action to foreclose a mortgage given to secure the bonds of the plaintiff, denying the plaintiff's ownership of the bonds sued on and setting up his own ownership of certain of the bonds secured by the same mortgage, has the burden, where it is denied, of proving his ownership as averred in the petition, and his possession alone of the bonds mentioned is not sufficient on such an issue. Central Trust Co. *v.* California & N. R. Co., 110 Fed. 70.

84. Proof of Bond, Mortgage and Assignment. — Makes Prima Facie Case for Assignee. — Bishop *v.* Felch, 7 Mich. 371.

If one as assignee seeks to foreclose a mortgage securing a non-negotiable note, the mere possession of the note and of the assignment of certain interests which are not shown to include the particular note is not sufficient to prove his title to the debt. Lashbrooks *v.* Hatheway, 52 Mich. 124, 17 N. W. 123. See "Assignments," *supra.*

85. Where the execution and contents of the mortgage are averred, though a copy is not filed, as against the defendant's unverified answer the execution of the mortgage will be taken to be true, and the plaintiff, without testimony, will be entitled to judgment of foreclosure and on the obligations secured. Case *v.* Edson, 40 Kan. 161, 19 Pac. 635. See "Execution and Delivery," *supra.*

86. Lashbrooks *v.* Hatheway, 52 Mich. 124, 17 N. W. 123.

87. Johnson *v.* Van Velsor, 43 Mich. 208, 5 N. W. 265.

88. Suit by Indorsee of Note Secured.— Proof of Original Consideration Not Required. — Heintz *v.*

the obligation produced as the one secured.[89] If the plaintiff is not the mortgagee he must prove such a transfer of the note and mortgage as entitles him to sue;[90] but this burden is usually satisfied by the production of the formal assignment and the note or bond,[91] or by producing the note or bond without the assignment.[92] In a suit by a trustee to foreclose a deed of trust, the notes which the deed was given to secure may be read in evidence to prove the amount of the debt secured, without being assigned by the payees to the trustee.[93]

b. *Proof of Mortgage by Production of Record.* — It is usually provided by statute that an exemplification of the record of a mortgage may be received as proof of the mortgage equally with the mortgage itself, and that the record shall be sufficient evidence of the existence and of the terms of the instrument. Without such a statute, however, the record is not competent.[94]

c. *Exercise of Option To Declare Whole Debt Due.* — In a suit to foreclose a mortgage given to secure a debt, providing that if

Klebba, 5 Neb. (Unof.) 289, 98 N. W. 431.

89. In a suit to foreclose a trust deed, the notes on obligations sued on must be shown to be the ones secured in such deed of trust. Santee *v.* Day, 111 Ill. App. 495.

90. In an action by an assignee he must prove, as against a general denial, the fact of the assignment. Nesbit *v.* Campbell, 5 Neb. 429.

Assignment when denied must be proved against the party claiming a superior right by conveyance from the mortgagor. McFarland *v.* Dey, 69 Ill. 419.

An assignee whose assignment of the note and mortgage is denied has the burden of proving his assignment. Wyman *v.* Russell, 4 Biss. 307, 30 Fed. Cas. No. 18,115.

Assignment of Mortgage Only Not Sufficient. — A person suing as assignee of a mortgage has the burden of proving the assignment of the obligation or evidence of debt. Proof of the assignment of the mortgage only is not sufficient. Cleveland *v.* Cohrs, 10 S. C. 224.

91. Introduction of Assignment and Obligation Sued on Prima Facie Proof. — Burnett *v.* Lyford, 93 Cal. 114, 28 Pac. 855; Reichert *v.* Neuser, 93 Wis. 513, 67 N. W. 939; Leary *v.* Leary, 68 Wis. 662, 32 N. W. 623. But see Van Raalte *v.* Congregation, etc., 39 La. Ann. 617, 2 So. 190; Burns *v.* Naughton, 24 La. Ann. 476; Tufts *v.* Beard, 9 La. Ann. 310; Miller *v.* Cappel, 36 La. Ann. 264. See also "Assignments," *supra.*

92. The plaintiff's possession of a negotiable note and mortgage sued on alleged to have been purchased by and delivered to him is sufficient evidence of ownership where such is not controverted or contradicted, and this is true where such possession is that only of the plaintiff's counsel. Michigan Mut. L. Ins. Co. *v.* Klatt, 2 Neb. (Unof.) 870, 90 N. W. 754, 2 Neb. (Unof.) 872, 92 N. W. 325.

The production by the plaintiff of a negotiable promissory note secured by a mortgage, which has been received by him by delivery from the payee without an indorsement, is sufficient evidence of the plaintiff's ownership. Greeley State Bank *v.* Line, 50 Neb. 434, 60 N. W. 966.

Contra. — A party seeking to foreclose who holds the note secured by the mortgagee's blank indorsement must give authentic evidence of the transfer of the note to him, and the mere fact of indorsement is not alone sufficient. Commercial Bank of New Orleans *v.* Poland, 6 La. Ann. 477. See also Tufts *v.* Beard, 9 La. Ann. 310; Burns *v.* Naughton, 24 La. Ann. 476.

93. Wilcox *v.* Hunt, 13 Pet. (U. S.) 378.

94. Proof by Record. — Lancaster

interest remain in arrears for a given period the principal sum shall become due at the option of the mortgagee, where it appears that the time stated for the payment of interest has elapsed, the production by the plaintiff of the bond and mortgage, without proof of non-payment of interest, is sufficient.[95]

XII. REDEMPTION.

1. Burden of Proof. — The party asserting a right to redeem has the burden of showing the exercise of his right within the appropriate time.[96] If payment is relied on the redemptioner has the burden to establish the making of the payments averred.[97] The defendant in a suit to redeem, relying on a paramount title, has the burden of establishing the superiority of his title.[98] In an action by a mortgagor to enforce an agreement permitting a redemption of the incumbered property, purchased by the mortgagee, a preponderance only is required to sustain the action.[99]

2. Proof of Right by Parol. — Parol evidence is admissible to

v. Smith, 67 Pa. St. 427. See articles "Best and Secondary Evidence." Vol. II, and "Records."

95. Sowarby *v.* Russell, 4 Abb. Pr. (N. S.) (N. Y.) 238.

96. Conditional Sale. — The party asserting a right of redemption from a conditional sale has the burden of establishing the time within which he is entitled to a reconveyance. Bridges *v.* Linder, 60 Iowa 190, 14 N. W. 217.

97. Payment When Relied on Must Be Proved. — Morgan *v.* Morgan, 48 N. J. Eq. 399, 22 Atl. 545; Strong *v.* Blanchard, 4 Allen (Mass.) 538.

In a suit by the mortgagor against the mortgagee for an accounting, indorsements of payments made on the mortgage by the defendant are admissible. Jordan *v.* Farthing, 117 N. C. 181, 23 S. E. 244.

Where property has been conveyed to another as security for a debt, which the latter has conveyed to a third party, in an action to redeem the plaintiff has the burden of proving payment of the debt. Agate *v.* Agate, 11 N. Y. St. 579.

In McIver *v.* Smith, 118 N. C. 73, 23 S. E. 971, the plaintiff had acquired the mortgagor's equity of redemption, and the defendant was a purchaser of the mortgaged property from the trustee in the deed of trust under a sale for default of payments. It was held that the plaintiff had the burden of showing that the debt had been satisfied at the time of the sale.

98. The complainants in a bill to redeem from a prior mortgage are not bound to show a title in their mortgagor in the first instance; and where the defendant claims by a paramount title, the complainants having a *prima facie* right to redeem, the defendant must assume the burden of showing a paramount title in himself. Farmers & Mechanics Bank *v.* Bronson, 14 Mich. 360.

Suit by Judgment Creditors Against Purchaser at Foreclosure. — Where, in an action to redeem, brought by a judgment creditor of the mortgagor against the purchaser at the foreclosure sale, the defendant relies upon a purchase of the mortgaged premises from the mortgagor before the rendition of the creditor's judgment, the burden is upon the defendant to prove such matters. Hodge *v.* Dent, 80 Iowa 378, 45 N. W. 1031.

99. First Nat. Bank *v.* Moor (Tex. Civ. App.), 79 S. W. 53.

show a right by agreement to redeem from the purchaser at a sale of the property on foreclosure.[1]

3. Certificate of Redemption as Evidence of Matters Recited. A certificate of redemption given pursuant to the statute is *prima facie* evidence of the fact of redemption and of the truth of the recitals therein.[2]

4. Miscellaneous Matters. — Where a purchaser from the mortgagor asserts a right to redeem as against the purchaser at the foreclosure sale, the non-delivery of the plaintiff's deed at the time of the foreclosure sale may be shown in defense.[3] As showing the insufficiency of the amount tendered to effect a redemption, the purchaser may prove the making of valuable improvements subsequently to the sale.[4] When a mortgagee has been in possession for such a period as presumptively to bar the mortgagor's right to redeem, the mortgagor may introduce evidence of acts of the mortgagee showing a continuance of the right to redeem.[5]

XIII. VACATING PROCEEDINGS AND SETTING ASIDE THE SALE.

1. Burden of Proof. — The party seeking to open or vacate a foreclosure proceeding or to set aside the sale made thereunder has the burden of establishing the grounds of his petition.[6] A purchaser under a deed of trust containing a power of sale is chargeable with notice of irregularities in the sale, but the rule is otherwise as to remote and subsequent purchasers.[7]

1. Foster *v.* Rice, 126 Iowa 190, 101 N. W. 771.

Evidence Held To Show a Right To Redeem by Agreement of Parties. Brown *v.* Johnson, 115 Wis. 430, 91 N. W. 1016. See *supra*, "Nature of Transactions."

2. **Prima Facie Evidence of Matters Required To Be Recited.** — Willis *v.* Jelineck, 27 Minn. 18, 6 N. W. 373.

3. In an action to redeem real estate sold under foreclosure the purchaser may show that the deed to the premises, upon which the plaintiff founds his right to redeem, though recorded, was unknown to the plaintiff, and hence not fully executed, until after the property had been bought by the defendant purchaser. Russ *v.* Stratton, 11 Misc. 565, 32 N. Y. Supp. 767.

4. **Tender. — Making of Improvements.** — In forcible entry and detainer by a mortgagor to recover the mortgaged premises after a foreclosure sale, on the ground that the redemption money required had been tendered and refused, the purchaser may show that he has made valuable permanent improvements. Harden *v.* Collins, 138 Ala. 399, 35 So. 357.

5. For this purpose an assignment of the mortgage by the mortgagee as collateral security may be proven by the mortgagor as showing an admission on the mortgagee's part that the mortgage continued as a subsisting obligation. Borst *v.* Boyd, 3 Sandf. Ch. (N. Y.) 501.

6. Maynes *v.* Moore, 16 Ind. 116; Vail *v.* McKernan, 21 Ind. 421.

If Fraud Is Alleged It Must Be Clearly Established. — Keiser *v.* Gammon, 95 Mo. 217, 8 S. W. 377 (evidence examined and held sufficient).

7. But a subsequent grantee in such circumstances, to be protected, on a bill in equity to set aside the sale and the successive conveyances, must introduce in evidence the trus-

2. Waiver of Irregularities Not Presumed as Against Mortgagor. A mortgagor suing to set aside a sale voidable for irregularities will not be presumed to have waived such irregularities when he knew nothing of them at the time of their occurrence.[8]

3. Interest of Petitioner. — A stranger to an action for foreclosure, seeking to set aside a sale of the property, has the burden of showing some interest in the property.[9] Even a party to the proceedings for foreclosure must show that the irregularity complained of will prejudice him.[10]

4. Previous Sales on Question of Value. — Evidence of the amounts received for the incumbered property at previous sales of the property, where its value does not appear to have changed, may be received on the issue of fraud and bad faith in making the particular sale.[11]

tee's deed and the deed from the purchaser. Gunnell *v.* Cockerill, 84 Ill. 319.

8. Meriwether *v.* Craig, 118 Ind. 301, 20 N. E. 769.

9. Humbolt Sav. & Loan Soc. *v.* March, 136 Cal. 321, 68 Pac. 968.

10. Humbolt Sav. & Loan Soc. *v.* March, 136 Cal. 321, 68 Pac. 968.

Inadequacy of price is not alone sufficient to avoid a sale under a foreclosure proceeding, but is a circumstance entitled to consideration along with the other facts and attending circumstances in ascertaining whether there has been a fair sale. Babcock *v.* Wells, 25 R. I. 23, 54 Atl. 599; Galvin *v.* Newton, 19 R. I. 176, 36 Atl. 3; Nichols *v.* Flagg, 24 R. I. 30, 51 Atl. 1039.

Sale in Disregard of Terms of Decree Presumed To Be Prejudicial. Meriwether *v.* Craig, 118 Ind. 301, 20 N. E. 769.

11. Keiser *v.* Gammon, 95 Mo. 217, 8 S. W. 377.

MOTIVE. — See Intent; Malice; Malicious Prosecution.

MUNICIPAL CORPORATIONS.

CROSS-REFERENCES:

Corporations;
Dedication;
Eminent Domain;
Highways;
Judicial Notice;
Officers;
Records.

I. CORPORATE EXISTENCE.

1. Judicial Notice. — The question of judicial notice of the charters of municipal corporations is fully discussed elsewhere in this work.[1]

2. Presumptions. — In one state, at least, it has been held that in an action by or against a municipal corporation it will be presumed, in the absence of evidence to the contrary, that the corporation was incorporated under the general laws of the state governing the incorporation of municipalities.[2]

3. Mode of Proof. — A. Production of Charter and Proof of Acts Done Thereunder. — Upon a collateral proceeding it is sufficient, for the purpose of proving the existence of a municipal corporation, to produce the charter,[3] or to prove acts done under it

1. See article "Judicial Notice," Vol. VII, p. 1020.

2. State *ex rel.* Columbus *v.* Hauser, 63 Ind. 155; Centerville *v.* Woods, 57 Ind. 192; Brazil *v.* Kress, 55 Ind. 14; Logansport *v.* Wright, 25 Ind. 512; House *v.* Greensburg, 93 Ind. 533.

3. In Howell *v.* Ruggles, 5 N. Y. 444, the appellant read in evidence a certificate of the clerk of the common council of the city of New York, annexed to the volume containing a copy of the charter thereof, in which certificate the clerk stated that the volume contained "a copy of the charter printed by authority of the common council of the city of New York;" and then offered to read in evidence the charter from said volume. His offer was rejected upon two grounds: (1) Because the volume was printed after the statute of April 17th, 1832, was passed; and (2) because the charter was offered to show title to real estate. The court, in holding neither ground tenable, said: "Although the second section of the action mentioned (Laws of 1832, p. 251) speaks of reading the charter 'in evidence from the volume,' etc., yet the legislature evidently did not intend to designate any volume in particular from which the charter should be read, but, on the contrary, intended to allow it to be read from any volume 'printed by authority of the common council.' Such was the character of the volume from which the appellant in this

and in conformity with it.[4] Record evidence that all the preliminary

case offered to read the charter. Nor does the act giving permission to read the charter in evidence from such a volume make any distinction in regard to the purposes for which it is to be read. It allows it to be so read generally, for all and every purpose. The rights of parties are not jeopardized by such permission, for the statute declares all evidence admitted under it to be *prima facie* only."

The Copy of a Charter of a Town, duly recorded in the town records and properly certified, is admissible to prove the charter. Forsaith *v.* Clark, 21 N. H. 409.

4. Mendota *v.* Thompson, 20 Ill. 197; Hamilton *v.* Carthage, 24 Ill. 22; Worley *v.* Harris, 82 Ind. 493. See also Jameson *v.* People, 16 Ill. 257, 63 Am. Dec. 304; People *ex rel.* Gridley *v.* Farnham, 35 Ill. 562.

The Exercise of Corporate Functions by a Town and the recognition of it by the legislature as a corporation are circumstances to be considered in determining the question of its corporate existence. Wells *v.* Pressy, 105 Mo. 164, 16 S. W. 670.

The Due Organization of a Town Previous to a Particular Time may be presumed from the fact that at that time it had appointed town officers and was exercising the rights and powers belonging to organized towns. Londonderry *v.* Andover, 28 Vt. 416. The court said: "Towns are *quasi* corporations, and it is not necessary for this purpose to show a strictly legal organization. It is sufficient that the town was organized *de facto*. The appointment of listers, a town clerk with other town officers, and the fact that they were then exercising those corporate rights and powers belonging to organized towns was sufficient *prima facie* proof of their due organization."

Evidence that the inhabitants of a particular place have exercised the rights and have performed the duties of a municipal corporation, and that it has been recognized as such, may be submitted to a jury on which to find an incorporation in fact. New Boston *v.* Dunbarton, 12 N. H. 409, 15 N. H. 201.

In Eubank *v.* Edina, 88 Mo. 650, an action against the defendant as a municipal corporation, wherein the mayor and other officers testified as to their official capacity, and a pamphlet purporting to be the book of ordinances of the city was put in evidence without objection, these ordinances showing that the defendant had a mayor, board of aldermen and such other officers as cities of the fourth class have, it was held that the proof was ample not only that the defendant was a municipal corporation, but that it was a city of the fourth class, although better evidence might have been offered if called for.

In Fitch *v.* Pinckard, 5 Ill. 69, for the purpose of proving the existence of a town corporation, the statute incorporating the town having been introduced in evidence, an offer was made to introduce the original minutes of the board of trustees of the town, proved by the clerk, to show the acceptance of the act and the proceedings under it. It appeared that the minutes had been transcribed into a book kept by the board of trustees for that purpose, which, however, had been lost. It was held that the minutes were admissible, and that the evidence was sufficient to establish the corporate existence. The court said: "The object was to establish the incorporation of the town under the act of 1833, and the act being read, the original minutes of the trustees, showing the acceptance of the charter and their acts under it, are good evidence to establish the fact. I think them of quite as high a grade of evidence as the book into which they had been transcribed. But admitting that they were but secondary, still their introduction was proper, the loss of the book having been shown. Much slighter proof has been received as sufficient to establish the existence of a corporation. Thus, having produced the act of incorporation, proof of acts by the corporation under it has been held sufficient evidence of the acceptance of the charter and organization of the corporation."

steps looking to the formal organization of the corporation were taken is not necessary.[5]

Upon a Direct Proceeding, by *quo warranto* or otherwise, to test the validity of the organization of a municipal corporation, it is necessary to show the manner of the organization under the charter, or that all of its requirements have been complied with.[6] But it has been held that even on such a proceeding strict proof of legal organization will not be required after the lapse of more than twenty years, during which time all the functions of a municipal government were exercised with public acquiescence.[7]

B. Reputation. — Where there is no record evidence of the incorporation and organization of a municipality, corporate existence may be proved by reputation.[8]

5. Mendota *v.* Thompson, 20 Ill. 197, where the court said: "Proof that all preliminary steps were taken, and that, too, by written evidence, as was insisted on in this case, would produce not only great public inconvenience, but, owing to those omissions to record facts with which all public bodies are chargeable, would be impossible."

Compare State *v.* Frost, 103 Tenn. 685, 54 S. W. 986, which was a prosecution for unlawfully selling liquors, the sale being justified or excused on the ground that it was within the limits of an incorporated town, and therefore not unlawful, where the court held that strict and literal compliance with the statutory requirements is essential in proceedings for the incorporation of a municipality. "Hence a municipal charter is void if it does not appear that the application or charter was registered as required by statute. The production of the charter in evidence by the county registrar without his certificate of registration affords no presumption that it was registered."

6. See Hamilton *v.* Carthage, 24 Ill. 22.

7. The defendant will be required to make only such proof as the nature of the case will permit. "Municipal corporations being required by public necessity, the law itself, for the purpose of strengthening the infirmity of evidence and upholding the public peace and the security of private property, will indulge, after long-continued use of corporate powers and the public acquiescence, in presumptions in favor of their legal existence. The policy of the law is to sustain rather than to defeat them." People *ex rel.* Mohlenbrock *v.* Pike, 197 Ill. 449, 64 N. E. 393.

8. Barnes *v.* Barnes, 6 Vt. 388, where it was held that the existence and organization of a school district may be proved by reputation if its organization does not appear of record. "All that is necessary in such case is to show that there is a district long known and recognized as such."

In Bassett *v.* Porter, 4 Cush. (Mass.) 487, speaking of a school district, the court said: "It was by no means necessary to produce a record of the laying out of the district, or any direct and positive evidence of such laying out; the fact that such a district had existed, had been known, recognized, and had acted as such in all respects, would be ample evidence from which a jury might well infer, or presume, that it had a legal origin, though no direct or positive evidence of its origin could be produced. In truth, the simple fact of the existence, in such a town as Taunton, of a school district, known and acting as such for many years, would lead the mind almost unavoidably and irresistibly to the conclusion that it must have had a legal origin. The longer its existence could be shown, the stronger would be the presumption that it was originally duly established, and that the direct evidence of its establishment had been lost by time and accident."

Where the act incorporating a

C. Admissions. — Corporate existence may be established by admissions in pleadings purporting to have been made by the city itself.[9]

D. Legislation Recognizing Corporate Existence. — Public acts of the legislature recognizing the existence of a municipal corporation and empowering it to act as a body corporate in issuing and negotiating municipal obligations, upon the faith of which individuals have invested their money, preclude inquiry into the question of the original legal organization of the corporation, and are conclusive upon the question of its existence.[10]

Acceptance of Charter. — Where the charter or the amendment to a charter of a municipal corporation provides that it shall be submitted to a vote of the electors and go into effect if there be a majority in its favor, a subsequent act of the legislature recognizing the charter as in force proves *prima facie* the acceptance of the charter or amendment.[11]

II. ACTS AND PROCEEDINGS BY MUNICIPAL OFFICERS AND BODIES.

1. Presumptions and Burden of Proof. — A. Matters of Administrative or Non-Legislative Character. — a. *In General.* — One

town cannot be found, parol evidence tending to show its existence and loss may be received, and it is competent evidence of the incorporation after more than thirty years' use of the powers and privileges of a town. Stockbridge *v.* West Stockbridge, 12 Mass. 400.

In Dillingham *v.* Snow, 5 Mass. 547, an action of trespass for taking and carrying away personal property of the plaintiff, which was shown on the trial to have been taken as a distress under a warrant issued by the defendants as parish assessors on the plaintiff's refusal to pay taxes, it appearing from the regular evidence that no act of incorporation of the parish could be found, it was held that the court very properly permitted the defendants to prove incorporation by reputation.

9. Where a City Making an Affirmative Defense to proceedings under the statute to exclude certain lands from the limits of the corporation admits that all necessary steps were taken by the plaintiffs up to the time of the trial, and the mayor and members of the council testify to their official capacity, such proof and admissions establish the corporate existence for the purpose of the proceeding, and the city is estopped from urging anything inconsistent therewith. Pelletier *v.* Ashton, 12 S. D. 366, 81 N. W. 735. Where a public municipal corporation appears and makes an affirmative defense, based upon the fact that it is a corporation, it thereby admits its corporate existence. Eubank *v.* Edina, 88 Mo. 650.

10. Jameson *v.* People, 16 Ill. 257, 63 Am. Dec. 304; People *ex rel.* Gridley *v.* Farnham, 35 Ill. 562. In Toledo, P. & W. R. Co. *v.* Chenoa, 43 Ill. 209, it was insisted that there was no evidence in the record that the defendant town was ever incorporated, and hence the town officers had no power to pass the ordinance for the violation of which suit was brought, but it was held that the objection was without merit, because there was introduced in evidence an act of the legislature legalizing the acts of the town in organizing the corporation, thus fully recognizing the organization of the corporation and curing all defects which may have occurred in its organization, and validating all constitutional ordinances passed by the town.

11. State *v.* Tosney, 26 Minn. 262, 3 N. W. 345.

who asserts the existence of a contract between himself and a municipal corporation, and claims rights thereunder, must show a valid contract as claimed.[12]

In an Action Upon City Warrants the holder must show that they were presented for payment to the proper officer, or show facts excusing such presentation.[13]

b. *Regularity.* — **(1.) Generally.** — Where the question as to the regularity of the acts of a municipal officer or body is not one of power, but of the manner in which the act was done, the presumption is that the duty was performed in a legal and sufficient manner.[14]

12. Sullivan *v.* Leadville, 11 Colo. 483, 18 Pac. 736, an action to recover damages for an alleged breach of contract by the defendant for grading and macadamizing certain streets, where it was held that as the plaintiffs rested their proof of the making of the contract, on the part of the defendant, upon its acceptance of their bid for doing the work, they must show that such acceptance was made in the manner prescribed by statute for the making of contracts by the council of a municipal corporation.

13. Central *v.* Wilcoxsen, 3 Colo. 566.

"Not Paid for Want of Funds." Connersville *v.* Connersville Hydraulic Co., 86 Ind. 184. The court said: "Ordinarily corporation orders are evidences of indebtedness upon which the holder may maintain an action. They constitute *prima facie* causes of action, for the presumption is that the officer by whom they were drawn did his duty. . . . It is not necessary for the holder of a warrant to show that the treasurer indorsed it 'not paid for want of funds.' It is sufficient for him to show that it was presented and payment refused. If it was the duty of the treasurer to make such an indorsement, and he failed to do his duty when the warrant was presented to him, then his wrong was that of the corporation, and not of the holder of the warrant, and it cannot be allowed to defeat his recovery. . . . It is well settled that the holder of a warrant is not bound to show that the municipality had funds in its treasury. It would be a strange doctrine that would impose upon a creditor, holding his debtor's obligation, the duty of showing both a liability and an ability to pay."

14. Kelley *v.* Broadwell (Neb.), 92 N. W. 643, *holding* that where a party seeks to enjoin the payment of city warrants drawn upon a specific fund, alleging that no estimate or appropriation had been made or fund created for their payment, the burden is upon him to establish these facts, and unless he overcomes the presumption of official regularity he is not entitled to a decree.

Presence of Mayor at Meeting of City Council. — Where a resolution of a city council directs the city marshal to notify a licensee that his license has been revoked by the mayor and council of the city, it will not be presumed that the mayor was not present at the meeting, it being his official duty to preside at all meetings of the council. Martin *v.* State, 23 Neb. 371, 36 N. W. 554.

Exceeding Law as to Appropriation. — In Howard *v.* Oshkosh, 33 Wis. 309, an action against the city to recover for the contract price of the construction of a bridge, the city charter provided that the council should have authority to appropriate in any one year over and above the ordinary expenses needed on the bridges in the city an expenditure not to exceed $10,000 for the construction of a new bridge, and that instead of collecting money for the payment of the same in the next tax roll it may issue its bonds, and it was held that the presumption was to be indulged in that case that the council had kept within the provisions of the statute, there being no proof that a tax was imposed or bonds issued in excess of the charter limit, notwithstanding the

But where the question involves the element of power of the officer or body to do the act a different rule prevails.[15]

(2.) Liability Exceeding Indebtedness Allowed by Law. — Where a municipal corporation seeks to escape liability on an obligation upon the ground that it created an indebtedness in excess of the limit fixed by law it has the burden of proving all the facts necessary to establish that defense.[16]

(3.) Instrument Executed Under Corporate Seal. — The seal of a

record showed the letting of the contract for the bridge in question at a price greatly exceeding $10,000.

Issuance of Warrant. — In an action on city warrants issued for current expenses, where it is admitted that the warrants were signed by the mayor and clerk, and that the city received full consideration therefor, and the defense is that the warrants were not issued in pursuance of an ordinance previously passed appropriating money to the payment thereof, the burden is upon the city to affirmatively show that no such ordinance had been passed. Hubbell *v.* South Hutchinson, 64 Kan. 645, 68 Pac. 52.

Recommendation as to Public Improvements. — Where it appeared by the proceedings of the city council that a report and recommendation of the board of city improvements had been made to it, and that thereupon the council proceeded to make the improvements so recommended, it will be presumed, until the contrary is shown, that the report and recommendation of the board was duly and properly made. Reynolds *v.* Schweinefus, 27 Ohio St. 311.

In McKee *v.* Greensburg, 160 Ind. 378, 66 N. E. 1009, an action against a city to recover damages for the alleged breach of a contract in refusing to permit the plaintiff to improve a street after accepting his bid, it appearing that the proceedings had been under the Indiana statute known as the "Barrett Law," and that the common council had entered a resolution purporting to rescind its action in accepting plaintiff's bid, it was held that the presumption must be in favor of such official action, and that accordingly the burden was upon the plaintiff to show that jurisdiction had attached to make the improvement. See also Barber Asphalt Pav. Co. *v.* Edgerton, 125 Ind. 455, 25 N. E. 436.

15. Reynolds *v.* Schweinefus, 27 Ohio St. 311, where the court said: "In cases where restraint is put upon their action by statute, and they can only act upon the authority and recommendation of another body, it would not be wise, by mere construction, to lessen the force of the restraint, to presume jurisdiction, simply because of its exercise."

On the trial of an appeal from the commissioners' report to the circuit court in a proceeding under the Indiana statute by a town to take land for street purposes, the burden of proof is upon the town to show the regularity of the proceedings of the board of town trustees. "It must show among other things that the report of the commissioner was adopted, and this must be shown by parol. This burden, however, is satisfied where the transcript of the record of the town trustees shows upon its face compliance with all the statutory requirements, where the objection is that the original record does not show such compliance and an amendment showing compliance had been made without order or direction on the part of the town trustees, the objection, however, not alleging that the report had not been adopted by the board." Terre Haute & L. R. Co. *v.* Flora, 29 Ind. App. 442, 64 N. E. 648.

16. Crebs *v.* Lebanon, 98 Fed. 549; German Ins. Co. *v.* Manning, 95 Fed. 597; Arbuckle-Ryan Co. *v.* Grand Lodge, 122 Mich. 491, 81 N. W. 358.

Although a municipal corporation cannot become indebted beyond a certain limit, and its officers cannot exceed the lawful appropriations in making contracts, yet the plaintiff is not required in every action against a municipal corporation to show that

municipal corporation to an instrument is *prima facie* evidence that it was placed there by proper authority, and raises the presumption that the instrument is the act of the corporation.[17]

B. Matters of Legislative Character. — a. *Existence of Ordinance, By-Law, Etc.* — Ordinances, by-laws or other acts of municipal corporations of a legislative character are private laws, of the existence of which courts do not ordinarily take judicial notice;[18] as in the case of other private laws, they must be proved.[19]

b. *Validity of Ordinance.* — **(1.) Generally.** — The presumption is always in favor of the validity of an ordinance passed in pursuance of competent statutory authority, and the burden of showing the invalidity of an ordinance is upon the one asserting that fact.[20]

it was not indebted beyond the constitutional limit, or that the expense involved in the contract did not exceed the appropriations. Chicago *v.* Peck, 196 Ill. 260, 63 N. E. 711.

In an action against a municipal corporation to recover for services rendered, where the employment of the plaintiff by proper authority and his performance of the services are admitted, and the defense set up is that the city could not create this liability under the constitution of the state because of the fact that its debts and liabilities in the aggregate already exceed the constitutional limit, the burden of proving that fact is upon the defendant city. Adams *v.* Waterville, 95 Me. 242, 49 Atl. 1042.

17. Chouquette *v.* Barada, 33 Mo. 249; Swartz *v.* Page, 13 Mo. 603; Wells *v.* Pressy, 105 Mo. 164, 16 S. W. 670; Memphis *v.* Adams, 9 Heisk. (Tenn.) 518; Levering *v.* Mayor Etc. of Memphis, 7 Humph. (Tenn.) 553; Adams *v.* Dignowity, 8 Tex. Civ. App. 201, 28 S. W. 373. See also the article "Deeds," Vol. IV.

In Morrison *v.* McMillan, 4 Litt. (Ky.) 210, 14 Am. Dec. 115, it was held that where town trustees are invested by a special statute with the title to land, and with a general authority to sell and convey, a conveyance by them, without the aid of extraneous evidence, *prima facie* implies everything to have been done which ought to be done to vest the title in the purchaser.

18. In Tilford *v.* Woodbury, 7 Humph. (Tenn.) 190, a suit to recover a penalty for violating a city ordinance, the plaintiff offered to read a paper, purporting to be an ordinance of the town, to the reading of which the defendant objected because it had not been proved to be such ordinance. The court said: "It is a well-settled principle that private laws must be proved; that until they are proved courts do not take notice of them, as they do of public statutes. The charter of a town is a private law and should be proved. For a much stronger reason are the by-laws of such corporate town private laws. They cannot be noticed by the court simply by the production of the book purporting to contain them. They are evidence of the law only upon proof that they are the laws of the corporation." And see article "Judicial Notice," Vol. VII.

19. Zimmerman *v.* Stahl, 38 App. Div. 638, 56 N. Y. Supp. 600; McRoberts *v.* Sullivan, 67 Ill. App. 435.

In a prosecution for a violation of a municipal ordinance it is indispensable that the evidence should show that the ordinance was in force at the time the act complained of was committed. Raker *v.* Maquon, 9 Ill. App. 155; Eubanks *v.* Ashley, 36 Ill. 177; Stevens *v.* Chicago, 48 Ill. 498.

Where the defendant, in a prosecution for the violation of a municipal ordinance, objects to the introduction of the ordinance on the ground that the municipal ordinances had been revised, and that all ordinances not included in the revision were repealed, the burden is on him to show that the ordinance objected to is not on the revised list. Hanna *v.* Kankakee, 34 Ill. App. 186.

20. Chicago & A. R. Co. *v.* Carlinville, 103 Ill. App. 251.

(2.) Reasonableness. — So, too, the presumption is in favor of the reasonableness of an ordinance or by-law duly adopted and within the corporate powers.[21] And one who attacks the ordinance on the ground of unreasonableness has the burden of showing wherein it is unreasonable.[22]

(3.) Election and Qualification of Members of Body or Officers. — The presumption is in favor of the legality of the election and qualification of corporate officers.[23]

(4.) Power to Pass the Ordinance or By-Law. — Some courts have held that where an ordinance is objected to it is incumbent upon the

In the absence of any evidence to the contrary it will be presumed that the municipal authorities acted rightly in passing an ordinance authorizing a public improvement. Rutherford *v.* Hamilton, 97 Mo. 543, 11 S. W. 249.

In a proceeding to recover a penalty fixed by an ordinance for its violation, if the defendant predicates his defense on the invalidity of the ordinance the burden is upon him to establish his defense. Frankfort *v.* Aughe, 114 Ind. 77, 15 N. E. 802, 114 Ind. 600, 15 N. E. 804.

A printed pamphlet of ordinances read in evidence, purporting to be published by authority of the corporation under its charter, which also provides that such publication shall be received in evidence in all courts without further proof, is sufficient to impose the burden of showing the invalidity of the ordinance upon the defendant in a prosecution for its alleged violation. Canton *v.* Ligon, 71 Mo. App. 407.

21. Van Hook *v.* Selma, 70 Ala. 361 (holding further that the court could not judicially know that the amount of a license fee was unreasonable); Com. *v.* Patch, 97 Mass. 221; Ivins *v.* Trenton, 68 N. J. L. 501, 53 Atl. 202, *affirmed* 69 N. J. L. 451, 55 Atl. 1132; New York *v.* Hewitt, 91 App. Div. 445, 86 N. Y. Supp. 832; Greensburg *v.* Young, 53 Pa. St. 280.

Where a municipal corporation has general power to pass an ordinance, the mere passage of the ordinance makes out a *prima facie* case for the validity of the ordinance so far as concerns any question of unreasonableness. The presumption is in favor of a reasonable and legitimate exercise of power by the city authorities; and when the courts are called upon to exercise the judicial function of declaring a municipal ordinance unreasonable they will do so only when the *prima facie* case made by the passage of the ordinance is overcome in the most satisfactory manner. Morse *v.* West Port, 110 Mo. 502, 19 S. W. 831.

If an ordinance is based upon a general power and its provisions are more detailed than the expression of power conferred, the court may look into its reasonableness. The presumption is that it is reasonable, and the burden is upon the party who denies its validity. Trenton Horse R. Co. *v.* Trenton, 53 N. J. L. 132, 20 Atl. 1076.

22. Moore *v.* District of Columbia, 12 App. D. C. 537.

The Adoption of an Ordinance Is Not Conclusive Evidence of Its Reasonableness, but the presumption in favor of its reasonableness is open to rebuttal by any person affected by it giving in evidence facts showing that in his case its enforcement would be unreasonable. Mayor *v.* Dry Dock E. B. & B. R. Co., 133 N. Y. 104, 30 N. E. 563, 28 Am. St. Rep. 609.

23. In a proceeding to recover a penalty for the alleged violation of a town ordinance it is not necessary to show that the members of the board of trustees which passed it were duly elected. The general rule is that in prosecutions for violations of town or city ordinances all that need be shown is that the persons assuming to be officers acted as such. Hardenbrook *v.* Ligonier, 95 Ind. 70.

party offering it to show that the corporation had the power to pass it.[24]

(5.) Regularity of Proceedings in Relation to Ordinance or By-Law. (A.) GENERALLY. — In some jurisdictions the courts lay down the broad rule that the presumption in favor of the regularity of the proceedings of the legislative department of the government applies to the regularity and legality of the proceedings of municipal corporations,[25] although this rule has been denied, and courts have held

24. Schott *v.* People, 89 Ill. 195. See also Dunham *v.* Rochester, 5 Cow. (N. Y.) 462; State *v.* Threadgill, 76 N. C. 17.

"Where a question arises as to any particular ordinance which it is claimed interferes with the rights of individuals as enjoyed under the common law or by statute, the burden of proof should be on the corporation to show that it has not exceeded its authority in framing such ordinance." St. Paul *v.* Laidler, 2 Minn. 190, 72 Am. Dec. 89.

In an action by a municipal corporation to recover a penalty for the violation of the city ordinance, the ordinance on which the prosecution is based should not be received in evidence on behalf of the municipality, unless accompanied by proof that the corporation had authority to pass the ordinance. Alton *v.* Hartford F. Ins. Co., 72 Ill. 328.

Compare McCaffrey *v.* Thomas, 4 Pen. (Del.) 437, 56 Atl. 382, an action to recover damages for unlawful arrest, wherein the defendant proved by the secretary of the town council, of which the defendant was a peace officer, that a certain book contained the ordinances of the town as regularly adopted at a meeting of the town council, and offered the ordinances in evidence, and it was held that the ordinance was admissible as against the plaintiff's objection that it was not shown that the ordinance under which the defendant claimed to have acted in making the arrest was authorized by the act of incorporation of the town.

25. Duluth *v.* Krupp, 46 Minn. 435, 49 N. W. 235, where it was held that under a charter providing that no ordinance should be passed at the same meeting at which it was presented except by unanimous consent, it would be presumed, in the absence of proof to the contrary, that an ordinance had been introduced at some prior meeting, the records themselves not affirmatively showing that fact.

In Dollar Sav. Bank *v.* Ridge, 183 Mo. 506, 82 S. W. 56, an action to enforce the lien of a special tax bill against the defendant's land, it was held that presumably every step to the valid enactment of the ordinance which was the basis of the performance and construction of the work for which the tax bill in question was issued was properly taken, and that the burden of showing that such ordinance was not legally enacted rested upon the defendant. "The meetings held by the city council and the official acts of the members of that body are entitled to the indulgence of the presumption that they were legally authorized meetings. Such presumption may be rebutted and the invalidity of the acts of the common council may be shown; such acts are susceptible of statutory proof; hence the invalidity of official acts and the destruction of the presumption as to their validity should not be made to rest upon a mere inference."

In an action against a city to recover for injuries caused by a defective sewer constructed by the city it is not necessary for the plaintiff to prove that the ordinance directing the construction of the sewer was regularly adopted; it is enough to prove that the city had assumed to adopt the ordinance, and that, acting under it, the corporate authorities had constructed the sewer. "The controlling question in such cases as this is not whether the city authorities have proceeded regularly, but whether they have assumed to exercise general authority to construct sewers conferred upon the munici-

that this presumption does not obtain and strict proof must be made.[26]

Some courts distinguish between matters not required to be made of record and those required to be made of record, holding in the former case that the action of the legislative body will be presumed to have been regular and lawful and such as the law required,[27] but in the latter case holding the requirement to be mandatory, and that if the record of the proceedings as to the adoption of the ordinance or by-law does not show such action no presumption can obtain that the requirement was complied with.[28]

pality, and have negligently built or maintained its sewers." Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743.

The production of a duly certified copy of an ordinance of a municipal corporation acting under the general laws affords *prima facie* evidence that every step has been taken to make it valid; and if the party against whom the ordinance is desired to be used as evidence wishes to controvert the fact that the ordinance was passed as required by law it devolves upon him to produce the journal and thus overcome the *prima facie* case made out by the production of the ordinance, or a certified copy thereof. Lindsay *v.* Chicago, 115 Ill. 120, 3 N. E. 443.

Where the point at issue involves the proper and regular enactment of the ordinance, and not merely its *prima facie* existence as a law of the town, a different mode of proof must be resorted to. It then becomes necessary to have recourse to the journals of the town meeting, and from them it must appear that every essential step in the enactment of the law has been observed and taken. In other words, proof of the existence and identity of the ordinance offered should by right be all that is required of the prosecution in any case, until some showing has been made that there was irregularity in the enactment of the ordinance, in which case it becomes necessary to prove that it was properly enacted in order to sustain a conviction or judgment. If no such question is raised, the presumption that the ordinance was properly passed becomes conclusive. Barnes *v.* Alexander City, 89 Ala. 602, 7 So. 437.

"In the passage of a general ordinance affecting subjects of municipal administration it should and will be presumed that the common council acted in the exercise of a judgment upon facts, and for reasons calling for such legislative action." Mayor *v.* Dry Dock E. B. & B. R. Co., 133 N. Y. 104, 30 N. E. 563, 28 Am. St. Rep. 609.

Under the Washington Statute, Bal. Code, § 1299, a certified copy of the record of an ordinance is *prima facie* proof of its due passage establishing the existence of the ordinance until the presumption is overcome. Gove *v.* Tacoma, 34 Wash. 434, 76 Pac. 73.

26. Altoona City *v.* Bowman, 171 Pa. St. 307, 33 Atl. 187, where the court said: "The cases are widely different. In the consideration of acts of assembly, etc., emanating directly from the law-making department, courts, as members of the judicial department, must necessarily presume that every constitutional requirement in the enactment of such laws has been observed. A proper degree of deference is due by each department to each of the others. The limited power and authority with which municipal corporations as agencies of the city are invested must be exercised strictly within the lines and limitations prescribed by the law-making power."

27. Markham *v.* Anamosa, 122 Iowa 689, 98 N. W. 493. See also State *v.* Vail, 53 Iowa 550, 5 N. W. 709; Eldora *v.* Burlingame, 62 Iowa 32, 17 N. W. 148; Preston *v.* Cedar Rapids, 95 Iowa 71, 63 N. W. 577; Downing *v.* Miltonvale, 36 Kan. 740, 14 Pac. 281.

28. Olin *v.* Meyers, 55 Iowa 209, 7 N. W. 509; Pickton *v.* Fargo, 10 N. D. 469, 88 N. W. 90; Greeley *v.* Hamman, 17 Colo. 30, 28 Pac. 460; Tracey *v.* People, 6 Colo. 151.

(B.) The Meeting. — In the absence of any evidence to the contrary it will be presumed that the meeting at which the ordinance or by-law in question was passed was properly convened.[29]

(C.) The Reading of the Ordinance, Etc. — The distinction noted *supra* as to requirements which are mandatory and those which are not seems to be observed by the courts in respect to the reading of a proposed ordinance or by-law previous to its passage.[30]

29. Rutherford *v.* Hamilton, 97 Mo. 543, 11 S. W. 249.

Where the record of a special meeting of the city council kept by the clerk shows that the meeting was called for the purpose of transacting the very business which was transacted, and that every member of the council was present and participated in the proceedings, the presumption is, in the absence of evidence to the contrary, that the meeting was a legal meeting duly and regularly called. Greeley *v.* Hamman, 17 Colo. 30, 28 Pac. 460, *distinguishing* Tracey *v.* People, 6 Colo. 151. The court said: "The statute provides for the calling of a special meeting of the council by notice to be served personally or to be left at the usual place of residence of each member. But it is not required that such notice or the record of such service shall be preserved in any particular manner. Hence, when the record shows that a special meeting was called and held it is to be presumed that the call was regular, and that the service of notice was duly made as required by the statute; at least, until the contrary is proved."

An ordinance authorizing the improvement of a street will be presumed to have been passed at a regular meeting by all the councilmen present when the proof tends to show that its passage was at an adjourned session of a regular meeting, and the record states that the ordinance was passed and the several councilmen, naming them, voted in the affirmative, and that none voted against it. Seattle *v.* Doran, 5 Wash. 482, 32 Pac. 105, 1002.

In Dollar Sav. Bank *v.* Ridge, 183 Mo. 506, 82 S. W. 56, which involved the validity of an ordinance attacked on the ground that it had been passed at what was called a special session, and that such a session was not legally convened, because at the time it was held there was no manner provided by ordinance for publishing the mayor's proclamation convening a special session of the common council as required by the city charter, it was held that the production in evidence of an ordinance of a certain date providing for the publication of proclamations by the mayor calling special sessions does not establish the fact that no ordinance was in existence prior to that time. "That would only be a mere inference of the non-existence of an ordinance at a particular date by the proof of its existence at a later date. In a municipal government there are proper custodians of all records bearing upon this subject, and there should at least be some affirmative testimony that no ordinance providing for the publication of the proclamations calling special sessions was in existence."

30. Where neither by statute nor by the ordinance itself is it requisite that the journal of the proceedings of a city council should show affirmatively that an ordinance was read at the time of its presentation for passage, it will be presumed that it was read when presented where it appears regular in other respects. Chicago Tel. Co. *v.* Northwestern Tel. Co., 100 Ill. App. 57, *affirmed* 199 Ill. 324, 65 N. E. 329.

The fact that the journals of the two boards composing the general council of a city do not state in express terms that an ordinance was read in full in compliance with a charter provision that no ordinance shall be attested until it shall be read in full in each board does not affect the legality or validity of the ordinance. Where the journals show that the ordinance was separately read and passed, and show the names of the aldermen and council-

(D.) THE VOTE. — (a.) *Generally.* — Where the records of a city council show the adoption of an ordinance or by-law it will be presumed to have been adopted by the requisite majority,[31] unless the requirement as to the record of the vote comes within the rule already noted as to mandatory requirements.[32]

(b.) *Where Unanimity Is Indispensable* to the legal authority to pass an ordinance, and such ordinance was entered on the records of the corporate books, it will be presumed to have been passed unanimously, although that fact does not appear in the record.[33]

(c.) *Calling the Yeas and Nays.* — Where the calling of the yeas and nays is a mandatory requirement, and the record does not show compliance therewith, it will not be presumed that they were called.[34]

men voting for and against its passage, the presumption arises that it was read in full as required by the charter. Elliott *v.* Louisville, 101 Ky. 262, 40 S. W. 690.

In Eldora *v.* Burlingame, 62 Iowa 32, 17 N. W. 148, a prosecution for the alleged violation of a town ordinance, the defendant offered oral evidence to prove that the record of the council showing the passage of the ordinance upon a motion suspending the rule requiring it to be read on three different days failed to establish the validity of the ordinance because the rules were not suspended upon the vote of a sufficient number of councilmen, but it was held that since the record recited that the rules were suspended, without showing the number of votes on the question, the law would conclusively presume in a collateral action that it was correct.

31. Brewster *v.* Davenport, 51 Iowa 427, 1 N. W. 737.

Although under a city charter an ordinance cannot be passed except by the vote of a majority of all the members of the council or board of aldermen in its favor, yet where it appears that nine out of the ten members were present at the submission of an ordinance, and the entry, instead of merely reciting the passage, declares it to have been passed by a "majority vote," it will be presumed that the entry meant such a majority as was required by the charter. McCormick *v.* Bay City, 23 Mich. 457.

32. Under the provisions of the charter of the city of Tacoma, Washington, requiring the passage of a resolution for the improvement of a street over the remonstrance of abutting property owners, to be adopted by a two-thirds vote of the council, the journal must show that two-thirds of the council actually voted to order such improvement, and no presumption of compliance with the charter can be drawn from the passage of the resolution by a *viva voce* vote. Buckley *v.* Tacoma, 9 Wash. 269, 37 Pac. 446.

33. Lexington *v.* Headley, 5 Bush (Ky.) 508. In Louisville *v.* Hyatt, 2 B. Mon. (Ky.) 177, 36 Am. Dec. 594, where an allegation that a city ordinance had been "duly made" was not denied, the court held that it would be presumed that the ordinance passed by a unanimous vote, as required by the charter.

In Covington *v.* Ludlow, 1 Metc. (Ky.) 295, it was said, after stating the rule to be as in the text, that it is a mere presumption that what has been done at a meeting of the city council has been done according to law, and that no such presumption can arise where there is nothing in the journal upon which it can be predicated.

34. Markham *v.* Anamosa, 122 Iowa 689, 98 N. W. 493; Tracey *v.* People, 6 Colo. 151. In that case it was held that inasmuch as the statute (Gen. Laws, p. 896, § 26; 2 Mills', § 4445) requires that on the passage of every ordinance "the yeas and nays shall be called and *recorded*," the court was not at liberty to presume that the statute was complied with unless the record affirmatively showed that the yeas and nays were recorded. The statute was held to be mandatory; and, further, that the actual entry of the yeas and nays in

But the presumption will obtain where the requirement is not mandatory, even though the record does not show compliance.[35]

(d.) *Voted Separately.* — It will be presumed that ordinances passed at the same meeting are voted on separately.[36]

the record was an essential requirement. Of course the court could not presume that the yeas and nays *were recorded*, when by an inspection of the record it was found that they *were not recorded.*

35. Where the only provision regulating the voting on the passage of an ordinance by a city council under a charter is a rule adopted by the council that "all votes taken on the adoption of ordinances shall be taken by the ayes and nays," the record is properly admitted in evidence where it does in fact show that all members of the council voted for the ordinance in question, although it does not show that the yeas and nays were called; under such circumstances it may well be presumed that the ordinance was adopted or passed in the manner required by the rule. Preston *v.* Cedar Rapids, 95 Iowa 71, 63 N. W. 577.

In Boyd *v.* Chicago, B. & Q. R. Co., 103 Ill. App. 199, the plaintiff offered a certified copy of the ordinance declared upon, the certificate of the city clerk stating it was passed on September 4, 1899. Defendant objected to the introduction of said ordinance, and in support of the objection offered to the court a certified copy of the record of the proceedings of the city council of said city at said meeting of September 4, 1899, which record failed to show that the yeas and nays were taken on the passing of said ordinance and entered of record upon the journal of the council proceedings, and did not show what aldermen, or how many, voted for the ordinance, but only set forth the conclusion of the clerk that it passed. Defendant also offered in evidence to the court, in support of its objection, an ordinance adopted June 26, 1894, establishing rules for the conduct of business by the city council, one of which required the yeas and nays to be taken on the passage of all ordinances and to be entered on the journal of its proceedings. It was held that the certificate of the clerk of the ordinance offered by the plaintiff that it was passed September 4, 1899, was *prima facie* proof sufficient to entitle it to be admitted in evidence, but that did not preclude the defendant from showing to the court by the journal that the ordinance had not, in fact, been legally adopted.

In S. D. Moody & Co. *v.* Spotorno, 112 La. 1008, 36 So. 836, an action to recover from the defendant for his share of the cost of the construction of a sidewalk under a contract made by the plaintiff with the city, it was contended by the defendant that the ordinance under which the contract was entered into was never legally adopted, the yeas and nays not having been called and recorded as required by the charter, but it was held that the certificate of the clerk of the city council at the bottom of the ordinance that it was adopted by the city council made a *prima facie* case in favor of the due adoption of the ordinance.

In re Board of Rapid Transit Railroad Com'rs, 18 N. Y. Supp. 320, it was urged that the New York rapid transit act provides that the adoption by the common council of a resolution approving the plans and conclusions of the rapid transit commissioners and consent to the construction of the railway or railways in accordance therewith shall be by vote taken therein by yeas and nays, and that in the report which gives the proceedings of the common council it did not appear that the yeas and nays were taken on the vote, but it was held that since it did appear that twenty-two members of the common council voted in favor thereof, and it did not appear that the vote was not taken by yeas and nays, the court could not presume the fact for the purpose of invalidating the action of the common council.

36. An entry by the clerk upon the records of the city council that certain ordinances, naming them, were passed does not show that all the ordinances were voted upon at one

(E.) Approval and Signature of Mayor. — The fact that an ordinance is not shown to have been approved and signed by the mayor will not warrant its rejection where the law provides other modes by which an ordinance may become effective.[37]

(F.) Recording, Registering, Etc. — The production of an ordinance by the clerk, who is the statutory custodian of the instrument, is sufficient proof, when uncontradicted, to show that it was deposited with him upon its passage as required by law.[38]

(G.) Publication, Posting, Etc. — Where the requirement as to the fact and mode of publication of an ordinance is not mandatory it will be presumed that the requirement has been complied with;[39]

time, and the presumption is that they were voted upon separately as required by the charter. Nevin *v.* Roach, 86 Ky. 492, 5 S. W. 546.

37. The signature of the mayor when he approves an ordinance is no part of the ordinance itself; it is merely the evidence of his approval required by the charter. While it is true that the ordinance, in order to be valid, must have been passed by the council and become effective in one of the modes provided by the charter of which the signature of the mayor is one, the ordinance itself need not bear upon its face the evidence of all or any of such proceedings; except, of course, where it is signed by the mayor, and then the signature will necessarily appear. Terre Haute & I. R. Co. *v.* Voelker, 129 Ill. 540, 22 N. E. 20. The court said that "possibly, if no provision had been made by statute as to the mode of proving the ordinances, it would have been incumbent on the party alleging its existence to prove each of the steps by which it was passed and given effect, [but that the charter expressly provided that] 'all ordinances and resolutions of the city may be proved by the seal of the corporation, and when printed and published in pamphlet or book form, and purporting to be printed and published by authority of the city council, are to be received in evidence by all courts and places without further proof.'" In this case the proof was made by the corporate seal and a certificate of the city clerk, who was the proper custodian of the seal, and it was held that this was all that was required, at least *prima facie,* to establish the existence of the ordinance and its terms.

38. Schofield *v.* Tampico, 98 Ill. App. 324. See also Bayard *v.* Baker, 76 Iowa 220, 40 N. W. 818.

A book purporting to contain the municipal ordinances and to show when they took effect, and upon its face purporting to be published by authority, is sufficient *prima facie* proof of the validity of the ordinances therein contained, and of compliance with all prerequisites of the law relative to the validity of an ordinance, including the depositing of the ordinance with the clerk and the filing thereof by him, if such is a prerequisite. McGregor *v.* Lovington, 48 Ill. App. 208.

39. The publication of an ordinance may be proved by oral testimony, and it will be presumed in the absence of a contrary showing that the paper in which it was thus shown to have been published was one of general circulation in the town, the law requiring publication in such a paper. Bayard *v.* Baker, 76 Iowa 220, 40 N. W. 818.

Where the organic act of a municipality declares that any ordinance shall be deemed sufficiently proved in any court, among other ways, by producing a printed copy thereof, taken from the newspaper in which by the act it is required to be published, provided it purports to have been done by the authority of the municipality, a printed copy in a newspaper having the caption, "Published by authority of the corporation," and purporting to have been signed by the proper municipal officers, fulfills the requirement of the act and is ad-

but not where the requirement is mandatory, the rule in such case being that compliance with the law must be shown by the record.[40]

missible in evidence. Bloch *v.* Jacksonville, 36 Ill. 301.

In Downing *v.* Miltonvale, 36 Kan. 740, 14 Pac. 281, a prosecution for the alleged violation of a city ordinance, where the record of the ordinance had a note appended thereto stating that the ordinance was duly published and the date of its publication, it was held sufficient unless it were shown that the ordinance was not published, and the burden of proving that fact was upon the defendant.

In Charleston *v.* Chur, 2 Bail. (S. C.) 164, an action to recover a penalty imposed by a city ordinance for its violation, it was held to be unnecessary to produce any evidence of the promulgation of the ordinance.

In Arkansas the statute makes printed copies of the ordinance of any city or incorporated town published by authority, and manuscript copies thereof copied by the proper officers, and under the corporate seal, evidence of the existence of the ordinance and its contents, and further provides that failure to publish is a sufficient defense to any suit or prosecution for fines or penalties imposed by the ordinance, the burden of proving such failure being upon the defendant. Van Buren *v.* Wells, 53 Ark. 368, 14 S. W. 38. See also Arkadelphia Lumb. Co. *v.* Arkadelphia, 56 Ark. 370, 19 S. W. 1053.

40. Where the organic act or general statute makes it the duty of the clerk of the municipality, immediately after the passage of any ordinance affecting the public, to post copies thereof in a certain manner and place and for a certain time before the ordinance takes effect, this provision is mandatory, and without such proof the ordinance is not admissible in evidence against objection. Schott *v.* People, 89 Ill. 195. See also Illinois Cent. R. Co. *v.* Kief, 111 Ill. App. 354.

The Illinois Statute provides that "the clerk shall record, in a book to be kept for that purpose, all ordinances passed by the city council or board of trustees, and at the foot of the record of each ordinance so recorded shall make a memorandum of the date of the passage and publication or posting of such ordinance, which record and memorandum . . . shall be *prima facie* evidence of the passage and legal publication or posting of such ordinance for all purposes whatsoever." And in Blanchard *v.* Benton, 109 Ill. App. 569, at the end of the ordinance in question, and as a part of the record was the following: "Passed January 3rd, 1893. Approved January 4th, 1893. W. W. Whittington, President of Village Board; J. M. Adams, Village Clerk. (Village Seal.) Published Jan. 13th, 1893." And it was held that the ordinance and all that pertained to its validity had been made matter of record in the manner required by statute, and that the statute makes it mandatory upon the courts to accept such record as *prima facie* evidence of the due passage and publication. *Distinguishing* Hutchison *v.* Mt. Vernon, 40 Ill. App. 19; Lindsay *v.* Chicago, 115 Ill. 120, 3 N. E. 443, in that in the latter cases the proofs were made under ch. 24, § 65, § 4, art. 5, of the City and Village Act, what was claimed to be the original ordinance having been offered under that statute, but not being certified to as that statute required, the proof was held insufficient. It was further urged in the Blanchard-Benton case that since the evidence showed that the words "Approved January 4th, 1893," were in different handwriting from that of the clerk who wrote the record, and were written in at a different time, the record should not have been admitted in evidence; but the court held otherwise; that there was nothing in the evidence tending to show that the words were fraudulently inserted in the record, or that their presence there made the record speak other than the truth, and furthermore that the statute under which the proof in that case was made did not require any memorandum of such approval to be made by the clerk, but only required him to make memorandum of the date of passage and of the publication or posting of the ordinance.

Sometimes proof of publication is made unnecessary by statute, unless the fact of publication is denied under oath.[41]

Acquiescence by Corporation. — It has been held that the publication of an ordinance need not be proved where the city authorities, by their action upon, and long acquiescence in, the ordinance as being in force raise the presumption that it was duly published as required by law.[42]

2. Mode of Proof. — A. Documentary Evidence. — a. *The Original Ordinance.* — An ordinance of a municipal corporation may be proved by the production of the original.[43] And the fact that

In Hutchison *v.* Mt. Vernon, 40 Ill. App. 19, it was held that the words "Published July 17, 1890. Attest: B. B. Slade, seal," are nothing more than a mere memorandum of the fact and date, so that thereafter a certificate thereof might be readily made when required, and that the attestation of the clerk was neither in form nor in substance such a certificate as was required by law. "It does not purport to be a certificate of its publication or of the place of publication, or state that it was duly published, from which an implication might arise as to place."

Posting Copies of an Ordinance is not a sufficient publication of it unless the evidence also shows that there was no newspaper in the town or village in which the ordinance could have been published. Raker *v.* Maquon, 9 Ill. App. 155.

Under the New York Village Law of 1847, p. 532, ch. 426, and acts amendatory thereof requiring the publication of ordinances before they shall take effect, an ordinance regulating the speed of trains in a village cannot be considered by the jury in an action for injuries resulting from collision on a street crossing, in the absence of evidence showing publication or posting. Shaw *v.* New York Cent. & H. R. R. Co., 85 App. Div. 137, 83 N. Y. Supp. 91.

A pamphlet containing the ordinances of a municipality is not sufficient evidence to establish the legal publication of the ordinances, unless it is further shown that the pamphlet was published by authority of the proper officials. Raker *v.* Maquon, 9 Ill. App. 155.

41. As in Indiana. — Green *v.* Indianapolis, 25 Ind. 490; Rowland *v.* Greencastle, 157 Ind. 591, 62 N. E. 474; Lake Erie & W. R. Co. *v.* Noblesville, 16 Ind. App. 20, 44 N. E. 652.

42. In an action against a city the plaintiff need not prove the publication of an ordinance offered in evidence when the ordinance was passed several years before the trial of the action, and where the city had, during all the time since its passage, acted upon the ordinance as one in force. Atchison *v.* King, 9 Kan. 550. The court said: "The city, having passed the ordinance four or five years before it was offered in evidence, and having acted upon it as valid, will not now be allowed in such an action to deny its publication. Such a rule would be a great inducement to cities to disobey the law. They get the benefits and escape the inconveniences of the law by such a course, as it would in most cases be impossible for a stranger to prove a publication four or five years after the passage of the ordinance, where the publication is by posted notices. Nor would the difficulty be much less where it was published in a newspaper in a country where newspaper changes are as frequent as they are in this state."

In Quincy *v.* Chicago, B. & Q. R. Co., 92 Ill. 21, it was held that the recognition by a municipal corporation for over twenty years of a resolution granting to a railroad company the right to lay railroad tracks in certain streets as being in force, and its acquiescence thereunder, would be presumptive evidence of its publication, if that were necessary to give it force.

43. Rutherford *v.* Swink, 90 Tenn. 152, 16 S. W. 76. See also Waln *v.* Philadelphia, 99 Pa. St. 330. *Compare* Keating *v.* Skiles, 72 Mo. 97.

the general law or the organic act provides another mode of proving an ordinance does not preclude a resort to the original itself.[44]

b. *Original Ordinance Book.* — An ordinance may be proved by the introduction in evidence of the original ordinance book of the city.[45] Nor is the competency of the book affected by the fact that

In Webb City *v.* Parker, 103 Mo. App. 295, 77 S. W. 119, a prosecution for the alleged violation of a city ordinance, the city attorney testified that the city clerk, who was by statute the legal custodian of all municipal records and papers, had delivered to him the ordinance in question; that he had kept it in his office; that it was signed by the proper municipal authorities; that the last sheet, on which their names were written, had within a few days before the trial been torn off and carried away by some one to him unknown, and that it was the original and the only ordinance of the kind in existence. There was no published or certified copy of it. The city clerk testified that the ordinance in the hands of the city attorney was recorded in the ordinance book in his office, in which all the ordinances were recorded, and produced the journal of the council which showed that at a regular session the rules were suspended and the ordinance in question was read a second and third time and passed, all the councilmen voting for it. The journal further recited that the ordinance, with others, was duly approved. This entry being approved by the mayor and attested by the clerk, it was held that the ordinance was sufficiently identified and proved to establish its binding force and efficacy.

In People *ex rel.* Cannaway *v.* Smith, 201 Ill. 454, 66 N. E. 298, an application by the county collector for judgment for the sale of property to pay a delinquent special tax, the plaintiffs introduced in evidence the original ordinance under which the sidewalk was constructed, after the same had been identified by the city clerk. It was urged that this was not the proper way to prove under what ordinance the sidewalk was constructed, but that the certified copy of the ordinance required by the statute to be annexed by the city clerk to his report to the county collector of the uncollected special taxes was the only proper proof. The city clerk testified that this was the ordinance under which the sidewalk was constructed, and his testimony was uncontradicted. It was held that the original ordinance was competent evidence.

A document purporting to be a city ordinance approved by the mayor, attested by the register and under the seal of the city, is admissible in evidence under Missouri Rev. Stats. 1879, § 4648, which provides that all ordinances of the city may be proved by the seal of the corporation, and that further proof of its passage by the council is not necessary. Eichenlaub *v.* St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590.

44. Bethalto *v.* Conley, 9 Ill. App. 339. In Johnson *v.* Finley, 54 Neb. 733, 74 N. W. 1080, a proceeding to foreclose a tax lien, the plaintiff called the city clerk as a witness, who testified, without objection, that the ordinance in question was an ordinance making a levy of taxes for the city of Omaha for the year 1892, and that the ordinance was part of the records of his office, and then introduced in evidence the original ordinance passed by the mayor and council of the city of Omaha. It was objected by the defendant that the enactment or existence of this ordinance could be proved only in the manner provided by the charter of the city. The court, however, in overruling the objection, said: "Certainly, the original ordinance and the proceedings of the city council showing its passage and approval, are as competent evidence that the ordinance was passed and approved as a certificate of the city clerk, under the seal of the city, that the ordinance attached to the certificate was a copy of the original ordinance on file in his office."

45. Independent *v.* Trouvalle, 15 Kan. 70, an action by the plaintiff as city marshal to recover money

a statute makes a certified copy of the ordinance also competent evidence.[46]

c. *Records.* — (1.) Competency. — (A.) Administrative Matters. — (a.) *Generally.* — The broad rule is laid down by many of the courts that in actions generally, including actions by or against officers or agents of the corporation, the records of a municipal corporation are competent evidence of the acts and proceedings of the corporation.[47]

claimed to be due to him under and by virtue of an ordinance for killing unlicensed dogs.

In Rockville *v.* Merchant, 60 Mo. App. 365, a prosecution for the alleged violation of a city ordinance, the ordinance as introduced in evidence appeared in a regular record book of ordinances preserved and kept for years by the city clerks, legal custodians thereof, and it was held that such registered ordinance was primary evidence. It was further held that even conceding that the original manuscript was the proper and only proof of the ordinance, there was abundant proof that such instrument had been accidentally destroyed by fire, so as to allow secondary evidence of its contents, the proof being equally convincing that the instrument used at the trial was a correct copy of the original so destroyed.

46. Although a statute makes an official certified copy of a municipal ordinance evidence, that is not the exclusive mode of proving the ordinance; it may be proved by the production of the original book of ordinances, identified as such by the clerk of the corporation and shown to have come from his custody. Metropolitan St. R. Co. *v.* Johnson, 90 Ga. 500, 16 S. E. 49.

47. *Indiana.* — Green *v.* Indianapolis, 25 Ind. 490.

Massachusetts. — Com. *v.* Shaw, 7 Metc. 52; Briggs *v.* Murdock, 13 Pick. 305; Houghton *v.* Davenport, 23 Pick. 235.

New Hampshire. — Bishop *v.* Cone, 3 N. H. 513.

New York. — Shaw *v.* New York Cent. & H. R. R. Co., 85 App. Div. 137, 83 N. Y. Supp. 91.

Vermont. — Lemington *v.* Blodgett, 37 Vt. 210.

West Virginia. — Grafton *v.* Reed, 34 W. Va. 172, 12 S. E. 767.

In Weith *v.* Wilmington, 68 N. C. 24, the court said: "The records of *public* corporations are evidence generally. Their acts are of a public character, and the public is bound by them. 2 Phil. Ev.; Greenleaf Ev. 484. Among the records so admissible are expressly enumerated 'the books of record of the transactions of towns, city councils and other municipal bodies.' The corporation of a city, and municipal corporations generally, differ from private corporations. They more nearly resemble the legislature, acting under a constitution prescribing its powers. Their acts are of a public character, and the confidence given to them is founded on the circumstance that they have been made by authorized and accredited agents, appointed for the purpose, and on the publicity of their subject-matter. We are of opinion that the records were properly admitted in evidence." This was an action to recover the bonds issued by the defendant city, and the records in question were those of the board of aldermen of the city offered for the purpose of showing that the bonds in question were given for an illegal purpose.

In Parsons *v.* Miller, 46 W. Va. 334, 32 S. E. 1017, an action on the official bond of a town sergeant, it was held that a record by the town council of a settlement of the matters in controversy should have been admitted.

The minutes of the proceedings of town commissioners whereby the relative location of two streets was fixed are, if properly identified, competent, although not conclusive, evidence to fix the point of intersection of such streets. Cheatham *v.* Young, 113 N. C. 161, 18 S. E. 92.

In Jay *v.* Carthage, 48 Me. 353, it was held that in order to prove the proceeding of the board of selectmen of the town in committing a person to the insane hospital their original

Others hold that while the books of a corporation are competent evidence against the corporation and between members thereof, they are not competent evidence in favor of the corporation in an action against it by a stranger.[48]

A Statute Making a Sworn Copy of the Record competent evidence does not make the copy the only evidence of the acts of the corporation; the original record is nevertheless competent, and indeed the best, evidence.[49]

record is admissible, as well as a transcript or duly authenticated copy thereof. See also Eastport *v.* Machias, 35 Me. 402.

In Barker *v.* Fogg, 34 Me. 392, it was held that in an action between third persons the public records of a city of the location or alteration of its streets might be used as evidence, and such records furnish evidence of the facts of which they speak equal to ordinary testimony given under the obligation of an oath; that accordingly, it being material in that case to show at what time a public street was actually widened, it was held competent to introduce the records of the city to prove at what time the widening was authorized.

Any action brought to recover the amount of an assessment for benefits, or to foreclose a lien laid to secure it, must be predicated on the assessment as it was actually made, of which the certificate recorded in the town clerk's office is usually the only evidence, and is always the only record evidence; and after the expiration of the time within which such certificate must be recorded the record becomes the sole evidence that an assessment was ever made. New London *v.* Miller, 60 Conn. 112, 22 Atl. 499.

48. Tuskaloosa *v.* Wright, 2 Port. (Ala.) 230. This was an action of assumpsit to recover money allowed to the plaintiff by resolution of the corporate authorities of the defendant town in settlement of his accounts as town marshal. The books of the corporation were produced in support of the claim, by which it appeared that the sum demanded had been allowed as charged. The defendant corporation contended that the resolution had been passed by mistake, and offered to show by the same books the passage of a subsequent resolution rescinding the first, but the court rejected this last resolution, and it was held properly so. It was further contended by the defendant corporation that the plaintiff, having introduced the books, had thereby made them evidence as well for as against the municipality in so far as they related to the matters in controversy, on the ground that the admissions of a party must all be taken together. But the court, in overruling this contention, said that the introduction of the books by the plaintiff was confined to the establishment of a contract between him and the municipality; that it was a distinct admission of a debt upon a subject properly within their control, and as to which they could bind the corporate body, but the effect of which they could not impair by any subsequent revocation by themselves, unaccompanied by the assent of the plaintiff. *Compare* Grafton *v.* Reed, 34 W. Va. 172, 12 S. E. 767.

49. Green *v.* Indianapolis, 25 Ind. 490.

Where the organic act requires that an ordinance be submitted to a vote of the people and adopted and published in the mode therein set forth, proof of these facts is not dispensed with by a statute making papers, entries, records and ordinances of a municipality provable by a copy thereof, certified under the hand of the clerk, or the keeper. The only effect of such a statute is to dispense with the production of the original by making the copy competent evidence; the copy proving precisely what the original would prove if produced, and no more. Schott *v.* People, 89 Ill. 195. The court said: "It is doubtless competent for the legislature to enact that the simple production of the ordinance or of a copy thereof shall be *prima facie* evi-

(b.) *Matters Not Required To Be Recorded.* — The records of the acts and proceedings of a municipal body cannot be received in evidence to prove those acts and proceedings, where the law does not require such a record to be kept.[50]

(c.) *Books of Account.* — Books kept by the selectmen of a town as official entries of their acts are competent evidence of such acts.[51]

(d.) *Ordinance Copied Into Ordinance Book.* — An ordinance of a municipal body cannot be read from an ordinance book into which it has been in part copied, unless there is special provision therefor, or unless it is therein properly certified, and accompanied by the prescribed proof of publication or posting.[52]

(B.) LEGISLATIVE MATTERS. — (a.) *Generally.* — An ordinance, by-law or other act of a municipal corporation of a legislative character may be proved by the production of the official records of the corporation in which such act is registered or recorded, if produced from the proper custody and properly authenticated.[53] In proving a munici-

dence that every step has been taken with reference to it essential to make it a valid ordinance. And this is the effect of sec. 65 of the general act in relation to the incorporation of cities, towns and villages. (Rev. Stat. 1874, p. 223.) See Byars *v.* Mt. Vernon, 77 Ill. 467. But the language of the section quoted professes no such object. It does not say that the ordinance or a certified copy shall be *prima facie* evidence that all conditions precedent to its validity have been complied with, nor by any equivalent language import that the mere production of the ordinance or a certified copy shall be *prima facie* evidence of the validity of the ordinance, but it simply makes the certified copy evidence in the place of the original."

50. Jackson *v.* Collins, 62 Hun 618, 16 N. Y. Supp. 651, wherein it was held that the record or minutes of the proceedings of the town officers were not legally admissible as evidence; that "the powers and duties of town clerks are prescribed by statute, and minutes and records kept by them are only competent evidence of matters and proceedings which they are bound by law to record or file; and any paper or record which they are not required by law to file or record does not, by reason of this filing or recording of the same, become legal evidence."

Compare State *v.* Van Winkle, 25 N. J. L. 73, *holding* that the record is competent, but not conclusive, and may be overcome by parol evidence.

51. Thornton *v.* Campton, 18 N. H. 20, where the court said as to the books, "that they appear to have been the official entries of the acts of the selectmen of the town; entries made by the agents of the town in the regular discharge of their duties; contemporaneous memoranda, such as are made for the precise reason that the facts they record are true. These books fall clearly within the rules which admit books and writings of this public nature to be given in evidence. 1 Greenl. Ev. 484. The law, which is in this particular the mere expression of the common sense of mankind, recognizes such records as among the most authentic instruments of evidence, and they are, to the common apprehension, as satisfactory as any that exist. They are made for public inspection, while the events are recent which they record; they are made in the midst of those who can at once attest their verity or detect an inaccuracy, if there be any, and by the public servants of those who have access to the record at all times." See article "BOOKS OF ACCOUNT," Vol. II.

52. Shaw *v.* New York Cent. & H. R. R. Co., 85 App. Div. 137, 83 N. Y. Supp. 91.

53. *Alabama.* — Greenville *v.* Greenville Water Wks. Co., 125 Ala. 625, 27 So. 764.

pal ordinance by a record copy, the fact that the signatures of the mayor and clerk are not in the handwriting of those officers does not in any way impugn the integrity of the record.[54]

(b.) *Passage of the Ordinance.* — A journal entry to the effect that

Colorado. — Greeley *v.* Hamman, 17 Colo. 30, 28 Pac. 460.

Michigan. — Napman *v.* People, 19 Mich. 352.

Missouri. — Clarence *v.* Patrick, 54 Mo. App. 462; Tipton *v.* Norman, 72 Mo. 380; Rutherford *v.* Hamilton, 97 Mo. 543, 11 S. W. 249.

Washington. — Gove *v.* Tacoma, 34 Wash. 434, 76 Pac. 73.

See also Barnes *v.* Alexander City, 89 Ala. 602, 7 So. 437.

"The ordinance, as introduced, appeared in a regular record book of ordinances, preserved and kept for years by the city clerks, the legal custodians thereof. Such registered ordinance, then, was primary evidence thereof. 1 Dill. Mun. Corp. (4 Ed.), sec. 422; Tipton *v.* Norman, 72 Mo. 380-385; Horr & B. Mun. Ord., sec. 185. But even conceding that the original manuscript (the instrument passed by the board of aldermen) was the proper and only proof of the ordinance, and then there was abundant, if not conclusive, proof that such instrument had been accidentally destroyed by fire, so as to let in secondary evidence of its contents. After the ordinance was adopted, and before this trial, a fire occurred in the building where the town records and papers were kept. Some of the original ordinances and papers were there destroyed, and the evidence is quite convincing that this one, relating to the regulation of meat markets, was among those burned. The proof, too, is equally convincing that the instrument used at the trial was a correct copy of the original so destroyed." Rockville *v.* Merchant, 60 Mo. App. 365.

In Billings *v.* Dunnaway, 54 Mo. App. 1, a prosecution for the alleged violation of a city ordinance, the trial judge had excluded the various ordinances offered in evidence tending to show that the act charged against the defendant was the violation of an ordinance legally adopted by the municipal authorities; these entries were read from the books of the corporation, which, it was held, were evidence of its official acts, both at common law and under the statute, and should have been received by the court.

In Rutherford *v.* Swink, 90 Tenn. 152, 16 S. W. 76, an action by a municipal corporation to punish an offender against its ordinance, it was held that, there being no regulation of the matter by charter or statute, the book of the corporation in which its ordinances, including the one in question, were registered by authority of the governing body of the municipality, being produced from the custody of the proper officer and thoroughly identified as one kept by the corporation for that purpose, the ordinance is properly proved, and the book should be admitted.

A book in which the city ordinances are copied, or the record copy, so called, of the ordinances, and of the signatures of the mayor and clerk as appended to the originals, is competent to prove the contents of an original ordinance therein contained. Selma St. & Sub. R. Co. *v.* Owen, 132 Ala. 420, 31 So. 598.

In Prell *v.* McDonald, 7 Kan. 426, an action against a city marshal for false imprisonment, the ordinance which the defendant claimed the plaintiff had violated when he was arrested was read from the book of ordinances of the city. The court said: "We think it was unnecessary to go into the proof of all the preliminary steps in passing and publishing said ordinance. The book itself of ordinances was *prima facie* evidence of the validity of the ordinance. If anything essential to its validity was omitted in passing or publishing it, it then devolved upon the plaintiff to show such invalidity."

54. Selma St. & Sub. R. Co. *v.* Owen, 132 Ala. 420, 31 So. 598.

an ordinance " was passed by council " is not a legal conclusion, but in reality a statement of a fact.[55]

The Certificate of the City Clerk under his official seal is *prima facie* evidence of the passage of a city ordinance.[56]

(2.) Authentication, Identification, Etc. — (A.) NECESSITY. — Some courts hold that it is not essential, to render them admissible in evidence, that there be further authentication of the records of a municipal corporation than that they came from the proper custody.[57]

(B.) MODE AND SUFFICIENCY. — (a.) *Generally.* — In the absence of any statute providing otherwise, the records of a municipal corporation may be authenticated by any witness.[58]

(b.) *Certificate of Clerk.* — Sometimes the law permits or requires the authentication of such records to be in the form of a certificate of the clerk of the corporation,[59] and when this mode of proof is adopted the authentication must be in compliance with the law in such cases.[60]

55. Gove *v.* Tacoma, 34 Wash. 434, 76 Pac. 73.

56. McChesney *v.* Chicago, 159 Ill. 223, 42 N. E. 894.

57. A book found in the custody of the town clerk, and purporting to be a record of births and marriages in the town, is *prima facie* evidence of the facts it contains, although it may have no title or certificate or other attestation of its character. Sumner *v.* Sebec, 3 Me. 223.

Books purporting to contain the charter and ordinances of a town, and shown to be in the custody of the town clerk, will be received in evidence without further attestation. Tipton *v.* Norman, 72 Mo. 380.

A book purporting to contain the official minutes of the city council may be received in evidence where it is shown that the clerk of the corporation is absent from his office from providential cause; that he is custodian of the records and minutes kept by the council; that the witness bringing the book into court was the city treasurer acting in the clerk's place during his absence, and in such capacity came into possession of the book, and that the book produced had upon its pages the official signature of the clerk in connection with what purported to be the proceedings of the council. Columbus *v.* Ogletree, 102 Ga. 293, 29 S. E. 749.

58. Robinson *v.* State, 82 Ga. 535, 9 S. E. 528; Hathaway *v.* Addison, 48 Me. 440. Grafton *v.* Reed, 34 W. Va. 172, 12 S. E. 767, where the plaintiff introduced as a witness the clerk of the defendant town, who testified that the book shown him was the record of the proceedings of the town council, and upon this evidence and identification the record was introduced in evidence.

In Ottumwa *v.* Schaub, 52 Iowa 515, 3 N. W. 529, a prosecution for the alleged violation of a city ordinance, it was held that testimony of a policeman familiar with a book claimed to be the ordinance book, that the signature to the ordinance in question was that of the mayor was sufficient to justify the reception in evidence of the book.

59. It is the duty of a town clerk to certify a copy of the record, and if he certifies the copy to be "a true record of the [instrument] recorded in his office," it appearing from the copy that such a record existed in the office, it will be presumed that the clerk certified from the record. Preston *v.* Robinson, 24 Vt. 583.

The official certificate of a town clerk is *prima facie* authentic, and papers certified by him are admissible in evidence without other proof that he was either elected to the office or sworn. Lemington *v.* Blodgett, 37 Vt. 210.

60. Under the Illinois Statute ordinances may be proved by the certificate of the clerk under the seal of the corporation, and when this mode of proof is adopted the authentication

(3.) Seal of Corporation. — A book of ordinances is not inadmissible because the seal of the corporation attested by the proper custodian is not attached to it.[61]

(4.) Signature of Clerk. — In the absence of a statute to the contrary, the record of the proceedings of a city council is not inadmissible because it is not signed by the city clerk.[62]

(5.) Corrections, Irregularities, Etc. — Corrections[63] or interlineations[64] do not affect the admissibility of a record otherwise proper to be received in evidence.

d. *Printed Books, Pamphlets, Etc.* — An ordinance may be proved by the production in evidence of a printed book[65] or pamphlet[66] containing it and purporting to be published by authority.

must be in compliance with the law in such cases, the only requirement being that the certificate be under the hand of the clerk. McGregor *v.* Lovington, 48 Ill. App. 208.

To admit an ordinance of a city in evidence it must be attested by the city clerk. Stats. 1889, p. 1070, ch. 175, § 73. O'Brien *v.* Woburn, 184 Mass. 598, 69 N. E. 350, *holding* further that where a city ordinance is not attested by the city clerk as required by this statute, the ordinance itself is not to be considered as affecting the right of a party litigant to introduce parol evidence as to the matters covered by the ordinance.

61. The law is that all ordinances, resolutions and proceedings of the city may be proved by the seal of the corporation, attested by the register, and, when printed and published by authority of the corporation, the same shall be received in evidence without any seal or attestation. St. Louis *v.* Foster, 52 Mo. 513.

62. In State *ex rel.* Johnston *v.* Badger, 90 Mo. App. 183, it was held that no statute required such signing by the clerk as a necessary condition of the reception of the minutes as evidence; that they became competent when a proper foundation for their admission was laid by the clerk's testimony that they were the records of the council meetings as they purported to be, written by himself pursuant to his official duties.

63. A record of the proceedings, by-laws and ordinances of municipal officers, expressly made evidence of the matters therein contained in all courts without further proof, is not rendered inadmissible by the fact that an entry therein has been honestly corrected. St. Charles *v.* O'Mailey, 18 Ill. 407.

64. Resolutions for the paving of a street, purporting to have been passed by the city council, and coming from the custody of the city clerk, are admissible as evidence of the act of the council, and the fact that in the resolutions there was an interlineation containing the words "Talfor macadam," and no explanation of the interlineation offered, does not justify the court in excluding the resolutions. Hutcheson *v.* Storrie (Tex. Civ. App.), 48 S. W. 785. The court said: "The interlineation did not raise a suspicion as to the genuineness of the paper, purporting as it did to be a resolution of the city council and coming from the custody of the city secretary."

65. Barnes *v.* Alexander City, 89 Ala. 602, 7 So. 437; Byars *v.* Mt. Vernon, 77 Ill. 467; McGregor *v.* Lovington, 48 Ill. App. 208.

An ordinance contained in a printed book which was in charge of the proper custodian and purported to have been published by authority of the city, and to contain its ordinances, is admissible in evidence without further proof under the Missouri statute. Rev. Stats. 1889, § 4846. Tarkio *v.* Cook, 120 Mo. 1, 25 S. W. 202, 41 Am. St. Rep. 678.

In Galveston, H. & S. A. R. Co. *v.* Washington, 25 Tex. Civ. App. 600, 63 S. W. 538, the question involved the admissibility of an ordinance of the city of Houston. The charter of that city, which was a special act, made it the duty of the city council

Codifications, Compilations, Etc. — And where all the ordinances of a city have been codified in one book, which is authentically published as the code of that city, any of the ordinances therein contained may be proved by the introduction in evidence of the ordinance as printed in the code.[67]

A Printed Statement That the Book Was Published by Order or Authority is sufficient proof of that fact,[68] although there is authority to the

to publish within a specified time all ordinances in force in the city in order to preserve their validity, and provided that all printed ordinances or codes of ordinances should be admitted in any suit, and should have the same force and effect as the original ordinances. This provision of the charter was held to be so mandatory that the court might with reason conclude that a book or pamphlet purporting to be a copy of such ordinances, and to be authoritatively published, was an authorized publication; that the presumption must be indulged that the city council had performed the duty demanded of it and had caused a publication to be made.

It is no objection to an ordinance that a word was not accurately printed in the published ordinance where it is plain from the context what word was intended. Moss *v.* Oakland, 88 Ill. 109.

66. Bethalto *v.* Conley, 9 Ill. App. 339. See also Canton *v.* Ligon, 71 Mo. App. 407.

67. Birmingham *v.* Tayloe, 105 Ala. 170, 16 So. 576, so holding, notwithstanding the charter of the city provides a different method of proving its ordinances.

A Volume of Revised Ordinances purporting to have been published by authority of the city is admissible in evidence under Missouri Rev. Stats. 1899, § 3100. Campbell *v.* St. Louis & Sub. R. Co., 175 Mo. 161, 75 S. W. 86.

In Jackson *v.* Kansas City, Ft. Scott & M. R. Co., 157 Mo. 621, 58 S. W. 32, an action for personal injuries wherein the plaintiff's case, as stated in his petition, was a violation by the defendant of a duty imposed by a city ordinance in running a train within the city limits and at a public crossing at a speed greater than that permitted by the ordinance, a book containing the ordinance in question was produced by the mayor of the city, who testified that it was a journal of the proceedings of the board of aldermen, including the ordinances adopted, the book being entitled "Revised Ordinances of the City of West Plains, in the County of Howell, and State of Missouri," and it was held that there was no error in permitting the book to be read in evidence. It seems that by a statute in force in Missouri at that time the board of aldermen of a city of the fourth class, to which class the city in question belonged, was required to keep a journal of its proceedings, and that the acts and ordinances of such corporation are evidenced by the entries in such journal.

Under the Texas Statute, art. 558, it is proper to read in evidence a book of city ordinances on the back of which is printed "Revised Code of Ordinances of the City of ———, printed and published by the authority of the City Council," at the end of which is the signature of approval by the mayor and attestation by the secretary of the state. Starks *v.* State, 38 Tex. Crim. 233, 42 S. W. 379.

68. McGregor *v.* Lovington, 48 Ill. App. 208; Wapella *v.* Davis, 39 Ill. App. 592. See also Louisville, N. A. & C. R. Co. *v.* Patchen, 167 Ill. 204, 47 N. E. 368. *Compare* International & G. N. R. Co. *v.* Hall (Tex. Civ. App.) 81 S. W. 82.

The Certificate of the Clerk of the Village of Grape Creek printed on a pamphlet of printed ordinances of the village, certifying such pamphlet was published by the authority of the president and board of trustees of the village, sufficiently proved the publishing of such pamphlet "by the authority of the board of trustees" to entitle the pamphlet to be received as evidence of the passage and legal publication of the ordinances of the village, within the provisions of para-

effect that there should be proof *aliunde* the book itself that publication was authorized.[69] But a book does not purport to be an authorized publication simply because it purports to contain the ordinances of a city.[70]

e. *Certified Copies.* — Within the rule that when public records would of themselves be evidence if produced, their contents may be proved by duly verified copies, for the reason that such records cannot be removed from their place of custody without inconvenience to the public service, it is proper, not only independently[71] of

graph 66 of chapter 24, entitled "Cities," etc. (1 Starr & Cur. Stat. 1896, p. 718.) Chicago & E. I. R. Co. *v.* Beaver, 199 Ill. 34, 65 N. E. 144.

69. In Western & A. R. Co. *v.* Hix, 104 Ga. 11, 30 S. E. 424, it was held that an ordinance of a municipal corporation cannot be proved by the introduction of a book purporting to contain the published ordinances of the city, merely upon the testimony of a witness that the book was published by authority of the city. By statute in Georgia passed in 1891, it is provided that "exemplifications of the records and minutes of the proceedings of municipal corporations of this state shall, when certified by the clerks or keepers of such records respectively, of such municipal corporations, under seal, be admitted in evidence in the courts of this state under the same rules and regulations as exemplifications of the records of the courts of record of this state are now by law admitted in evidence." The court said: "From the statute and decision above quoted it will be seen that there are at least two ways in which a municipal ordinance may be proved: First, by an official certified copy thereof, under seal; or, secondly, by the production of the original book of ordinances, identified as such by the clerk of the corporation, and shown to have come from his custody. The ordinance in the present case was admitted in evidence, over the objection of the defendant, upon the testimony of a witness who swore that the book containing the same was a compilation of the city ordinances of Dalton, published by authority of the city of Dalton as their laws. That the witness stated simply that this book was published 'by authority of the city of Dalton' would not render it competent evidence. It was not even shown that any municipal ordinance or law was passed authorizing the publication, nor that it was adopted by the proper city authorities as a compilation of its book of ordinances."

70. Quint *v.* Merrill, 105 Wis. 406, 81 N. W. 664; International & G. N. R. Co. *v.* Hall (Tex. Civ. App.), 81 S. W. 82, where it was held that under Tex. Rev. Stat., art. 558, providing that all ordinances of cities, when printed and published by authority of the city council, shall be admitted and received in all courts and places without further proof, a book purporting to contain the ordinances of a city is not admissible without proof that it was printed and published by authority as required, and that a mere statement upon the back of the book that it is a digest of the ordinances of the city in question is not evidence of the fact that the book was so printed and published.

71. A certified copy of the proceedings of a town meeting as kept and reported by a clerk *pro tem.* to the town clerk is admissible for the purpose of showing the vote of the meeting. Hickok *v.* Shelburne, 41 Vt. 409.

In East St. Louis *v.* Freels, 17 Ill. App. 339, it was held that a copy of the bond register kept by a city, certified to by the then clerk of the city, under his hand and the corporate seal, together with his testimony that he had examined and compared the copy with the original and found it correct, offered for the purpose of showing the indebtedness of the city, was competent. The court said: "We think a copy of a record re-

any statute, but by express statute in many states,[72] to receive in evidence duly certified copies of the records of municipal corporations, whether the purpose is to prove an act of the corporation of an administrative or of a legislative character. But the certificate of the clerk of a municipal corporation which does not certify copies

quired by law to be kept by a city, duly certified as required by the statute, is original evidence, and that its introduction in evidence does not depend upon the fact that the record itself is lost or destroyed. A sufficient guarantee against a false certificate is provided for in section 19 of the same chapter, making all persons thus authorized to certify copies amenable to the statute relating to perjury, if they shall knowingly make a false certificate."

Where a copy of an ordinance offered in evidence in a prosecution for its alleged violation is certified by the town recorder as "a true copy of Ordinance No. 21 of the town as passed by the town council at the meeting of March 21, 1888," the certificate is sufficient to make the copy admissible. Bayard *v.* Baker, 76 Iowa 220, 40 N. W. 818.

The town clerk's oath that a certified copy of the resolution of the town meeting was copied from the town book is sufficient proof to admit the resolution in evidence. It is not necessary to produce the book itself. State *v.* Clothier, 30 N. J. L. 351.

In Com. *v.* Chase, 6 Cush. (Mass.) 248, a prosecution for the alleged violation of a city ordinance, it was held that the city clerk of the town is the proper certifying officer to authenticate copies of the ordinances and by-laws of the town, and that such copies are admissible in evidence when purporting to be duly attested without any verification of the clerk's signature, and that of course copies so authenticated are *prima facie* evidence only, which may be controlled by any circumstances tending to show a forgery.

"The ordinances of municipal corporations are public records (Rev. St. sec. 674; Thomp. Corp. sec. 7734; St. Louis Gaslight Co. *v.* City of St. Louis, 86 Mo. 495; Johnson *v.* Wakulla Co., 28 Fla. 720, 9 South. 690), and fall within the principle of the rule announced by this court in Magruder *v.* Roe, 13 Fla. 602; Simmons *v.* Spratt, 20 Fla. 495, and Bell *v.* Kendrick, 25 Fla. 778, 6 South. 868, to the effect that public records may, independent of statute, be proven by copies thereof certified by the officer having such records in charge. Com. *v.* Chase, 6 Cush. 248; Greenl. Ev. secs. 483-485; 1 Dill. Mun. Corp. sec. 304. The court was not, therefore, in error in admitting the certified copy of the ordinance in evidence." Florida Cent. & P. R. Co. *v.* Seymour, 44 Fla. 557, 33 So. 424.

72. Fox Lake *v.* Fox Lake, 62 Wis. 486, 22 N. W. 584.

By Statute in Illinois "all ordinances and the date of publication may be proven by the certificate of the clerk under the seal of the corporation;" and a certified copy of an ordinance under seal of the corporation, made by the clerk, proves the passage of the ordinance as effectually as it would be proved by the introduction of a printed book of ordinances. Nor is the statute to be construed as meaning that the contents of an ordinance must be thus proved. "The language is the ordinance may be proved. The legislature no doubt intended by the use of this language that a certified copy of an ordinance under the seal of the corporation, made by the clerk of the council, should have the same force and effect as evidence as a printed book of ordinances, which in express terms is made evidence of the passage and publication of an ordinance." Lindsay *v.* Chicago, 115 Ill. 120, 3 N. E. 443. See also Terre Haute & I. R. Co. *v.* Voelker, 129 Ill. 540, 22 N. E. 20, *holding* that a copy of an ordinance, certified by the city clerk, and authenticated by the corporate seal, is competent to show that the ordinance had been duly passed by the city council, and had gone into effect in one of the modes prescribed by the charter. And in Pendergast *v.* Peru, 20 Ill. 51, it was held that a

of the records, but is in fact a statement of what does or does not appear on those records, is not admissible.[73]

B. Best and Secondary Evidence. — a. *In General.* — Record evidence of the acts and proceedings of a municipal body or its officers is the best evidence thereof,[74] and resort should not be had

copy of a city ordinance, certified in conformity with the charter, is competent evidence of the existence of such ordinance in a suit wherein the city is a party.

73. Roe *v.* Philippi, 45 W. Va. 785, 32 S. E. 224, where the purpose of the certificate in question was to establish the amount of indebtedness of the defendant corporation, the suit being a mandamus to compel payment for work done by the petitioner under a contract with the defendant town.

In Boyd *v.* Chicago, B. & Q. R. Co., 103 Ill. App. 199, a personal injury action, wherein the plaintiff had offered in evidence a certain ordinance on which he had declared, and under which his right to recover was asserted, before the court ruled upon the objection to this ordinance the defendant offered to the court certified copies of certain other ordinances and proceedings. The certificate of the clerk was not only that they were true copies, but also that the proceedings so certified contained the only reference to certain matters in the journal of the council proceedings between certain dates. It was held that although under the general act for the incorporation of cities and villages, and under the Illinois statute relative to evidence, copies of ordinances and council proceedings, certified by the clerk, are competent evidence, yet the statute does not authorize the city clerk to create proof of the non-existence of any fact or record by his official certificate; that such negative proof requires oral testimony, under oath, of a search made, and its results; that accordingly so much of the clerk's certificate as stated what the record did not contain was incompetent.

74. In Childrey *v.* Huntington, 34 W. Va. 457, 12 S. E. 536, 11 L. R. A. 313, an action against a town to recover damages for injuries received because of an alleged defect in a sidewalk, where the plaintiff sought to prove that the defendant town authorized and directed the property owner to construct the sidewalk at the point where the injury occurred, it was held that the record of the council was the best evidence as to what its action was, unless no such record was made as required by law; and that parol evidence should not have been received as to such action, because the record books were accessible, and could be produced.

In a proceeding to vacate a highway, an order of vacation made by the board of commissioners cannot be proved by parol in the absence of any reason shown or attempted to be shown justifying a resort to secondary evidence. Whetton *v.* Clayton, 111 Ind. 360, 12 N. E. 513.

Parol evidence of the proceedings of a city council and of the declarations of individual members thereof in ordering the grading of a street is not admissible until some valid excuse is shown for not producing the record of the proceedings. Aurora *v.* Fox, 78 Ind. 1.

Where work or other acts of city officials is claimed to have been done by authority of the corporation, the records of the city council are the proper and best evidence, and must be produced if accessible. Mere oral evidence tending to show authority from the city is not in the first instance admissible. Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266.

In Slack *v.* Norwich, 32 Vt. 818, the plaintiff sued the town of Norwich to recover back certain taxes paid by him, in the years 1848 to 1854 inclusive, on a school lot leased to and occupied by him, which was by statute exempt from taxation. The defendant pleaded the general issue and the statute of limitations. To the latter plea the plaintiff replied a new promise, and, to prove it, introduced in evidence a copy, from the town records, of a vote of the town, passed at an adjourned March meeting in 1855, as follows: "On

to secondary evidence unless the usual proper foundation has been laid therefor.[75]

b. *Proof of Publication.* — (1.) **Generally.** — The publication of an ordinance may be shown by oral evidence;[76] such evidence is not

motion, voted that the matter of Lorenzo Slack, relative to his having been taxed on more land than he actually possessed, be referred to the selectmen." The plaintiff then offered to prove by parol that at the same meeting a motion was made and carried in the affirmative by vote of the town as follows: "That the matter of Lorenzo Slack against the town of Norwich be referred to the selectmen to go to the records and find what was due Mr. Slack, and draw an order in his favor on the treasury for that amount." It was held that the testimony offered was inadmissible for the reason that parol evidence of the vote offered to be proved could not be received until it was shown either that the vote had not been recorded or that the record of it was lost or destroyed.

Where it appears that it was the custom of a city clerk to make no record of claims presented to him for damages against the city, but simply to file them and place them in a receptacle kept for that purpose, to await the action of the council, and that an original claim so filed was lost and cannot be produced, secondary evidence may be received to establish the facts relating to the filing thereof. In such a case the recorded proceedings of the city council, reciting that such claim was before that body for consideration about the time it was alleged to have been filed, may be read in evidence for the purpose of showing that a claim was in fact filed. South Omaha *v.* Wrzesinski, 66 Neb. 790, 92 N. W. 1045.

Where the proper officers of a municipal corporation, acting in accordance with instructions, have made the designation for the location of hydrants by marking the place upon a plan of the streets, and have filed with the municipal clerk the plan so marked as the record evidence of their action in the premises, such plan, or a copy thereof, becomes the official and best evidence of what place was designated. Secondary evidence is not admissible in the place of the plan until the absence of the plan itself is sufficiently accounted for. Bean *v.* Maine Water Co., 92 Me. 460, 43 Atl. 22.

In Nebraska City *v.* Lampkin, 6 Neb. 27, an action to recover damages alleged to have been occasioned to a store building by reason of changing the grade of the adjoining street, it was necessary under the issues for the plaintiff to show the existence of a prior grade with reference to which the building had been erected. It was held that in order to establish the existence of the grade the records and files pertaining thereto should have been produced, and that unless these were shown to have been either lost or destroyed secondary evidence was not admissible. It was held also that loose expressions by the officers of the city indicating that they supposed that such a grade had been established were but hearsay, by which the corporation was not bound.

75. Wells *v.* Pressy, 105 Mo. 164, 16 S. W. 670; Gulf, C. & S. F. R. Co. *v.* Calvert, 11 Tex. Civ. App. 297, 32 S. W. 246; Seattle *v.* Doran, 5 Wash. 482, 32 Pac. 105, 1002; Sawyer *v.* Manchester & K. R. Co., 62 N. H. 135.

Where the selectmen of the town make a return of the laying out of the highway, which is duly recorded, but no petition for the laying out is recorded or to be found, secondary evidence is admissible to prove the existence of the petition and its contents in order to show that the selectmen had jurisdiction of the subject-matter. Haywood *v.* Charlestown, 43 N. H. 61.

76. Bayard *v.* Baker, 76 Iowa 220, 40 N. W. 818. In Eldora *v.* Burlingame, 62 Iowa 32, 17 N. W. 148, a prosecution for the alleged violation of a town ordinance, oral evidence was admitted, against the defendant's objection, to prove that the ordinance under which the prosecution was had

to be regarded as secondary.[77] Thus the fact of publication may be shown by the testimony of the clerk of the corporation.[78]

(2.) Affidavit of Publisher. — The affidavit of the publisher may be competent to prove publication.[79]

was published in a newspaper as required by law. It was held that in the absence of a statute to the contrary oral evidence is competent to establish the fact of publication; that "the ordinance being found in the proper record of the town in its form as published was at least *prima facie* admissible. If the publication was disputed the fact was properly established by oral testimony."

In Larkin *v.* Burlington, C. R. & N. R. Co., 85 Iowa 492, 52 N. W. 480, reported also in 91 Iowa 654, 60 N. W. 195, it was held, first, that oral proof of publication was admissible as primary evidence, and, second, that such proof was admissible as secondary evidence, since it was shown that the ordinance in question was passed in a certain year; that all ordinances passed in that year were published in a certain newspaper, the files of which for that year were lost and could not be found upon reasonable search, and that no proof of publication was on file with the recorder.

77. Des Moines *v.* Casady, 21 Iowa 570, where the court said: "Why is this not competent evidence? Of what is it secondary? The inquiry is not as to the contents or provisions of the ordinance, for that was before the court. Whether it had been published or not was an extrinsic fact, a matter *in pais*, susceptible of proof by any one cognizant thereof. It may be said that if the printed copy was produced in court and testified to, that that would make the proof stronger and more satisfactory. Grant it, but the distinction between best and secondary evidence is of quality, not of strength. . . . Suppose it was required to publish the ordinance six consecutive weeks in some newspaper before it can take effect. Would the rules of evidence require that the newspaper of each week should be produced in court to prove the fact? And if they were produced would they, without more, be competent evidence that the requirement had been complied with? Certainly not, for with change of date they might all have been published on the same day. Other evidence *aliunde* would necessarily have to be produced. We hold, in short, that the evidence in this case was original, and, *prima facie*, at least, showed the publication of the ordinance."

78. In Teft *v.* Size, 10 Ill. 432, for the purpose of proving the due publication of an ordinance, the records of the corporation were produced and an offer made to prove by the clerk that he had posted copies of the ordinance as required, but his testimony was excluded on the ground that either the notices, or one of them, which were originally posted, should have been produced or their absence accounted for; but it was held that the testimony was improperly excluded, its object being to establish the fact of publication, and not to prove the contents of the ordinance.

79. Klais *v.* Pulford, 36 Wis. 587.

In Faribault *v.* Wilson, 34 Minn. 254, 25 N. W. 449, a city charter provided for publication of city ordinances, and that the publication thereof should be proved "by the affidavit of the foreman or publishers of such newspaper, which at all times and in all courts shall be deemed and taken as sufficient evidence of such publication." The objection taken was that the affidavit was not proof unless it was shown, otherwise than by a statement in it, that the person making it was the printer or publisher; but the court held that the affidavit alone was sufficient evidence.

The publication of an ordinance may be shown by a proper affidavit of publication if it sufficiently identifies the ordinance, although it is attached to the manuscript record in the ordinance book, and not to the printed copy. Albia *v.* O'Harra, 64 Iowa 297, 20 N. W. 444, a prosecution for the alleged violation of a city ordinance. See also De Loge *v.* New York Cent. & H. R. R. Co., 92 Hun 149, 36 N. Y. Supp. 697.

(3.) Certificate of Clerk of Corporation. — Sometimes it is provided by express statute that publication may be proved by the certificate of the clerk of the corporation.[80]

C. PAROL EVIDENCE. — a. *Administrative Matters.* — **(1.) Matters Not of Record.** — (A.) GENERALLY. — As to matters which the law requires to be of record, the general rule is that parol evidence cannot be received;[81] while as to matters not required by law to be of

80. For cases applying such a statute see Lindsay *v.* Chicago, 115 Ill. 120, 3 N. E. 443; Illinois Cent. R. Co. *v.* Kief, 111 Ill. App. 354; Moss *v.* Oakland, 88 Ill. 109; People *v.* Wilson, 62 Hun 618, 16 N. Y. Supp. 583.

81. Greeley *v.* Quimby, 22 N. H. 335. See also Cook *v.* Ansonia, 66 Conn. 413, 34 Atl. 183; Brown *v.* Webster City, 115 Iowa 511, 88 N. W. 1070; Lowell *v.* Wheelock, 11 Cush. (Mass.) 391; Sawyer *v.* Manchester & K. R. Co., 62 N. H. 135.

Where a city charter provides that the city clerk shall keep a record of all votes or proceedings of the common council, parol evidence is not admissible to show that the council agreed to an arrangement proposed by a property holder, and recommended by the committee on streets, that in consideration of such property owner opening and grading certain streets without expense to the city he should not be called on to pay any assessment when the street in question should at some future time be laid out. "The rules of law and the dictates of public policy require our courts to consider the record as constituting the evidence, and the only evidence, of the votes and proceedings of the court of common council." Gilbert *v.* New Haven, 40 Conn. 102.

The Action of a Village Board in Opening Streets should be a matter of record, and the record is the best evidence thereof. Eastland *v.* Fogo, 58 Wis. 274, 16 N. W. 632, where it is held error to permit a witness to testify that the village board had been requested to open the street, that the board had met for that purpose, that he was present at the meeting, that the board decided that the way was a street and ordered it opened, etc.

In Parsons *v.* Atlanta University, 44 Ga. 529, it was held that the city council of Atlanta, in holding out or accepting public streets and roads, acts as a court, and its proceedings can only be proved by its records, and that parol evidence of its action in this respect cannot be received.

Parol Evidence That a Street Has Been Abandoned is not admissible to prove that it has been vacated, for that is properly a matter of record. The power to vacate streets is vested in the town or city. It can be exercised only by the proper town or city authorities, and when exercised the action of the body should be made a matter of record. Lathrop *v.* Central I. R. Co., 69 Iowa 105, 28 N. W. 465.

In an action by a property owner to recover damages occasioned by digging a ditch in a public street, evidence to the effect that the ditch was dug with the sanction and under the direction of the municipal authorities is not admissible in the absence of proof that no record was made of their action in the premises. The reason is that until the contrary appears it is to be presumed that accurate minutes are kept of the official action taken by a city council with reference to municipal affairs. Jackson *v.* Ellis, 116 Ga. 719, 43 S. E. 53.

Parol evidence of verbal instructions by the members of a city council to the city marshal to give a water works company notice to discontinue its supply of water to the city, and the pursuant action of the marshal thereunder, is not competent; if the city is entitled to terminate the contract it requires corporate action to do so, and the best and only evidence of such action is to be found in the records or minutes of the council's proceedings. Greenville *v.* Greenville Water Wks. Co., 125 Ala. 625, 27 So. 764.

record, such evidence can be received.[82] Although the charter may not in terms require that a municipal board shall keep a record of its proceedings, yet the nature of the duties imposed by the statute may be such as to require a record to be kept.[83]

School Districts Are by Statute in Maine required to keep a record of their proceedings by a sworn clerk, which proceedings can thereafter be proved only by the record or by a copy thereof properly authenticated, and parol evidence of any such proceedings is properly excluded. Jordan *v.* School District No. 3, 38 Me. 164.

In Moor *v.* Newfield, 4 Me. 44, an action by the plaintiff to recover for salary as school teacher under employment by the school district, it appeared that the statute governing school district meetings provided that a clerk might be chosen, who should be sworn and keep a record of all votes. It was held that if the acting clerk had been duly sworn, of which there was no proof offered, it was his duty to record all votes passed at the meeting; and the only legal mode of proving facts on record is by the record itself, or an attested copy of it.

In Thompson *v.* School District No. 6, 25 Mich. 483, an action by a school district for tuition of one of the defendant's children, it was held that under the provisions of the statute under which the action was brought, the district board, before any action could be maintained for the tuition of defendant's child, must first have fixed and determined the rate of tuition of non-resident pupils, and that this should have been done by resolution of the board, as such; and that such resolution was not, by the statute, intended to rest merely in parol, or the recollection of members of the board, but that it should have been properly recorded by the director in the records of the district. The fact, therefore, was one requiring proof by the district record as the highest evidence, and could not be shown by parol if objections were offered.

If it does not appear from the record of the warning for a meeting of a school district that the hour of the day for the meeting was specified in the warning, the defect cannot be supplied by parol evidence that, in the original warning, the hour for the meeting was named. Nor can the collector of a tax raised at such meeting, who seeks to justify the taking of property by virtue of his warrant, be allowed to supply such defect in the record by parol evidence that all the legal voters in the district were present at such meeting, and voted upon the question of raising the tax. Sherwin *v.* Bugbee, 17 Vt. 337. The court said: "The objection is to the mode of proof. Any fact that should be a matter of record should be proved by the record. That all the voters in the district were present is not necessary, in order to make the proceedings legal; nor can such fact be gathered from the record. To allow parol proof of that fact, as a substitute for a fact that should appear from the record, would be substituting parol proof for the record."

82. Brown *v.* Webster City, 115 Iowa 511, 88 N. W. 1070.

While the minutes of the proceedings of a common council are evidence of such proceedings, yet where no such minutes have been kept the proceedings may be proved by other competent evidence. State *ex rel.* Columbus *v.* Hauser, 63 Ind. 155.

Whether or not a township constable's official bond was received or rejected may be proved by parol evidence, where no written entry is made upon the records of the township trustees concerning it. Westerhaven *v.* Clive, 5 Ohio 136.

83. Thus in Larned *v.* Briscoe, 62 Mich. 393, 29 N. W. 22, it was held that the preparation of plans for laying out streets, the approval of plats, the establishment of a system of grades and sewers, cannot rest in parol, or upon fugitive papers, but that the law plainly implies that such important acts shall be evidenced in

(B.) Record Defective or Silent. — It has been held that if the record is defective[84] or silent[85] it may be explained by parol evidence if the law does not require a record to be kept.

(C.) Proving Contracts. — Where it is sought to prove a contract existing between a municipal corporation and a private person, the fact that the municipal authorities have failed to keep a proper record does not prevent proof of such contract by any competent evidence,[86] notwithstanding the fact that the law requires them to

the permanent form of a record by the board of public works.

84. Gearhart *v.* Dixon, 1 Pa. St. 224.

85. The failure of a clerk of a municipal corporation to make a record of proceedings relating to the issuance of bonds by the municipality cannot avail it in order to defeat the enforcement of the bonds, but parol evidence may be resorted to to supply the missing parts of the record. Rondot *v.* Rogers Twp., 99 Fed. 203.

In a case where it becomes material to prove that an official act of township trustee was done on a particular date, and the record of the township clerk is silent thereon, it is competent to prove such date by the testimony of a witness who was present. Such testimony does not contradict the record. Ratcliff *v.* Teters, 27 Ohio St. 66.

In Chamberlain *v.* Dover, 13 Me. 466, it was held that where the record of a town meeting states that "the inhabitants met in the highway and read the warrant in the open air and adjourned the meeting" to a different place, parol evidence is admissible at the instance of the inhabitants to prove the time when, and the place where, the transactions took place, how many persons were present, and that others came afterward to attend the meeting, and, finding no appearance of such meeting, went home; that such evidence does not contradict the record.

86. Halbut *v.* Forrest City, 34 Ark. 246.

The right of a creditor to recover for materials furnished to the city at the instance of the council cannot be prejudiced by the neglect of the council to keep proper minutes of its proceedings. Bigelow *v.* Perth Amboy, 25 N. J. L. 297.

In Belton *v.* Sterling (Tex. Civ. App.), 50 S. W. 1027, the court said: "The evidence shows that no record or minutes were preserved of the contract in question, but the testimony shows that the contract was made between the plaintiff and the council. The fact that the city, or the officer charged with the duty of making a record or minutes of the proceedings of the council, failed to enter upon the minutes the contract in question would not defeat the right of the plaintiff to prove by parol evidence the contract actually entered into."

In Long *v.* Battle Creek, 39 Mich. 323, 33 Am. Rep. 384, where an oral proposition had been made to a common council and acted upon, it was held that the recital of the proposition in the records of the council would not preclude oral testimony as to what it really was, nor of subsequent conversations in regard to it between the man who made it and the members of the council.

Where a city ordinance authorizes a bond payable to the city to be taken to be approved by the city council, the city, in an action on the bond, may show by parol evidence that the bond was delivered to and approved by the council, although such approval was not made part of the minutes of the council's proceedings. Decherd *v.* Drewry, 64 Ark. 599, 44 S. W. 351.

In Porter *v.* Dubuque, 20 Iowa 440, a creditor of a municipal corporation had had an interview with a committee of the common council in relation to the adjustment of his debt, and the committee had made a report in writing to the council of the terms upon which the debt could be discharged, and it was held in action on the debt that introduction of the report in evidence did not preclude

keep a complete record of their official proceedings in a proper book.[87]

(2.) Contradiction of Record. — (A.) GENERALLY. — The records of a municipal corporation cannot be contradicted by parol evidence in respect of matters regularly within the jurisdiction of board or officers, and when the entry of record is made in pursuance of law.[88]

A Record Duly Amended by the clerk to conform to the facts is,

the defendant town from showing the conversation. The plaintiff objected on the ground that the evidence would contradict or vary the terms of the written evidence.

87. In Board of Com'rs *v.* Brewington, 74 Ind. 7, an action by the plaintiff to recover for professional services rendered to paupers in the county under employment by township trustees, it was held that the testimony of the trustees was properly permitted to prove the actual contract of employment of the plaintiff as alleged, notwithstanding the fact that the statute required the trustees to keep a record of their official proceedings in a book to be provided for that purpose.

88. Crommett *v.* Pearson, 18 Me. 344; Long *v.* Battle Creek, 39 Mich. 323, 33 Am. Rep. 384. See also Sawyer *v.* Manchester & K. R. Co., 62 N. H. 135.

In Saxton *v.* Nimms, 14 Mass. 315, an action of trespass to recover for the seizure of plaintiff's personal property, justified by the defendants on the ground that the seizure was under a distress for unpaid taxes, it was held that the return upon a warrant from the selectmen for warning a meeting of the inhabitants of the corporation at which the taxes in question had been voted, that he had warned the inhabitants according to law, was conclusive evidence on that point, and that evidence on behalf of the plaintiff showing that some of the inhabitants had not been duly warned was improperly admitted.

Where the validity of an assessment for a local improvement is in issue, evidence *dehors* the record of the common council to show that objections to the confirmation of the assessment roll were not read to, or heard by, the council is not admissible. Pooley *v.* Buffalo, 15 Misc. 240, 36 N. Y. Supp. 796.

Parol evidence of the proceedings of a common council as to matters required by statute to be recorded is not admissible to contradict the record. Chippewa Bridge Co. *v.* Durand (Wis.), 99 N. W. 603. The court said: "The authorities are not in harmony as regards whether evidence *aliunde* the official record is permissable to show proceedings of a public governing body, where the law requires such a record to be kept. The rule here is that such evidence is not admissible where the effect thereof will be to vary or contradict the record, but may otherwise be received for the purpose of showing occurrences which, through oversight, or some other cause, were not recorded. Duluth S. S. & A. R. Co. *v.* Douglas Co., 103 Wis. 75, 78, 79 N. W. 34; Bartlett *v.* Eau Claire Co., 112 Wis. 237, 88 N. W. 61; Nehrling *v.* Herold Co., 112 Wis. 558, 88 N. W. 614."

In Mayhew *v.* District of Cay Head, 13 Allen (Mass.) 129, an action against a corporation to recover on an award by arbitrators under an alleged agreement between the plaintiff and the corporation, the corporate records disclosed no submission and no vote on an agreement to arbitrate, and it was held that parol evidence to show the vote was not admissible; that such evidence tended to impeach and contradict the record of the proceedings of the corporation, which under a statute in existence at that time was required to be kept in writing by the clerk of the corporation; that "extrinsic evidence to vary or control the record was clearly inadmissible in collateral proceedings, although it might be competent in a proper process to compel the clerk to amend his record according to the truth."

like an original record, conclusive evidence of its own truth, and cannot be contradicted or varied by parol evidence.[89]

Where There Are Two Apparently Perfect Records of the Proceedings of a town meeting, parol evidence must of necessity be resorted to in order to determine which is the legitimate record.[90]

(B.) Jurisdictional Matters. — As to matters of a jurisdictional nature the parol evidence rule does not apply; in such case facts may be shown which establish the want of power in the board to act.[91]

(3.) Construction of Record. — In case of an ambiguity in the record of a vote, parol evidence is admissible to apply the vote to its proper subject-matter.[92]

b. *Legislative Matters.* — **(1.) Generally.** — Parol evidence is not ordinarily admissible to establish the existence of an ordinance, by-law or other legislative act of a municipal corporation.[93] Nor

89. Boston Tpke. Co. *v.* Pomfret, 20 Conn. 590.

90. Walter *v.* Belding, 24 Vt. 658.

91. Although in a collateral proceeding parol evidence is not admissible to contradict the record of the proceedings of the city council, it is admissible in such a case to show that the council had not, and could not have, convened at all, or acquired the right to make a record at the time in question, although the minutes contain the recital, "Roll of members called and a quorum found present."

Benwood *v.* Wheeling R. Co., 53 W. Va. 465, 44 S. E. 271. The court said: "Until it comes into existence it cannot proceed nor make any record of its proceedings. It has no authority to make a record showing anything. Less than a quorum are without power to act or bind anybody in any manner. Their action, being absolutely void, may be ignored or attacked in any proceeding. The record of a legally constituted tribunal is aided and upheld by a presumption in favor of regularity. Surely there can be no presumption in favor of a record made by persons who have no shadow of 'authority to act.'"

92. In Baker *v.* Windham, 13 Me. 74, where a town had voted to indemnify an inhabitant for his cost in a certain action "which had arisen or might arise in the same on account of" a certain line, and an action had been brought against the town to recover costs of that action, it was held that parol evidence was admissible to show that the action was brought at the request of the selectmen and town agent for the purpose of settling a disputed line between that and an adjoining town, with the express agreement that the town should pay all costs incurred in settling the line; that these facts had been communicated to the town before the vote was passed, and that the action was conducted to its termination with the advice and under the direction of the selectmen and the town agent; that such evidence was not adduced to explain or extend the vote, but to apply it to its proper subject-matter.

93. Lebanon Light & M. W. Co. *v.* Lebanon, 163 Mo. 254, 63 S. W. 811; Pugh *v.* Little Rock, 35 Ark. 75; Breaux's Bridge *v.* Dupuis, 30 La. Ann. 1105; Stewart *v.* Clinton, 79 Mo. 603; Morrison *v.* Lawrence, 98 Mass. 219.

When the fact is denied that a certain ordinance has been enacted by a town council, that fact can be proved only by the deliberations of the council and their promulgation duly attested. Mandeville *v.* Band, 111 La. 806, 35 So. 915.

In Hencke *v.* Standiford, 66 Ark. 535, 52 S. W. 1, an action on a note given to a municipal corporation for a liquor license, it was held that evidence showing that the town council had met and decided to allow the defendant to give the note in contro-

is such evidence admissible to supply omissions in the record of such an act as to matters which the law requires to be of record.[94]

versy for his license was inadmissible; that an ordinance could not be proved in this way, and that nothing short of an ordinance would have been sufficient to authorize the taking of the note, and it was not shown that such ordinance had been passed.

94. Pickton *v.* Fargo, 10 N. D. 469, 88 N. W. 90, where the question involved was whether or not a record of the adoption of a city ordinance sufficiently showed, or showed at all, that the yeas and nays had been called and recorded, and as the record was held not to show such fact the court held as stated. This is in line with the rule that a statute requiring the recording of the yeas and nays is mandatory.

"When the law requires municipal bodies to keep records of their official action in the legislative business conducted at their meetings, the whole policy of the law would be defeated if they could rest partly in writing and partly in parol, and the true official history of their acts would perish with the living witnesses, or fluctuate with their conflicting memories. No authority was found, and we think none ought to be, which would permit official records to be received as either partial or uncertain memorials. That which is not established by the written records, fairly construed, cannot be shown to vary them. They are intended to serve as perpetual evidence, and no unwritten proofs can have this permanence." Stevenson *v.* Bay City, 26 Mich. 44. See also Cincinnati & I. W. R. Co. *v.* People *ex rel.* Moffett, 205 Ill. 538, 69 N. E. 40.

In Klais *v.* Pulford, 36 Wis. 587, it was held that the record of a resolution was a nullity, by reason of the absence of an affidavit of publication, and that parol evidence was incompetent to support it.

In Logansport *v.* Crockett, 64 Ind. 319, an action by the plaintiff to recover for salary as city attorney of the defendant city, it appeared that by a statute in force at that time all by-laws and ordinances should within a reasonable time after passage be recorded in a book kept for that purpose, and signed by the presiding officer of the city, and attested by the clerk, on the passage or adoption of any ordinance, by-law or resolution, the yeas and nays to be taken and entered of record; it was held that this provision was mandatory, and that accordingly the vote by yeas and nays on the adoption of a resolution by the city council removing the plaintiff as city attorney could not be established by evidence other than the record of a duly authenticated copy thereof; that if the city clerk failed to record the vote as required, the proper remedy was for the council to cause a *nunc pro tunc* entry to be made, but they could not establish the vote by the testimony of a witness who was present at the time.

It is not competent to prove by extrinsic evidence that an ordinance of a city council was voted upon and passed where the journal shows only that it was reported. No presumption arises that an ordinance was passed from the fact that it was reported, nor from the performance of a contract entered into pursuant under such ordinance. Covington *v.* Ludlow, 1 Metc. (Ky.) 295. The court said: "It is, however, contended that the subsequent proceedings of the same board show by the entries and orders in the journal of their proceedings that the ordinance referred to was acted under, and a contract made under it for the performance of the work therein contemplated, and therefore a presumption arises that it had been passed by the board. The entries relied upon are vague and defective, and do not show with any degree of certainty that they were made in pursuance of the ordinance in question; but if they did, we do not think they would authorize such a presumption as would supply the defect in the journal, or legalize the action of the board in having a street improved without having first made an order for that purpose."

But parol evidence is admissible in support of the record as to matters not required to be in writing.[95]

Where a Corporation Fails to Provide a Proper Record of Its Ordinances, the originals of which are kept on file with the clerk of the corporation, one acting in good faith upon an ordinance, a certified copy of which he obtained from the clerk, may in a subsequent controversy between himself and the corporation show the due passage and existence of the ordinance by parol evidence.[96]

(2.) To Contradict Record. — Parol evidence is not admissible to contradict the record of an ordinance required by law to be kept.[97]

(3.) Validity of Ordinance. — (A.) GENERALLY. — Parol evidence has been held admissible to show that an ordinance was not passed in

95. Where the journal entry states that an ordinance "was passed by council," without stating what the vote was, it is competent to show by the testimony of a member of the council who was present that the ordinance was passed by a vote of twelve for and four against it, upon the theory that evidence *aliunde* the record is admissible where no record was made. Gove *v.* Tacoma, 34 Wash. 434, 76 Pac. 73.

96. Troy *v.* Atchison & N. R. Co., 11 Kan. 519, reported on rehearing in 13 Kan. 70, where the court said: "It may, perhaps, be proper to state, in order to guard against misapprehension, that we do not by any means hold that a party may, independent of any question of equitable estoppel, and without other and corroboratory circumstances introduce parol proof of the passage of an ordinance, and found thereon any claim against the city. Here the findings show that the railroad company had, on the strength of the acts of the city, and relying on the certified copies of the ordinance and other proceedings of the city council, duly attested, been to an extra expenditure of a large sum of money — facts presenting a strong foundation for the application of the doctrine of equitable estoppel. A certified copy of the ordinance, duly attested by the proper officers, is in evidence. Record evidence is before the court also of the passage by the council of resolutions, and of other proceedings of the council, which imply the previous passage of such an ordinance, and are meaningless without it. An election, which is a matter of public notoriety, is shown to have been held — an election which implied the existence as well as required the authority of a prior ordinance, and public notice of which is shown to have been posted about the city. The ordinance itself is produced from the files of ordinances kept by the city register. The testimony of the city officials is that they had no book in which to record the ordinances, and that they were thus kept on file, waiting till some book should be purchased in which to record them; and also that the proceedings of the council were kept on slips and pieces of paper. Under all these corroboratory circumstances, and with the pressure of the equitable estoppel, we cannot say that the district court erred in admitting parol proof that the ordinance did, as a matter of fact, pass the council, and receive the approval of the mayor."

97. Morrison *v.* Lawrence, 98 Mass. 219.

The records of the council showing that an ordinance was passed by the two boards on different days is conclusive of that question, and cannot be overcome by the recollection of a witness; moreover the statement of a witness that an ordinance was passed by both boards on the same day may be consistent with the proper passage of the ordinance by one of the boards at a subsequent date, which is a sufficient compliance with the Kentucky Stats., §2777, providing that an ordinance shall not be passed by both on the same day. Barfield *v.* Gleason, 111 Ky. 491, 63 S. W. 964.

conformity with the requirements of law.[98] But evidence as to the motives of the framers of the law, or the influences under which they acted, is not admissible for the purpose of nullifying an ordinance.[99]

(B.) UNREASONABLENESS. — One charged with the violation of a municipal ordinance may introduce extrinsic evidence showing that in its application to him the ordinance is unreasonable.[1]

3. Use and Admissibility of Ordinances. — A. AS AGAINST THE CORPORATION. — A municipal ordinance made for the enforcement of a public duty may be received in evidence against the corporation in an action against it based on the violation of that duty.[2] Thus in an action to recover damages resulting from negligence in the construction and maintenance of streets, sidewalks, etc., an ordinance regulating such construction and maintenance is competent against the city to charge it with knowledge of the condition of the street or sidewalk in question.[3]

98. An ordinance as entered upon the municipal journal is not conclusive; it may be impeached and shown by extraneous evidence to be void for want of the unanimity of vote required by the charter. Louisville *v.* Hyatt, 2 B. Mon. (Ky.) 177.

99. "The legality of the acts of legislative or of corporate bodies cannot be tested by the motives of the individual members, or of the adventitious circumstances they may lay hold of to carry their measures, provided they proceed regularly and act within the scope of their powers. If they be regularly convened, if the purpose be lawful, and if their acts are passed in due form of law and within the scope of their authority, persons who lend their money on the faith of such acts, or do other lawful things in a just reliance upon their validity, cannot be affected by the secret springs of corporate action, and the public faith cannot be tarnished by the unseen influences surrounding it." Freeport *v.* Marks, 59 Pa. St. 253, an action on a municipal bond, wherein the defendant municipality attempted to show that the passage of the ordinance under which the bond was issued was brought about through interested motives at the instance of the persons advancing the money.

1. Moore *v.* District of Columbia, 12 App. D. C. 537. See also Wo Lee *v.* Hopkins, 118 U. S. 356.

2. See Levy *v.* Salt Lake City, 5 Utah 302, 16 Pac. 598.

3. *Georgia.* — Columbus *v.* Ogletree, 102 Ga. 293, 29 S. E. 749.

Iowa. — Bauer *v.* Dubuque, 122 Iowa 500, 98 N. W. 355.

Massachusetts. — Collins *v.* Dorchester, 6 Cush. 396.

Michigan. — Thompson *v.* Quincy, 83 Mich. 173, 47 N. W. 114.

Minnesota. — Erd *v.* St. Paul, 22 Minn. 443.

Missouri. — Reed *v.* Mexico, 101 Mo. App. 155, 76 S. W. 53; Myers *v.* Kansas, 108 Mo. 480, 18 S. W. 914.

New York. — Pomfrey *v.* Saratoga Springs, 104 N. Y. 459, 11 N. E. 43.

Where the issue is whether or not a town had actual notice of the defective condition of a sidewalk, a resolution of the town council requiring the owner to repair all his walks is admissible, although the particular sidewalk in question is not mentioned in the resolution. Butler *v.* Malvern, 91 Iowa 397, 59 N. W. 50.

In an action against a municipal corporation to recover damages for personal injuries resulting from a defective sidewalk, a resolution of the city council, adopted before the injuries in question, instructing the street commissioner to notify parties to repair the sidewalk in question, may be received in evidence against the corporation as tending in some degree to show that the city authori-

B. As Between Third Persons. — So, too, in an action between third persons wherein the defendant is charged with negligence predicated upon his violation of a municipal ordinance, the ordinance may be received in evidence against him.[4]

III. DAMAGES RESULTING FROM CHANGING GRADE OF STREETS.

1. Scope of Inquiry. — A. In General. — Upon a proceeding for the assessment of damages for injury to abutting property re-

ties knew before the happening of the accident that the sidewalk at the place in question needed repairs. Aurora *v.* Pennington, 92 Ill. 564.

In Herries *v.* Waterloo, 114 Iowa 374, 86 N. W. 306, an action to recover for personal injuries received through the vehicle in which the plaintiff was riding having been overturned by striking a stone placed in the defendant city's street for the purpose of preventing the public from driving over the curb and a park laid out along the curb, it was held that an ordinance authorizing the parking and curbing of the street in question was admissible as bearing upon the issue whether the defendant was negligent as charged in having placed the stone in the street.

In an action against a city to recover damages for personal injuries alleged to have resulted from the city carelessly and negligently permitting an obstruction upon a sidewalk, it was held that the admission in evidence of a section of a city ordinance touching the duties of the commissioner of streets was proper; that "it was the act of the city and she cannot complain of her own act." Indianapolis *v.* Gaston, 58 Ind. 224.

In Shumway *v.* Burlington, 108 Iowa 424, 79 N. W. 123, an action against a city for damages for personal injuries sustained by falling on a sidewalk constructed after the passage of an ordinance regulating the construction of sidewalks, it was held that the ordinance was admissible in evidence as showing negligence on the part of the city, there being evidence that the sidewalk in question was not constructed as required by the ordinance.

4. Brasington *v.* South Bound R. Co., 62 S. C. 325, 40 S. E. 665; Grinnell *v.* Taylor, 85 Hun 85, 32 N. Y. Supp. 684; Haywood *v.* New York Cent. & H. R. R. Co., 59 Hun 617, 13 N. Y. Supp. 177; Robertson *v.* Wabash, St. L. & P. R. Co., 84 Mo. 119.

In an action against a telegraph company to recover damages for injuries arising from an obstruction placed in a street of a city by the servants of the defendant company, ordinances of the city are admissible in evidence for the plaintiff to show that the place obstructed was a public street and that the obstruction was forbidden by law, and hence the defendant company was guilty of negligence. Western Union Tel. Co. *v.* Eyser, 2 Colo. 141.

In Skelton *v.* Larkin, 82 Hun 388, 31 N. Y. Supp. 234, an action for personal injuries resulting from the falling of a flagstone which stood on the sidewalk near the curb leaning against a tree, and which slipped from the sidewalk, it was held that an ordinance of the city wherein the accident occurred forbidding the obstruction of sidewalks was competent evidence on the question of the defendant's negligence.

A city ordinance limiting the speed of trains within corporate limits, found in a book of ordinances published by authority of the city, and which by the statute was made competent evidence, may be received in a case against a railroad company to recover damages for personal injuries, wherein one of the allegations is that the defendant railroad company was running the train which struck the plaintiff at a speed greater than that allowed by the ordinance. Chi-

sulting from changing the grade of a street, it is proper to admit evidence of the value of the property immediately before the change and its value immediately after.[5] But evidence of merely consequential damage should not be received.[6]

Improvements. — Nor should evidence of damage to improvements to the land be received.[7] There is authority, however, to the effect that for the purpose of assessing damages the destruction of or

cago, B. & Q. R. Co. *v.* Thorson, 68 Ill. App. 288.

5. Platt *v.* Milford, 66 Conn. 320, 34 Atl. 82; Bloomington *v.* Pollock, 141 Ill. 346, 31 N. E. 146; Harvard *v.* Crouch, 47 Neb. 133, 66 N. W. 276; Lowe *v.* Omaha, 33 Neb. 587, 50 N. W. 760; San Antonio *v.* Mullaly, 11 Tex. Civ. App. 596, 33 S. W. 256; Blair *v.* Charleston, 43 W. Va. 62, 26 S. E. 341.

In Bloomington *v.* Pollock, 141 Ill. 346, 31 N. E. 146, it was held proper to permit the plaintiff to prove the amount paid by him as a special tax on his premises for the improvement in question. The court said: "Manifestly he [the plaintiff] is not benefited the whole sum of benefit conferred, because he has been compelled to pay a certain amount by way of assessment in order to obtain whatever benefit is attributable to the improvement. It is the *net* benefit which should be deducted from the damage produced by the improvement, and the sum remaining will represent the just compensation which he will be entitled to. . . . Where the improvement so made is paid for, in part, by the owner of the property injured, by way of special taxation, then another element necessarily enters into the computation of the damage to be assessed in favor of such owner, for unless the amount paid in order to secure the benefits set off against damage is taken into consideration and deducted from benefits, by exactly that amount the damage recovered will fall short of being just compensation. We are inclined to think that there was no error in admitting the testimony in question."

In Denise *v.* Omaha, 49 Neb. 750, 69 N. W. 119, an action to recover damages caused by the grading of a street adjacent to the plaintiff's property, the value of the house separately from that of the lot was shown by a number of witnesses, and it was held proper to prove the value of the lot or land separately from the improvements. "The jury, by a comparison and combination of the values shown of the lot alone, and the improvements in themselves, or the two together, could form a correct conclusion as to their values either before or after the grading which was claimed to have reduced the value and caused the damages."

Where property is so situated that it has no market value, or that the difference in market value cannot be ascertained, the proof should show an injury substantially affecting its use, as rendering it inaccessible, uncomfortable or unhealthful. Springfield *v.* Griffith, 46 Ill. App. 246.

6. Davis *v.* Missouri Pac. R. Co., 119 Mo. 180, 24 S. W. 777.

In the case of injury to property occasioned by grading or cutting down streets or sidewalks, neither the fall of a brick wall built by the property owner, nor the apprehended undermining of the house, caused by subsequent rains, can be considered on the question of damages, since they are damages caused by the intervention of an independent agency, not put in operation by the act of the corporation, and are too remote to be considered. Montgomery *v.* Townsend, 80 Ala. 489, 2 So. 155, 60 Am. Rep. 112.

7. Groff *v.* Philadelphia, 150 Pa. St. 594, 24 Atl. 1048. See also Clinkenbeard *v.* St. Joseph, 122 Mo. 641, 27 S. W. 521. *Compare* Hempstead *v.* Des Moines, 52 Iowa 303, 3 N. W. 123, where the court said: "The improvement became part of the realty; the statute provides that

injury to sidewalks, shade trees, fences, grass, etc., on the premises may be shown.[8]

B. Expenditures. — In General. — In determining whether there has been a diminution in the market value of the property affected by the change, facts which show that certain expenditures, changes, etc., were necessary to restore it to its former condition in relation to the new grade are admissible in evidence as throwing light upon the general question,[9] although they would not authorize

he shall recover for the diminution of the value of realty."

8. Platt *v.* Milford, 66 Conn. 320, 34 Atl. 82; Walker *v.* Sedalia, 74 Mo. App. 70; Brown *v.* Webster City, 115 Iowa 511, 88 N. W. 1070. See also Holley *v.* Torrington, 63 Conn. 426, 28 Atl. 613, where the court said: "The special damages to the plaintiff's land could be determined only by considering everything by which its value would be affected. The shade trees and the sidewalks were such things." See Cook *v.* Ansonia, 66 Conn. 413, 34 Atl. 183.

In an action to recover damages to property resulting from changing the grade of a street, the property holder cannot show a former change of grade, with the expenses attendant thereon. Watson *v.* Columbia, 77 Mo. App. 267.

9. Augusta *v.* Schrameck, 96 Ga. 426, 23 S. E. 400, 51 Am. St. Rep. 146; Chase *v.* Portland, 86 Me. 367, 29 Atl. 1104; McCarthy *v.* St. Paul, 22 Minn. 527 (cost of retaining wall); Springfield *v.* Griffith, 46 Ill. App. 246; French *v.* Milwaukee, 49 Wis. 584, 6 N. W. 244; Cook *v.* Ansonia, 66 Conn. 413, 34 Atl. 183; Chase *v.* Worcester, 108 Mass. 60.

In Barker *v.* Taunton, 119 Mass. 392, a proceeding for the assessment of damages occasioned by the change of grade in a street, wherein the city had shown that the changes made, including the plaintiff's own improvements, had enhanced by a certain sum the value of the premises, it was held competent for the plaintiff to show how much he had expended in improving the premises since the change of grade. The objection was that the plaintiff should not have been permitted to show his expenditure in that respect, and it was held that this objection would have been well taken if the cost of the improvements had been claimed as a substantive ground of damages, but that the testimony was competent in that case in reply to the defendant's evidence as to the enhancement in the value of the premises due to the improvement; that it was necessary for the jury to know how much of that enhancement was due to the plaintiff's own acts. See also Buell *v.* Worcester, 119 Mass. 372, to the effect that evidence of the improvements would not have been admissible as a substantive ground of damages.

Cost of Raising Improvements. Where the damage to adjacent property occasioned by a change of the grade of a street is in question, and there is evidence tending to show the enhanced value of the property after the improvements were raised to the new grade, it is proper for the jury to consider the cost of raising the improvements to grade in determining the question of damages. Thompson *v.* Keokuk, 61 Iowa 187, 16 N. W. 82.

Cost of Lowering Building. — In an action against a city to recover for depreciation in value of property by reason of lowering the grade of the street in front of the property, the cost of lowering a building on the property to the newly established grade may be shown as an element of the damage suffered. Topeka *v.* Martineau, 42 Kan. 387, 22 Pac. 419. The court said: "It may be conceded that it is not the proper measure of damages in the action, but this cost is an element which the jury may properly consider to ascertain the damage or difference in the value of the property before and after the injury."

Cost of Filling. — Evidence of the expense of filling the lot to make it

a recovery of the cost of such changes, or of the expenditures, as independent items of special damage.[10]

C. Purpose for Which Property Was Intended. — In determining the difference in the value of improved property before and after a change in the grade of a street it is proper to consider the purpose for which the property was intended.[11]

conform to the new grade is admissible where it appears that the filling was necessary. Springfield *v.* Griffith, 21 Ill. App. 93; Tyson *v.* Milwaukee, 50 Wis. 78, 5 N. W. 914. *Contra.* — Clark *v.* Philadelphia, 185 Pa. St. 503, 39 Atl. 1104; Chambers *v.* South Chester, 140 Pa. St. 510, 21 Atl. 409. *Compare* Kelly *v.* Baltimore, 65 Md. 171, 3 Atl. 594, where it was held that the owner of the land abutting on a street which had been graded and paved in front of his lot before being legally condemned and opened as a public highway, could not recover against the city as a trespasser the cost of filling up his land in order to utilize it for building lots upon the street so graded and paved.

Cost of Wall. — In an action against a city to recover damages for unlawful excavations adjoining the plaintiff's property, evidence showing what would be the cost of a wall along the line of the plaintiff's property to protect it from caving in is admissible, the necessity of such a wall being a question of fact for the jury. Aurora *v.* Fox, 78 Ind. 1. In this case the excavation consisted in digging into and cutting down a street. Apparently it did not involve the establishment of a grade pursuant to a general plan.

"The fact that a change in the grade of a street has left a lot considerably below the level of the street, and that the expenditure of a certain amount would be necessary to restore it to a level with the street, would not authorize a recovery of that amount as specific damages, but might very properly be considered as showing that the lot was thereby rendered less salable than before, and that its market value had decreased." Augusta *v.* Schrameck, 96 Ga. 426, 23 S. E. 400, 51 Am. St. Rep. 146.

But see Lewis *v.* New Britain, 52 Conn. 568, which held that where the city charter provides that the owners of land adjoining a public street may be compelled at their own expense to grade their land for and to construct sidewalks in such manner as the council shall require, when land is taken for a public street and damages assessed in favor of the landowner for the land taken, the expense of grading for and laying a sidewalk cannot be shown as an item of damage. The court said: "It is easy to see that if such items are proper subjects of damage, and the plaintiff should hereafter be required to grade and pave for a sidewalk, it would not be done at his expense as the charter of the city requires."

10. Albertson *v.* Philadelphia, 185 Pa. St. 223, 39 Atl. 887.

Matters of Choice. — But this rule does not permit evidence of expenditures which are not in fact necessary, but are purely a matter of taste and choice. Springfield *v.* Griffith, 21 Ill. App. 93. See also Chase *v.* Worcester, 108 Mass. 60.

11. Preston *v.* Cedar Rapids, 95 Iowa 71, 63 N. W. 577, where the court said: "We do not think that there was error in admitting this evidence. Now, upon what is this difference in value based? Manifestly, in part, upon the use the property is intended for, and how the value of the property is affected, if at all, in view of the purposes for which it is adapted or used. In other words, in determining the market value, or difference in value, we take into consideration the uses and purposes for which the building was erected. The evidence tended to show that the building was used for stores and offices. Such, then, was the use, whether it be called 'commercial' or 'trade,' or by some other name. In either case it is its market value."

D. Injury to Business. — Upon such a proceeding, injury to the business carried on upon the premises cannot be shown.[12]

E. Injury to Rental Value of Property. — Whether or not injury to the rental value of the property is proper to be considered is a question as to which the courts do not agree.[13]

2. Mode of Inquiry. — A. Award of Damages to Other Property Owners. — Evidence of the damages awarded to other owners of abutting property is not admissible.[14]

12. Edmands *v.* Boston, 108 Mass. 535.

Compare In re Grade Crossing Com'rs, 17 App. Div. 54, 44 N. Y. Supp. 844, a proceeding to ascertain the damages to property by reason of the change of grade of a street, wherein evidence of the effect on the business of the occupant while the improvement was being made, and its effect after the completion of the improvement, was held competent, not on the theory that the loss of the profits was an element of damages, but as bearing on the question of the value of the property for business purposes.

13. Where rented property is injured by public improvement, it is proper to inquire to what extent, if any, the improvement will affect the rental value. This is merely an element of damage for the jury to consider, keeping in view the fact that the measure of damages is the difference between the value of the property immediately before and immediately after the construction of the improvement, and disregarding public improvements. Omaha *v.* Hansen, 36 Neb. 135, 54 N. W. 83, where the improvement consisted of the erection of a viaduct past the property owner's lot, being at that point more than thirty feet above the surface of the lot.

In Joliet *v.* Alder, 71 Ill. App. 456, an action to recover damages to property caused by an excavation and change of grade in a street, a witness was asked whether the matters complained of had any effect upon the rental value of the property, to which he answered that it would not be so desirable to live in. It was held that the question allowed by the court to be answered, even if not strictly proper, did no harm, and no serious objection could be urged to the answer, which went only to the extent of showing that the property was less desirable as a residence after the improvement than before, since no attempt was made to show the rental value of the property before and after the improvement as a basis for the estimation of damages.

In Chicago *v.* McDonough, 112 Ill. 85, an action to recover damages to the reversion occasioned by the construction of a viaduct and changing the grade of a street, it was held that a lease of the property and evidence of the damage to the rental value, as well as to the property, by the depreciation of its market value, furnished *data* from which might be calculated the damage to the reversion separate from that to the possession.

In an action against a municipal corporation to recover damages caused to property by the vacation of a street, evidence of the decrease in rental values of other properties than that directly in issue is not competent. Chicago *v.* Baker, 86 Fed. 753, where the court said: "We cannot believe that evidence of that character can, in general, be promotive of just conclusions, and it is beyond doubt that the evidence offered in this case was deceptive and misleading in its tendency. It was doubly so, because the reductions in rents which were shown were attributed by the witnesses largely to an increase of dust, cinders, smoke and steam, credited to the elevation of the railroad tracks, and not solely to the vacation of the street; and neither by the evidence nor by the instructions of the court was the jury furnished a basis for determining to what extent the rental values proved were affected by the vacation of the street alone."

14. In Donovan *v.* Springfield, 125

B. Opinion Evidence. — The opinions of witnesses as to the value of the property before and after the change in the grade of the street are competent.[15] But whether or not the property was in fact injured is not a question upon which it is proper to take opinion evidence.[16]

3. Reduction or Mitigation of Damages. — Benefits. — Upon a proceeding to assess damages resulting from changing the grade of a street, evidence in reduction of the damages should be confined to proof of benefits special to the property and resulting from the change,[17] although there are cases in which it has been held proper to permit evidence of benefits common to all property owners by the change.[18]

Negligence. — Where a city undertakes the improvement of its streets and is sued by an owner of abutting property to recover damages for its negligence in doing the work, evidence that the improvement enhanced the value of the plaintiff's property is incompetent and properly excluded.[19]

Mass. 371, a proceeding to assess damages occasioned to abutting property by raising the grade of a street, it was held that evidence that damages had been awarded to abutting property owners other than the petitioners is *res inter alios,* and not competent as an admission by the city.

15. Blair *v.* Charleston, 43 W. Va. 62, 26 S. E. 341; Lafayette *v.* Nagle, 113 Ind. 425, 15 N. E. 1; Chicago *v.* McDonough, 112 Ill. 85; Topeka *v.* Martineau, 42 Kan. 387, 22 Pac. 419; Sexton *v.* North Bridgewater, 116 Mass. 200.

16. In Church *v.* Milwaukee, 31 Wis. 512, an action for damages from changing the grade of a street, it was held that witnesses for the defendant city could not be asked whether the plaintiff's property was injured or benefited by such grading.

17. *Connecticut.* — Cook *v.* Ansonia, 66 Conn. 413, 34 Atl. 183; Terry *v.* Hartford, 39 Conn. 286.

Illinois. — Bloomington *v.* Pollock, 141 Ill. 346, 31 N. E. 146; North Alton *v.* Dorsett, 59 Ill. App. 612; Hopkins *v.* Ottawa, 59 Ill. App. 288; Osgood *v.* Chicago, 44 Ill. App. 532, *affirmed* 154 Ill. 194, 41 N. E. 40.

Iowa. — Meyer *v.* Burlington, 52 Iowa 560, 3 N. W. 558.

Missouri. — Smith *v.* St. Joseph, 122 Mo. 643, 27 S. W. 344; Cole *v.* St. Louis, 132 Mo. 633, 34 S. W. 469.

Nebraska. — Kirkendall *v.* Omaha, 39 Neb. 1, 57 N. W. 752; Schaller *v.* Omaha, 23 Neb. 325, 36 N. W. 533; Omaha *v.* Schaller, 26 Neb. 522, 42 N. W. 721.

New Jersey. — Lambertville *v.* Clevenger, 30 N. J. L. 53.

Pennsylvania. — Rudderow *v.* Philadelphia, 166 Pa. St. 241, 31 Atl. 53.

West Virginia. — Blair *v.* Charleston, 43 W. Va. 62, 26 S. E. 341.

18. Chattanooga *v.* Geiler, 13 Lea (Tenn.) 611; Stowell *v.* Milwaukee, 31 Wis. 523; Church *v.* Milwaukee, 31 Wis. 512.

Increased Value of the Land Due to Private Improvements subsequently made by neighbors on their property is not a special benefit available to the municipality as a fact proper to be shown in reduction of the damages. Cook *v.* Ansonia, 66 Conn. 413, 34 Atl. 183.

19. Martinsville *v.* Shirley, 84 Ind. 546.

MUNICIPAL OFFICERS.— See Officer.

MUNICIPAL TAXATION.— See Taxation.

MURDER.— See Homicide.

MUTE.— See Competency; Credibility; Direct Examination; Witnesses.

MUTUAL BENEFIT ASSOCIATION.— See Beneficial Association.

MUTUAL INSURANCE.— See Insurance.

NAMES.—See Abbreviations; Identity.

NATURALIZATION.— See Citizens and Aliens.

NECESSARIES.— See Husband and Wife; Infants; Parent and Child.

NEGATIVE EVIDENCE.—See Positive and Negative Evidence.

NEGLIGENCE.

By Chas. M. Bufford

CROSS-REFERENCES:

Attorney and Client;
Carriers;
Landlord and Tenant;
Master and Servant;
Physicians and Surgeons;
Railroads.

I. PRELIMINARY CONSIDERATIONS.

Limitation of Subject-Matter of Article. — This article does not deal with the negligent breach of duties purely contractual, but with those not founded on the express consent of the parties, and excludes matters peculiar to actions between masters and servants.

Scope of Treatment. — This article considers the manner of proving negligence, the presumptions in respect thereto, and the burden of proof thereof, but not the proof of matters involved in actions for negligence other than the negligence itself. Moreover, there being nothing peculiar to the subject of negligence in the admissibility of certain classes of evidence, as admissions, declarations, opinions (except the opinion as to the dangerousness of a particular act or omission), and *res gestae,* these classes of evidence are considered in the respective articles on those subjects.

Ultimate Facts Involved in Proof of Negligence. — In proving negligence the following ultimate facts must be shown: (1) The damage complained of as the proximate result of an act or omission

controlled by the party to be charged;[1] (2) the negligent character of the act or omission;[2] and (3) reasonably long notice to the party to be charged with the negligence of the omission.[3] Where the

1. Bromley *v.* Birmingham M. R. Co., 95 Ala. 397, 11 So. 341; Hopkins *v.* Utah N. R. Co., 2 Idaho 277, 13 Pac. 343; Benton *v.* Central R. R., 42 Iowa 192; McNeil *v.* Boston Elev. R. Co., 187 Mass. 569, 73 N. E. 657; Warner *v.* St. Louis & M. R. Co., 177 Mo. 125, 77 S. W. 67; Lohr *v.* Philipsburg Borough, 165 Pa. St. 109, 30 Atl. 822; Chesapeake & O. R. Co. *v.* Heath (Va.), 48 S. E. 508.

In an action for injuries from a fall of snow alleged to have come from defendant's elevated structure the burden is on plaintiff to show that the fall came from defendant's structure, and not from some other elevation. McGee *v.* Boston Elev. R. Co., 187 Mass. 569, 73 N. E. 657.

In an action for injuries alleged to have been caused by falling over defects in a city street, where there is no evidence that the fall was caused by the defects, but only that plaintiff fell in the vicinity of the defects, it is error to submit the case to the jury. Menzies *v.* Interstate Pav. Co., 94 N. Y. Supp. 492.

2. Bromley *v.* Birmingham M. R. Co., 95 Ala. 397, 11 So. 341; Hopkins *v.* Utah N. R. Co., 2 Idaho 277, 13 Pac. 343; Lohr *v.* Philipsburg Borough, 165 Pa. St. 109, 30 Atl. 822; Chesapeake & O. R. Co. *v.* Heath (Va.), 48 S. E. 508.

In an action for negligence of a physician in reducing a fracture, from the condition of plaintiff's arm, without a showing of defendant's negligence, the jury would not be justified in finding for plaintiff. Whitesell *v.* Hill (Iowa), 66 N. W. 894.

In an action for negligently permitting vicious dogs to frighten the horses behind which decedent was riding, causing them to run away and decedent to be killed, it is necessary for plaintiff to establish the vicious character of the dogs, and defendant's previous knowledge of it. Mann *v.* Weiand, 81 Pa. St. 243, 253.

In an action for injuries by falling on an alleged defective sidewalk, where there is a failure of proof as to the alleged defects in the sidewalk, the court should direct a verdict for defendant. Hyer *v.* Janesville, 101 Wis. 371, 77 N. W. 729.

3. Carruthers *v.* Chicago, R. I. & P. R. Co., 55 Kan. 600, 40 Pac. 915; York *v.* Spellman, 19 Neb. 357, 27 N. W. 213; Lohr *v.* Philipsburg Borough, 165 Pa. St. 109, 30 Atl. 822. See Mann *v.* Weiand, 81 Pa. St. 243, 253, as quoted in note *2 supra*.

Where defendant is charged with negligence in the use of a defective structure, plaintiff must prove that the defect came to the knowledge of the defendant or existed for such length of time that knowledge should be presumed. Case *v.* Chicago, R. I. & P. R. Co., 64 Iowa 762, 21 N. W. 30 (where plaintiff while on a street was injured by the door of defendant's passing freight car falling upon him).

In an action for injuries received in breaking through a defective bridge, "in order to recover it becomes necessary for plaintiff to show, not only damage from defects in the bridge, but fault in defendant in having a bridge in such condition; and such fault could only exist where there had been failure to repair defects which defendant either knew or had such notice of as should have led to the removal of the mischief." Fulton Iron & Engine Wks. *v.* Kimball Twp., 52 Mich. 146, 17 N. W. 733.

In an action for falling on a thin coating of ice on defendant's steps, where it appeared that it was snowing at the time of the accident, the burden is on plaintiff to show that the ice had been there a sufficient time to charge defendant with notice of the defect. Rusk *v.* Manhattan R. Co., 46 App. Div. 100, 61 N. Y. Supp. 384.

In an action for falling on a defective sidewalk it is necessary, in the event of a failure to prove that defendant had actual notice of the condition of the walk at the place of accident, to prove that the walk had been in the defective condition for such a length of time that the defendant should have known of it, and was therefore chargeable with constructive notice of its condition.

plaintiff avers two or more acts of negligence on defendant's part, proximately resulting in damage to him, it is sufficient to prove either one of them only, unless, perhaps, where the injury would not have occurred in the absence of the joint operation of the several acts of negligence.[4]

II. BURDEN OF PROOF.

1. On Which Party It Rests. — A. Of Negligence. — The plaintiff or other party who avers the negligence of another as a cause of action against him has the burden of showing such other's negligence. This rule applies equally whether the plaintiff is the person injured or is suing as his representative.[5]

Gillrie *v.* Lockport, 122 N. Y. 403, 25 N. E. 357.

In an action for injuries from a defect in a street consisting of a ditch dug across it by the city authorities, "the question of notice to the city authorities concerning the condition of a street is involved only where they have not produced the condition themselves, in which case they necessarily know the fact." Salem *v.* Webster, 192 Ill. 369, 61 N. E. 323.

4. Weber Wagon Co. *v.* Kehl, 139 Ill. 644, 656-657, 29 N. E. 714.

Where, in a complaint charging negligence, plaintiff unites immaterial with material charges, he is not bound to establish the immaterial in order to be entitled to recover. Thompson *v.* Toledo A. A. & N. M. R. Co., 91 Mich. 255, 51 N. W. 995.

Where plaintiff averred that a street car collision in which she was injured was caused by the breakage of the brake of defendant's car while descending a hill, together with the fractious disposition of the horses which drew the same, causing them to run away, and the failure to station a conductor on the car, who could have put on the rear brake, plaintiff must prove each element of negligence in order to make out a case. Wormsdorf *v.* Detroit City R. Co., 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453.

5. *United States.* — Kefauver *v.* Philadelphia & R. R. Co., 122 Fed. 966 (personal injury by sudden starting of train as plaintiff was alighting).

Alabama. — Western Ry. *v.* Williamson, 114 Ala. 131, 21 So. 827; Birmingham M. R. Co. *v.* Wilmer, 97 Ala. 165, 11 So. 886; Bromley *v.* Birmingham M. R. Co., 95 Ala. 397, 11 So. 341.

Arkansas. — Hot Springs St. R. Co. *v.* Hildreth, 82 S. W. 245; St. Louis & S. F. R. Co. *v.* Townsend, 69 Ark. 380, 63 S. W. 994.

California. — Kahn *v.* Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164 (injury to property by leak in boiler on upper floor).

Colorado. — Denver & R. G. R. Co. *v.* Ryan, 17 Colo. 98, 28 Pac. 79 (death caused by being struck by locomotive at street crossing).

Delaware. — Goldstein *v.* People's R. Co., 60 Atl. 975 (death of child from falling from street car on which it was trespassing); Colbourn *v.* Wilmington, 4 Pen. 443, 56 Atl. 605 (death of horse by coming in contact with live wire); Jarrell *v.* Wilmington, 4 Pen. 454, 56 Atl. 379 (struck by falling awning); Cox *v.* Wilmington City R. Co., 4 Pen. 162, 53 Atl. 569 (death of one caused by his buggy being struck by street car); Farley *v.* Wilmington & N. C. Elec. R. Co., 3 Pen. 581, 52 Atl. 543 (death by being struck by street car at street crossing); Boyd *v.* Blumenthal, 3 Pen. 564, 52 Atl. 330 (struck by a projecting joist while riding in elevator); Adams *v.* Wilmington & N. Elec. R. Co., 52 Atl. 264 (struck by street car at street crossing); Tully *v.* Philadelphia W. & B. R. Co., 3 Pen. 455, 50 Atl. 95 (death by falling from moving train); Martin *v.* Baltimore & P. R. Co., 2 Marv. 123, 42 Atl. 442

(injuries to property struck by train at highway crossing); Wilkins *v.* Wilmington, 2 Marv. (Del.) 132, 42 Atl. 418 (personal injuries by driving into hole in city street); Maxwell *v.* Wilmington City R. Co., 1 Marv. 199, 40 Atl. 945 (personal injuries to equestrian by collision with street car); Louth *v.* Thompson, 1 Pen. (Del.) 149, 39 Atl. 1100 (personal injuries by falling into area in sidewalk).

Idaho. — Hopkins *v.* Utah N. R. Co., 2 Idaho 277, 13 Pac. 343 (injuries to team struck by train).

Illinois. — Chicago & E. I. R. Co. *v.* Geary, 110 Ill. 383 (personal injuries by being struck by train at highway crossing); Chicago, B. & Q. R. Co. *v.* Harwood, 90 Ill. 425 (death by being struck by train at highway crossing); Quincy, A. & St. L. R. Co. *v.* Wellhoener, 72 Ill. 60; Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177 (death by being struck by train); Galena & C. U. R. Co. *v.* Fay, 16 Ill. 558, 561, 570, 63 Am. Dec. 323 (personal injuries by derailment of railway car).

Indiana. — Huntingburgh *v.* First, 22 Ind. App. 66, 53 N. E. 246 (personal injuries resulting from defect in sidewalk); Miller *v.* Miller, 17 Ind. App. 605, 47 N. E. 338 (loss of property by fire spreading from defendant's property); Lake Erie & W. R. Co. *v.* Stick, 143 Ind. 449, 41 N. E. 365 (personal injuries by being struck by train at highway crossing); Cleveland, C. C. & I. R. Co. *v.* Newell, 104 Ind. 264, 273, 274, 3 N. E. 836, 54 Am. Rep. 312 (personal injuries by derailment of railway car); Cincinnati H. & I. R. Co. *v.* Butler, 103 Ind. 31, 2 N. E. 138 (personal injuries by being struck by train at highway crossing).

Iowa. — Larkin *v.* Chicago & G. W. R. Co., 92 N. W. 891; Whittlesey *v.* Burlington, C. R. & N. R. Co., 90 N. W. 516 (personal injuries by derailment of train); Cramer *v.* Burlington, 42 Iowa 315; Garrett *v.* Chicago & N. W. R. Co., 36 Iowa 121 (loss from fire set by locomotive); Gandy *v.* Chicago & N. W. R. Co., 30 Iowa 420 (loss from fire caused by locomotive); Baird *v.* Morford, 29 Iowa 531.

Kansas. — Atchison, T. & S. F. R. Co. *v.* McFarland, 2 Kan. App. 662, 43 Pac. 788 (death of child struck by train); Pettigrew *v.* Lewis, 46 Kan. 78, 26 Pac. 458.

Louisiana. — Buechner *v.* New Orleans, 112 La. 599, 36 So. 603, 6 L. R. A. 334 (death by falling through hole in bridge); Le Blanc *v.* Sweet, 107 La. 355, 369, 31 So. 766.

Maine. — Stevens *v.* E. & N. A. R., 66 Me. 74 (personal injuries by derailment of train); Bachelder *v.* Heagan, 18 Me. 32.

Maryland. — Baltimore Elev. Co. *v.* Neal, 65 Md. 438, 451, 5 Atl. 338. See Baltimore & O. R. Co. *v.* State, 63 Md. 135, 144.

Massachusetts. — Brennan *v.* Standard Oil Co., 187 Mass. 376, 73 N. E. 472 (death by being run down by defendant's servant); Robinson *v.* Fitchburg & W. R. Co., 7 Gray 92.

Michigan. — Pzolla *v.* Michigan Cent. R. Co., 54 Mich. 273, 20 N. W. 71 (personal injuries by being struck by train at highway crossing); Kelly *v.* Hendrie, 26 Mich. 255 (death by being struck by street car); Detroit & M. R. Co. *v.* Van Steinburg, 17 Mich. 99, 119 (personal injuries by being struck by train).

Missouri. — Warner *v.* St. Louis & M. R. R. Co., 177 Mo. 125, 77 S. W. 67; Blanton *v.* Dold, 109 Mo. 64, 18 S. W. 1149.

Nebraska. — Lincoln Trac. Co. *v.* Webb, 102 N. W. 258.

New Hampshire. — Dame *v.* Laconia Car Co. Wks., 71 N. H. 407, 52 Atl. 864.

New Jersey. — Bien *v.* Unger, 64 N. J. L. 596, 46 Atl. 593.

New York. — Casper *v.* Dry Dock, E. B. & B. R. Co., 56 App. Div. 372, 67 N. Y. Supp. 805; Cosulich *v.* Standard Oil Co., 122 N. Y. 118, 126, 25 N. E. 259, 19 Am. St. Rep. 475; Hart *v.* Hudson Riv. Bridge Co., 80 N. Y. 622 (death by falling off bridge).

North Carolina. — Cox *v.* Norfolk & C. R. Co., 123 N. C. 604, 31 S. E. 848; Jones *v.* North Carolina R. Co., 67 N. C. 122 (death of horse by being run down by railway train).

North Dakota. — Balding *v.* Andrews, 12 N. D. 267, 96 N. W. 305 (firing of property by burning elevator).

Ohio. — Schweinfurth *v.* Cleveland,

B. Of Last Clear Chance. — Likewise a plaintiff who avers that notwithstanding his own contributory negligence his peril could have been discovered by the defendant in time to avoid the injury had the latter exercised due care, has the burden of proving defendant's negligent failure to discover the peril, or, having discovered it, to take due precautions to avoid injury.[6]

C. Of Contributory Negligence. — a. *The General Rule.* — In most jurisdictions, the defendant's negligence having been shown *prima facie,* the burden of proof then rests on defendant to affirmatively prove the contributory negligence of the person who has sustained damage. In the absence of proof it cannot be assumed.[7]

C. C. & St. L. R. Co., 60 Ohio St. 215, 223, 54 N. E. 89.

Pennsylvania. — Pennsylvania Tel. Co. *v.* Varnau, 15 Atl. 624; Hays *v.* Millar, 77 Pa. St. 238, 18 Am. Rep. 445 (sinking of scow in tow by negligence of tow-boat).

South Carolina. — Joyner *v.* South Carolina R. Co., 26 S. C. 49, 1 S. E. 52.

Texas. — St. Louis S. W. R. Co. *v.* Parks, 76 S. W. 740.

Utah. — Wells *v.* Utah Const. Co., 27 Utah 524, 76 Pac. 560.

Vermont. — Bovee *v.* Danville, 53 Vt. 183 (personal injuries on defective highway).

Virginia. — Bowers *v.* Bristol Gas & Elec. Co., 100 Va. 533, 42 S. E. 296 (death by electric current).

Wisconsin. — Atkinson *v.* Goodrich Transp. Co., 69 Wis. 5, 31 N. W. 164; Dressler *v.* Davis, 7 Wis. 527 (personal injuries in collision between buggies).

In an action by a railway passenger for injuries by being struck by a large stone swinging from a derrick too close to the track on which the car was passing, an instruction that the owner of the derrick must show by a preponderance of the evidence his freedom from negligence is error. Chicago & A. R. Co. *v.* Murphy, 198 Ill. 462, 470, 64 N. E. 1011.

6. *Arkansas.* — St. Louis & S. F. R. Co. *v.* Townsend, 69 Ark. 380, 63 S. W. 994; St. Louis, I. M. & S. R. Co. *v.* Jordan, 65 Ark. 429, 47 S. W. 115.

Missouri. — Koegel *v.* Missouri Pac. R. Co., 181 Mo. 379, 80 S. W. 905.

New Jersey. — Solatinow *v.* Jersey City H. & P. St. R. Co., 70 N. J. L. 154, 56 Atl. 235.

North Carolina. — Cox *v.* Norfolk & C. R. Co., 123 N. C. 604, 31 S. E. 848; Norwood *v.* Raleigh & G. R. Co., 111 N. C. 236, 16 S. E. 4.

Texas. — Luna *v.* Missouri, K. & T. R. Co. (Tex. Civ. App.), 73 S. W. 1061.

Virginia. — Richmond Pass. & Power Co. *v.* Allen, 101 Va. 200, 43 S. E. 356.

7. *England.* — *Per* Pollock, B., in Bridges *v.* Directors Etc. of North London R. Co., L. R. 7 H. L. 213, 223.

United States. — Ward *v.* Dampskibselskabet Kjoebenhaven, 136 Fed. 502; Baltimore & P. R. Co. *v.* Landrigan, 191 U. S. 461; Northern Pac. R. Co. *v.* Spike, 57 C. C. A. 384, 121 Fed. 44; Hemingway *v.* Illinois Cent. R. Co., 52 C. C. A. 477, 114 Fed. 843; Watertown *v.* Greaves, 50 C. C. A. 172, 112 Fed. 183; Chicago G. W. R. Co. *v.* Price, 38 C. C. A. 239, 97 Fed. 423; Toledo P. & W. R. Co. *v.* Chisholm, 27 C. C. A. 663, 83 Fed. 652; Texas & P. R. Co. *v.* Gentry, 163 U. S. 353, 366; Texas & P. R. Co. *v.* Volk, 151 U. S. 73; Horn *v.* Baltimore & O. R. Co., 4 C. C. A. 346, 54 Fed. 301; Eddy *v.* Wallace, 1 C. C. A. 435, 49 Fed. 801; Inland & Seaboard Coast. Co. *v.* Tolson, 139 U. S. 551; Indianapolis & St. L. R. Co. *v.* Horst, 93 U. S. 291; Railroad Co. *v.* Gladmon, 15 Wall. 401.

Alabama. — Pullman Palace-Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921; Western Ry. *v.* Williamson, 114 Ala. 131, 21 So. 827; McDonald *v.* Montgomery St. Ry., 110 Ala. 161, 20 So. 317; Birmingham M. R. Co.

v. Wilmer, 97 Ala. 165, 11 So. 886; Bromley *v.* Birmingham M. R. Co., 95 Ala. 397, 11 So. 341; Louisville & N. R. Co. *v.* Hall, 87 Ala. 708, 722-723, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710; Montgomery Gas-Light Co. *v.* Montgomery & E. R. Co., 86 Ala. 372, 5 So. 735; Montgomery & E. R. Co. *v.* Chambers, 79 Ala. 338; Thompson *v.* Duncan, 76 Ala. 334.

Arizona. — Southern Pacific Co. *v.* Tomlinson, 4 Ariz. 126, 33 Pac. 710; Hobson *v.* New Mexico & A. R. Co., 2 Ariz. 171, 11 Pac. 545; Lopez *v.* Central Arizona Min. Co., 1 Ariz. 464, 2 Pac. 748.

Arkansas. — Hot Springs St. R. Co. *v.* Hildreth, 82 S. W. 245; St. Louis I. M. & S. R. Co. *v.* Martin, 61 Ark. 549, 33 S. W. 1070; Little Rock & Ft. S. Ry. *v.* Atkins, 46 Ark. 423, 436; Texas & St. L. R. Co. *v.* Orr, 46 Ark. 182, 193.

California. — Daly *v.* Hinz, 113 Cal. 366, 45 Pac. 693; MacDougall *v.* Central R. Co., 63 Cal. 431; Nehrbas *v.* Central Pac. R. Co., 62 Cal. 320, 334. *Compare,* however, Gay *v.* Winter, 34 Cal. 153, 163-164.

Colorado. — Platte & Denver Canal & Mill. Co. *v.* Dowell, 17 Colo. 376, 30 Pac. 68; Denver & R. G. R. Co. *v.* Ryan, 17 Colo. 98, 28 Pac. 79; Kansas Pac. R. Co. *v.* Twombly, 3 Colo. 125. *Compare* Denver Tram. Co. *v.* Reid, 4 Colo. App. 53, 35 Pac. 269.

Dakota. — Mares *v.* Northern Pac. R. Co., 3 Dak. 336, 21 N. W. 5; Sanders *v.* Reister, 1 Dak. 151, 171-172, 46 N. W. 680.

Delaware. — Reed *v.* Queen Anne's R. Co., 4 Pen. 413, 57 Atl. 529; Cox *v.* Wilmington City R. Co., 4 Pen. 162, 53 Atl. 569; Boyd *v.* Blumenthal, 3 Pen. 564, 52 Atl. 330; Louth *v.* Thompson, 1 Pen. 149, 39 Atl. 1100; Martin *v.* Baltimore & P. R. Co., 2 Marv. 123, 42 Atl. 442; Wilkins *v.* Wilmington, 2 Marv. 132, 42 Atl. 418.

District of Columbia. — Cowen *v.* Merriman, 17 App. D. C. 186, 202-204; Harmon *v.* Washington & G. R. Co., 7 Mack. 255.

Florida. — Jacksonville T. & K. W. R. Co. *v.* Peninsular Land Transp. & Mfg. Co., 27 Fla. 1, 99, 100, 9 So. 661, 17 L. R. A. 33; Louisville & N. R. Co. *v.* Yniestra, 21 Fla. 700.

Georgia. — Augusta *v.* Hudson, 88 Ga. 599, 15 S. E. 678.

Idaho. — Hopkins *v.* Utah N. R. Co., 2 Idaho 277, 13 Pac. 343.

Indiana. — Burns' Anno. Stat. 1901, § 359*a*; Diamond Block Coal Co. *v.* Cuthbertson, 73 N. E. 818, *affirming* 67 N. E. 558; Southern R. Co. *v.* Davis, 72 N. E. 1053; Pennsylvania Co. *v.* Fertig, 70 N. E. 834; Harris *v.* Pittsburgh C. C. & St. L. R. Co., 32 Ind. App. 600, 70 N. E. 407; Howard *v.* Indianapolis St. R. Co., 29 Ind. App. 514, 64 N. E. 890; Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 232, 61 N. E. 197. The rule was otherwise in Indiana before the passage of the act of 1899.

Indian Territory. — Chicago R. I. & P. R. Co. *v.* Pounds, 1 Ind. Ter. 51, 35 S. W. 249.

Kansas. — Kansas City-Leavenworth R. Co. *v.* Gallagher, 75 Pac. 469; Chicago R. I. & P. R. Co. *v.* Lee, 66 Kan. 806, 72 Pac. 266; Burns *v.* Metropolitan St. R. Co., 66 Kan. 188, 71 Pac. 244; Missouri Pac. R. Co. *v.* Moffatt, 60 Kan. 113, 55 Pac. 837; Atchison T. & S. F. R. Co. *v.* Aderhold, 58 Kan. 293, 49 Pac. 83; Chicago, R. I. & P. R. Co. *v.* Hinds, 56 Kan. 758, 44 Pac. 993; St. Louis & S. F. R. Co. *v.* Weaver, 35 Kan. 412, 423-424, 11 Pac. 408, 57 Am. Rep. 176; Kansas Pac. R. Co. *v.* Pointer, 14 Kan. 37; Union Pac. R. Co. *v.* Hand, 7 Kan. 380, 388. See Atchison T. & S. F. R. Co. *v.* Hill, 57 Kan. 139, 45 Pac. 581.

Kentucky. — Louisville & N. R. Co. *v.* Clark, 20 Ky. L. Rep. 1375, 49 S. W. 323; Paducah & M. R. Co. *v.* Hoehl, 12 Bush 41.

Louisiana. — Buechner *v.* New Orleans, 112 La. 599, 36 So. 603, 66 L. R. A. 334.

Maryland. — Baltimore & O. R. Co. *v.* Stumpf, 97 Md. 78, 90-92, 54 Atl. 978; Price *v.* Philadelphia, W. & B. R. Co., 84 Md. 506, 36 Atl. 263, 36 L. R. A. 213; State *v.* Baltimore & P. R. Co., 58 Md. 482; Frech *v.* Philadelphia W. & B. R. Co., 39 Md. 574. See Northern Cent. R. Co. *v.* State, 31 Md. 357, 100 Am. Dec. 69.

Minnesota. — Newstrom *v.* St. Paul & D. R. Co., 61 Minn. 78, 63 N. W. 253; Wilson *v.* Northern Pac. R. Co., 26 Minn. 278, 3 N. W. 333; Hocum *v.* Weitherick, 22 Minn. 152; St. Paul *v.* Kuby, 8 Minn. 154.

Mississippi. — Simms *v.* Forbes, 38 So. 546; Hickman *v.* Kansas City M. & B. R. Co., 66 Miss. 154, 5 So. 225. *Contra,* Vicksburg *v.* Hennessey, 54 Miss. 391, 28 Am. Rep. 354.

Missouri. — Schroeder *v.* St. Louis Transit Co. (Mo. App.), 85 S. W. 968; Riska *v.* Union Depot R. Co., 180 Mo. 168, 79 S. W. 445; Priesmeyer *v.* St. Louis Transit Co., 102 Mo. App. 518, 77 S. W. 313; Weller *v.* Chicago M. & St. P. R. Co., 164 Mo. 180, 64 S. W. 141; Crumpley *v.* Hannibal & St. J. R. Co., 111 Mo. 152, 19 S. W. 820; Mitchell *v.* Clinton, 99 Mo. 153, 12 S. W. 793; Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 229, 39 Am. Rep. 503; Thompson *v.* North Missouri R. Co., 51 Mo. 190, 11 Am. Rep. 443.

Montana. — Cummings *v.* Helena & L. Smelt. & R. Wks., 26 Mont. 434, 68 Pac. 852; Hunter *v.* Montana Cent. R. Co., 22 Mont. 525, 57 Pac. 140; Prosses *v.* Montana Cent. R. Co., 17 Mont. 372, 388, 43 Pac. 81, 30 L. R. A. 814; Nelson *v.* Helena, 16 Mont. 21, 39 Pac. 905; Higley *v.* Gilmer, 3 Mont. 90, 35 Am. Rep. 450. *Contra,* Ryan *v.* Gilmer, 2 Mont. 517, 25 Am. Rep. 744.

Nebraska. — Omaha St. R. Co. *v.* Martin, 48 Neb. 65, 66 N. W. 1007; Spears *v.* Chicago B. & Q. R. Co., 43 Neb. 720, 62 N. W. 68; Union Stock Yards Co. *v.* Conoyer, 41 Neb. 617, 625, 59 N. W. 950; Omaha *v.* Ayer, 32 Neb. 375, 49 N. W. 445; Lincoln *v.* Walker, 18 Neb. 244, 20 N. W. 113, *affirmed* 18 Neb. 250, 25 N. W. 66.

New Jersey. — Shelly *v.* Brunswick Trac. Co., 65 N. J. L. 639, 48 Atl. 562; Consolidated Trac. Co. *v.* Behr, 59 N. J. L. 477, 37 Atl. 142; Jersey Exp. Co. *v.* Nichols, 33 N. J. L. 434; Durant *v.* Palmer, 29 N. J. L. 544. *Contra,* Moore *v.* Central R. Co., 24 N. J. L. 268.

North Carolina. — Cox *v.* Norfolk & C. R. Co., 123 N. C. 604, 31 S. E. 848; Wood *v.* Bartholomew, 122 N. C. 177, 29 S. E. 959; Norton *v.* North Carolina R. Co., 122 N. C. 910, 29 S. E. 886; Russell *v.* Monroe, 116 N. C. 720, 728, 21 S. E. 550, 47 Am. St. Rep. 823.

North Dakota. — See Cameron *v.* Great Northern R. Co., 8 N. D. 124, 77 N. W. 1016.

Ohio. — Schweinfurth *v.* Cleveland C. C. & St. L. R. Co., 60 Ohio St. 215, 223, 54 N. E. 89; Baltimore & O. R. Co. *v.* Whitacre, 35 Ohio St. 627.

Oregon. — Dubiver *v.* City & S. R. Co., 44 Or. 227, 75 Pac. 693; McBride *v.* Northern Pac. R. Co., 19 Or. 64, 23 Pac. 814; Grant *v.* Baker, 12 Or. 329, 7 Pac. 318. *Contra,* see Walsh *v.* Oregon R. & Nav. Co., 10 Or. 250.

Pennsylvania. — Coolbroth *v.* Pennsylvania R. Co., 209 Pa. St. 433, 58 Atl. 808; Brown *v.* White, 206 Pa. St. 106, 55 Atl. 848; Sopherstein *v.* Bertels, 178 Pa. St. 401, 35 Atl. 1000; Baker *v.* Westmoreland & C. Nat. Gas Co., 157 Pa. St. 593, 601, 27 Atl. 789; Baker *v.* North East Borough, 151 Pa. St. 234, 24 Atl. 1079; Bradwell *v.* Pittsburg & W. E. Pass. R. Co., 139 Pa. St. 404, 20 Atl. 1046.

Rhode Island. — See Cassidy *v.* Angell, 12 R. I. 447.

South Carolina. — Nohrden *v.* Northeastern R. Co., 59 S. C. 87, 100, 37 S. E. 228; Carter *v.* Columbia & G. R. Co., 19 S. C. 20, 28-29, 45 Am. Rep. 754.

South Dakota. — Kelley *v.* Anderson, 15 S. D. 107, 87 N. W. 579; Smith *v.* Chicago M. & St. P. R. Co., 4 S. D. 71, 80-81, 55 N. W. 717.

Tennessee. — Burke *v.* Citizens St. R. Co., 102 Tenn. 409, 52 S. W. 170; Stewart *v.* Nashville, 96 Tenn. 50, 33 S. W. 613. *Contra,* Bamberger *v.* Citizens St. R. Co., 95 Tenn. 18, 31 S. W. 163, 49 Am. St. Rep. 909, 28 L. R. A. 486.

Texas. — Texas & P. R. Co. *v.* Shoemaker, 84 S. W. 1049; Gillum *v.* New York & T. S. S. Co. (Tex. Civ. App.), 76 S. W. 232; Missouri K. & T. R. Co. *v.* Gist, 31 Tex. Civ. App. 662, 73 S. W. 857; Chicago R. I. & P. R. Co. *v.* Buie, 31 Tex. Civ. App. 654, 73 S. W. 853; Marshall *v.* Dallas Consol. Elec. St. R. Co. (Tex. Civ. App.), 73 S. W. 63; Galveston H. & S. A. R. Co. *v.* Jackson, 31 Tex. Civ. App. 342, 71 S. W. 991; Lee *v.* International & G. N. R. Co., 89 Tex. 583, 36 S. W. 63; Gulf C. & S. F. R. Co. *v.* Shieder, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538; Dallas & W. R. Co. *v.* Spicker, 61 Tex. 427, 48 Am. Rep. 297. *Contra,* Walker *v.* Herron, 22 Tex. 56.

Utah. — Holland *v.* Oregon S. L. R. Co., 26 Utah 209, 72 Pac. 940; Corbett *v.* Oregon S. L. R. Co., 25

In case of personal injury this rule applies equally whether or not the injury results in death,[8] and in case of injuries to children as

Utah 449, 71 Pac. 1065; Harrington *v.* Eureka Hill Min. Co., 17 Utah 300, 53 Pac. 737.

Virginia. — Southern R. Co. *v.* Bryant, 95 Va. 212, 220-221, 28 S. E. 183; Baltimore & O. R. Co. *v.* Whittington, 30 Gratt. 805.

Washington. — Steele *v.* Northern Pac. R. Co., 21 Wash. 287, 57 Pac. 820.

West Virginia. — McVey *v.* Chesapeake & O. R. Co., 46 W. Va. 111, 32 S. E. 1012; Fowler *v.* Baltimore & O. R. Co., 18 W. Va. 579.

Wisconsin. — Conrad *v.* Ellington, 104 Wis. 367, 80 N. W. 456; Green *v.* Ashland Water Co., 101 Wis. 258, 77 N. W. 722, 43 L. R. A. 117; Rhyner *v.* Menasha, 97 Wis. 523, 73 N. W. 41; Waterman *v.* Chicago & A. R. Co., 82 Wis. 613, 634, 52 N. W. 247; Hoye *v.* Chicago & N. W. R. Co., 67 Wis. 1, 15, 29 N. W. 646; Seymer *v.* Lake, 66 Wis. 651, 29 N. W. 554; Randall *v.* North Western Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17; Hoyt *v.* Hudson, 41 Wis. 105, 22 Am. Rep. 714. *Contra,* Dressler *v.* Davis, 7 Wis. 527; Chamberlain *v.* Milwaukee & C. R. Co., 7 Wis. 425.

An instruction putting the burden of proof on plaintiff to show that the injury was caused from lack of ordinary care on the part of the person injured is error. O'Brien *v.* Tatum, 84 Ala. 186, 4 So. 158; Little Rock & Ft. S. R. Co. *v.* Eubanks, 48 Ark. 460, 475, 3 S. W. 808, 3 Am. St. Rep. 245; Heckle *v.* Southern Pacific Co., 123 Cal. 441, 56 Pac. 56; Wortman *v.* Minich, 28 Ind. App. 31, 62 N. E. 85; Fulks *v.* St. Louis & S. F. R. Co., 111 Mo. 335, 19 S. W. 818; Jordan *v.* Asheville, 112 N. C. 743, 16 S. E. 760.

In the absence of any evidence to the contrary it will be presumed that a person run down while on a railroad crossing took ordinary precautions before entering on the crossing. Chesapeake & O. R. Co. *v.* Steele, 29 C. C. A. 81, 84 Fed. 93; Chicago, R. I. & P. R. Co. *v.* Hinds, 56 Kan. 758, 44 Pac. 993.

Thus in an action for falling from an unguarded bridge, plaintiff need not offer evidence of his want of contributory negligence, nor need he go on the witness stand himself, to warrant a recovery. Hays *v.* Gallagher, 72 Pa. St. 136, Thompson, C. J., *dissenting.*

8. Rule Applies in Case of Death. *England.* — See *per* Pollock, B., in Bridges *v.* Directors Etc. of North London R. Co., L. R. 7 H. L. 213, 223.

United States. — Ward *v.* Dampskibselskabet Kjoebenhaven, 136 Fed. 502; Baltimore & P. R. Co. *v.* Landrigan, 191 U. S. 461, 474; Hemingway *v.* Illinois Cent. R. Co., 52 C. C. A. 477, 114 Fed. 843; Chesapeake & O. R. Co. *v.* Steele, 29 C. C. A. 81, 84 Fed. 93; Toledo P. & W. R. Co. *v.* Chisholm, 27 C. C. A. 663, 83 Fed. 652; Texas & P. R. Co. *v.* Gentry, 163 U. S. 353, 366; Horn *v.* Baltimore & O. R. Co., 4 C. C. A. 346, 54 Fed. 301.

Arizona. — Southern Pacific Co. *v.* Tomlinson, 4 Ariz. 126, 33 Pac. 710.

California. — Heckle *v.* Southern Pacific Co., 123 Cal. 441, 56 Pac. 56; Nehrbas *v.* Central Pac. R. Co., 62 Cal. 320, 334.

Colorado. — Denver & R. G. R. Co. *v.* Ryan, 17 Colo. 98, 28 Pac. 79.

Delaware. — Reed *v.* Queen Anne's R. Co., 4 Pen. 413, 57 Atl. 529; Cox *v.* Wilmington City R. Co., 4 Pen. 162, 53 Atl. 569.

Indiana. — Southern R. Co. *v.* Davis (Ind. App.), 72 N. E. 1053; Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 232, 61 N. E. 197.

Kansas. — Kansas City-Leavenworth R. Co. *v.* Gallagher, 75 Pac. 469; Missouri Pac. R. Co. *v.* Moffatt, 60 Kan. 113, 55 Pac. 837; Atchison T. & S. F. R. Co. *v.* Aderhold, 58 Kan. 293, 49 Pac. 83.

Kentucky. — Louisville & N. R. Co. *v.* Clark, 20 Ky. L. Rep. 1375, 49 S. W. 323.

Louisiana. — Buechner *v.* New Orleans, 112 La. 599, 36 So. 603, 66 L. R. A. 334.

Maryland. — State *v.* Baltimore & P. R. Co., 58 Md. 482.

Mississippi. — Hickman *v.* Kansas City, M. & B. R. Co., 66 Miss. 154, 5 So. 225.

Missouri. — Riska *v.* Union Depot R. Co., 180 Mo. 168, 79 S. W. 445;

well as to other persons.[9] In Indiana, however, this rule applies in case of injury to the person only, and not to cases of injury to property,[10] and in Massachusetts applies only where a person is killed by a train at a highway crossing.[11] The fact that plaintiff avers freedom from contributory negligence does not alter the rule.[12] Nor does the fact that plaintiff puts in evidence tending to show contributory negligence.[13]

Weller *v.* Chicago, M. & St. P. R. Co., 164 Mo. 180, 64 S. W. 141; Crumpley *v.* Hannibal & St. J. R. Co., 111 Mo. 152, 19 S. W. 820; Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 229, 39 Am. Rep. 503.

Nebraska. — Union Stock Yards Co. *v.* Conoyer, 41 Neb. 617, 625, 59 N. W. 950.

North Carolina. — Cox *v.* Norfolk & C. R. Co., 123 N. C. 604, 31 S. E. 848; Wood *v.* Bartholomew, 122 N. C. 177, 29 S. E. 959.

North Dakota. — See Cameron *v.* Great Northern R. Co., 77 N. W. 1016.

Oregon. — McBride *v.* Northern Pac. R. Co., 19 Or. 64, 23 Pac. 814; Grant *v.* Baker, 12 Or. 329, 7 Pac. 318.

Pennsylvania. — Schum *v.* Pennsylvania R. Co., 107 Pa. St. 8, 52 Am. Rep. 468; Weiss *v.* Pennsylvania R. Co., 79 Pa. St. 387; Cleveland & P. R. Co. *v.* Rowan, 66 Pa. St. 393.

South Carolina. — Carter *v.* Columbia & G. R. Co., 19 S. C. 20, 28-29, 45 Am. Rep. 754.

Texas. — Texas & P. R. Co. *v.* Shoemaker, 84 S. W. 1049.

Virginia. — Southern R. Co. *v.* Bryant, 95 Va. 212, 220-221, 28 S. E. 183.

West Virginia. — McVey *v.* Chesapeake & O. R. Co., 46 W. Va. 111, 32 S. E. 1012.

Wisconsin. — Green *v.* Ashland Water Co., 101 Wis. 258, 77 N. W. 722, 43 L. R. A. 117; Seymer *v.* Lake, 66 Wis. 651, 29 N. W. 554.

9. Railroad Co. *v.* Gladmon, 15 Wall. (U. S.) 401; Daly *v.* Hinz, 113 Cal. 366, 45 Pac. 693; St. Paul *v.* Kuby, 8 Minn. 154; Galveston, H. & S. A. R. Co. *v.* Jackson, 31 Tex. Civ. App. 342, 71 S. W. 991; Corbett *v.* Oregon S. L. R. Co., 25 Utah 449, 71 Pac. 1065.

Thus it must be assumed, until otherwise proved, that the minor has exercised the care and circumspection to be expected of one of his years and discretion. Dubiver *v.* City & S. R. Co., 44 Or. 227, 75 Pac. 693, denying rehearing of 74 Pac. 915. *Contra*, see Bamberger *v.* Citizens St. R. Co., 95 Tenn. 18, 31 S. W. 163, 49 Am. St. Rep. 909, 28 L. R. A. 486.

10. "The situation, management and treatment of property, real and personal, are in most instances well known, and can be readily established. But the circumstances attending an injury to the person are often difficult of proof. Where the mind of the plaintiff is affected by the injury, or death immediately ensues, proof that the plaintiff was free from negligence is in many cases impossible. . . . The same degree of inconvenience is seldom or ever experienced in making proof of the plaintiff's case in actions for injuries to property." Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 232, 61 N. E. 197.

11. R. L., ch. 111, §§ 188, 268; Brusseau *v.* New York N. H. & H. R. Co., 187 Mass. 84, 72 N. E. 348; McDonald *v.* New York C. & H. R. R. Co., 186 Mass. 474, 72 N. E. 55.

Before the enactment of the statute, the rule in these cases, as in others, was that the plaintiff must prove freedom from contributory negligence. Livermore *v.* Fitchburg R. Co., 163 Mass. 132, 39 N. E. 789; Hubbard *v.* Boston & A. R. Co., 159 Mass. 320, 34 N. E. 459; Gahagan *v.* Boston & L. R. Co., 1 Allen (Mass.) 187, 79 Am. Dec. 724.

12. Fitchburg R. Co. *v.* Nichols, 29 C. C. A. 500, 85 Fed. 945; Montgomery & E. R. Co. *v.* Chambers, 79 Ala. 338; Denver & R. G. R. Co. *v.* Ryan, 17 Colo. 98, 28 Pac. 79; Atchison *v.* Wills, 21 App. D. C. 548, 563; Missouri Pac. R. Co. *v.* Preston (Kan.), 63 Pac. 444. *Contra*, Padgett *v.* Atchison T. & S. F. R. Co., 7 Kan. App. 736, 52 Pac. 578.

13. Mares *v.* Northern Pac. R.

This Rule Is Founded on the General Principle of Law that no person is assumed to be in fault until his fault appears,[14] and in case of personal injuries its justice is reinforced by its accord with the natural instinct of self-preservation, and of fear of pain, maiming and death.[15]

b. *The Exceptional Rule.* — In other jurisdictions the burden of proof rests on plaintiff to affirmatively show freedom from contributory negligence, as well as to show defendant's negligence. Without such evidence the jury cannot guess or surmise that the person injured exercised due care. Thus it is not sufficient merely that contributory negligence does not appear anywhere in the evidence.[16]

Co., 3 Dak. 336, 21 N. W. 5; Randall *v.* North Western Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17.

14. Harmon *v.* Washington & G. R. Co., 7 Mack (D. C.) 255; Paducah & M. R. Co. *v.* Hoehl, 12 Bush (Ky.) 41; Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 229, 39 Am. Rep. 503; Durant *v.* Palmer, 29 N. J. L. 544.

"Contributory negligence is in its nature defensive, the disproof of which does not rest on plaintiff, unless in rebuttal of defensive testimony tending to establish it. Like the defense of payment, or set-off, when pleaded, a general verdict for the plaintiff is simply an assertion, or finding, that the defense has not been proved." Thompson *v.* Duncan, 76 Ala. 334.

"The law presumes that every person performs his duty; and this presumption continues until it is shown affirmatively that he does not or has not. Hence, whenever there is no evidence upon the subject, or where the evidence is equally balanced, this presumption in favor of the person in question requires that the findings of the court and jury should be that such person has performed his duty and is not guilty of any culpable negligence, contributory or otherwise. Hence, while it may be said in a general sense that the burden of proving his case devolves upon the plaintiff, yet if he has shown that the defendant was guilty of the negligence causing the injury complained of, and the evidence tending to show that he has performed his duty is at least equal to that which tends to show otherwise, he has made out his case." St. Louis & S. F. R. Co. *v.* Weaver, 35 Kan. 412, 423-424, 11 Pac. 408, 57 Am. Rep. 176.

"It seems to be illogical, and not required by the rules of good pleading, to compel a plaintiff to aver and prove negative matters in cases of this kind. . . . I cannot see what possible ground of distinction there can be between the rule forbidding a plaintiff to recover when his negligence has contributed to the injury, and that which prevents a recovery for a fraud or trespass, when the parties are in *pari delicto*. Yet it would be difficult to find a case in which it has been held that the plaintiff in such actions must assume the burden of proving himself free from fault." Thompson *v.* Northern Missouri R. Co., 51 Mo. 190, 11 Am. Rep. 443.

A rule that plaintiff must prove the care of the injured party would involve intolerable hardship, by protecting the culpable party in those instances where the chance of disaster is multiplied by the obscurity of night. Moreover, it is hostile to the principle that he who avers a fact in excuse of his own misfeasance must prove it. Beatty *v.* Gilmore, 16 Pa. St. 463, 55 Am. Dec. 514.

15. Baltimore & P. R. Co. *v.* Landrigan, 191 U. S. 461, 474; Hemingway *v.* Illinois Cent. R. Co., 52 C. C. A. 477, 114 Fed. 843; Atchison T. & S. F. R. Co. *v.* Aderhold, 58 Kan. 293, 49 Pac. 83; Norton *v.* North Carolina R. Co., 122 N. C. 910, 29 S. E. 886; Grant *v.* Baker, 12 Or. 329, 7 Pac. 318. To hold otherwise would be to assume negligence on the part of one person in excuse of negligence on the part of another. Gay *v.* Winter, 34 Cal. 153, 163-164.

16. *Connecticut.* — Ryan *v.* Bris-

tol, 63 Conn. 26, 27 Atl. 309; Lutton *v.* Vernon, 62 Conn. 1, 10, 23 Atl. 1020.

Illinois. — Wilson *v.* Illinois Cent. R. Co., 210 Ill. 603, 71 N. E. 398, *affirming* 109 Ill. App. 542; Illinois Cent. R. Co. *v.* Cozby, 174 Ill. 109, 50 N. E. 1011; Chicago B. & Q. R. Co. *v.* Levy, 160 Ill. 385, 43 N. E. 357; Illinois Cent. R. Co. *v.* Nowicki, 148 Ill. 29, 35 N. E. 358; North Chicago St. R. Co. *v.* Louis, 138 Ill. 9, 27 N. E. 451; Indianapolis & St. L. R. Co. *v.* Evans, 88 Ill. 63; Chicago B. & Q. R. Co. *v.* Gregory, 58 Ill. 272; Galena & C. U. R. Co. *v.* Fay, 16 Ill. 558, 561, 570, 63 Am. Dec. 323; Dyer *v.* Talcott, 16 Ill. 300; Aurora Branch R. Co. *v.* Grimes, 13 Ill. 585. *Compare*, however, Chicago B. & Q. R. Co. *v.* Harwood, 90 Ill. 425.

Iowa. — Wissler *v.* Atlantic, 123 Iowa 11, 98 N. W. 131; Bell *v.* Clarion, 84 N. W. 962; Crawford *v.* Chicago G. W. R. Co., 109 Iowa 433, 80 N. W. 519; Baker *v.* Chicago, R. I. & P. R. Co., 95 Iowa 163, 63 N. W. 667; Rabe *v.* Sommerbeck, 94 Iowa 656, 63 N. W. 458; Hopkinson *v.* Knapp, 92 Iowa 328, 60 N. W. 653; Cramer *v.* Burlington, 42 Iowa 315; Benton *v.* Central R. R., 42 Iowa 192; Nelson *v.* Chicago R. I. & P. R. Co., 38 Iowa 564; Manmerschid *v.* Dubuque, 25 Iowa 108; Rusch *v.* Davenport, 6 Iowa 443, 451-452.

Maine. — Day *v.* Boston & M. R. R., 96 Me. 207, 215, 52 Atl. 771; McLane *v.* Perkins, 92 Me. 39, 42 Atl. 255, 43 L. R. A. 487; Giberson *v.* Bangor & A. R. Co., 89 Me. 337, 36 Atl. 400; Ward *v.* Maine Cent. R. Co., 96 Me. 136, 145, 51 Atl. 947; Lesan *v.* Maine Cent. R. Co., 77 Me. 85; State *v.* Maine Cent. R. Co., 76 Me. 357; Benson *v.* Titcomb, 72 Me. 31.

Massachusetts. — Gleason *v.* Worcester Consol. St. R. Co., 184 Mass. 290, 68 N. E. 225; Cox *v.* South Shore & B. St. R. Co., 182 Mass. 497, 65 N. E. 823; Dacey *v.* New York N. H. & H. R. Co., 168 Mass. 479, 47 N. E. 418; Moore *v.* Boston & A. R. Co., 159 Mass. 399, 34 N. E. 366; Wheelwright *v.* Boston & A. R. Co., 135 Mass. 225; Com. *v.* Boston & L. R. Co., 126 Mass. 61, 69; Mayo *v.* Boston & M. R., 104 Mass. 137; Murphy *v.* Deans, 101 Mass. 455, 463, 3 Am. Rep. 390.

Michigan. — Gardner *v.* Detroit St. R. Co., 99 Mich. 182, 58 N. W. 49; McGrail *v.* Kalamazoo, 94 Mich. 52, 53 N. W. 955; Guggenheim *v.* Lake Shore & M. S. R. Co., 66 Mich. 150, 159, 33 N. W. 161; Pzolla *v.* Michigan Cent. R. Co., 54 Mich. 273, 20 N. W. 71; Mitchell *v.* Chicago & G. T. R. Co., 51 Mich 236, 16 N. W. 388, 47 Am. Rep. 566; Billings *v.* Breinig, 45 Mich. 65, 7 N. W. 722; Teipel *v.* Hilsendegen, 44 Mich. 461, 7 N. W. 82.

New Hampshire. — Waldron *v.* Boston & M. R. R., 71 N. H. 362, 52 Atl. 443.

New York. — Coleman *v.* New York C. & H. R. R. Co., 98 App. Div. 349, 90 N. Y. Supp. 264; Wieland *v.* Delaware & H. Canal Co., 167 N. Y. 19, 60 N. E. 234; Hoffman *v.* Syracuse Rapid Transit R. Co., 50 App. Div. 83, 63 N. Y. Supp. 442; Lorickio *v.* Brooklyn Heights R. Co., 44 App. Div. 628, 60 N. Y. Supp. 247; Campion *v.* Rollwagen, 59 N. Y. Supp. 308, 43 App. Div. 117; Whalen *v.* Citizens Gas Light Co., 151 N. Y. 70, 45 N. E. 363; Weston *v.* Troy, 139 N. Y. 281, 34 N. E. 780; Riordan *v.* Ocean S. S. Co., 124 N. Y. 655, 26 N. E. 1027; McRickard *v.* Flint, 114 N. Y. 222, 21 N. E. 153; Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. 344; Hart *v.* Hudson River Bridge Co., 84 N. Y. 56. *Compare* Johnson *v.* Hudson River R. Co., 20 N. Y. 65, 74, 75 Am. Dec. 375. *Contra*, Button *v.* Hudson River R. Co., 18 N. Y. 248 (especially page 259).

Vermont. — Bovee *v.* Danville, 53 Vt. 183; Walker *v.* Westfield, 39 Vt. 246.

In an action for injuries caused by a defective sidewalk, where defendant offers evidence tending to show that plaintiff was intoxicated, the burden is on plaintiff to show by a preponderance of evidence his freedom from intoxication. Hubbard *v.* Mason City, 60 Iowa 400, 14 N. W. 772.

In an action against defendant railway for running down plaintiff's cow, plaintiff must prove that the loss occurred through no fault of his, or that, though guilty of want of

In case of personal injury this rule applies equally whether or not the injury results in death,[17] and in cases of injuries to children as well as to other persons.[18] In Illinois this rule does not apply to cases of live stock run down by a train,[19] and in Indiana applies only in cases of injuries to property, and not in cases of injuries to persons,[20] while a certain exception is also recognized in Massachusetts.[21] The rule applies in actions both on common law and on statutory liabilities,[22] and in criminal proceedings.[23] The fact that a person is riding in a vehicle under the control of another does not render it any the less necessary to prove his freedom from negligence,[24] nor does the fact that when plaintiff's property was injured it was

care, such want of care was not responsible for the injury. Waldron *v.* Portland, S. & P. R. Co., 35 Me. 422.

In an action for injuries from a defect in a highway, where it was alleged that plaintiff's injuries were caused by her driving at an unlawful rate of speed, the burden is on plaintiff to prove the contrary. Tuttle *v.* Lawrence, 119 Mass. 276.

It is error to instruct the jury that the burden of proof was on defendant to show plaintiff's contributory negligence. Mynning *v.* Detroit L. & N. R. Co., 67 Mich. 677, 35 N. W. 811.

17. Applies in Case of Death.

Connecticut. — Ryan *v.* Bristol, 63 Conn. 26; Lutton *v.* Vernon, 62 Conn. 1, 10, 23 Atl. 1020.

Illinois. — Illinois Cent. R. Co. *v.* Cozby, 174 Ill. 109, 50 N. E. 1011; Chicago B. & Q. R. Co. *v.* Harwood, 90 Ill. 425.

Iowa. — Bell *v.* Clarion, 84 N. W. 962; Crawford *v.* Chicago G. W. R. Co., 109 Iowa 433, 80 N. W. 519; Baker *v.* Chicago R. I. & P. R. Co., 95 Iowa 163, 63 N. W. 667; Hopkinson *v.* Knapp, 92 Iowa 328, 60 N. W. 653; Murphy *v.* Chicago, R. I. & P. R. Co., 45 Iowa 661.

Maine. — Day *v.* Boston & M. R. R., 96 Me. 207, 215, 52 Atl. 771; McLane *v.* Perkins, 92 Me. 39, 42 Atl. 255, 43 L. R. A. 487; Giberson *v.* Bangor & A. R. Co., 89 Me. 337, 36 Atl. 400; Benson *v.* Titcomb, 72 Me. 31.

Massachusetts. — Cox *v.* South Shore & B. St. R. Co., 182 Mass. 497, 65 N. E. 823; Dacey *v.* New York, N. H. & H. R. Co., 168 Mass. 479, 47 N. E. 418.

Michigan. — Billings *v.* Breinig, 45 Mich. 65, 7 N. W. 722.

New York. — Coleman *v.* New York C. & H. R. R. Co., 98 App. Div. 349, 90 N. Y. Supp. 264; Wieland *v.* Delaware & H. Canal Co., 167 N. Y. 19, 60 N. E. 234; Lorickio *v.* Brooklyn Heights R. Co., 44 App. Div. 628, 60 N. Y. Supp. 247; Rodrian *v.* New York, N. H. & H. R. Co., 125 N. Y. 526, 26 N. E. 741; Riordan *v.* Ocean S. S. Co., 124 N. Y. 655, 26 N. E. 1027; Wiwirowski *v.* Lake Shore & M. S. R. Co., 124 N. Y. 420, 26 N. E. 1023; Hart *v.* Hudson River Bridge Co., 84 N. Y. 56; Cordell *v.* New York C. & H. R. R. Co., 75 N. Y. 330.

18. Hathaway *v.* Toledo, W. & W. R. Co., 46 Ind. 25; Smith *v.* Boston Gas Light Co., 129 Mass. 318; Scialo *v.* Steffens, 94 N. Y. Supp. 305 (death of minor of sixteen); Reynolds *v.* New York C. & H. R. R. Co., 58 N. Y. 248.

19. Cairo & St. L. R. Co. *v.* Woosley, 85 Ill. 370.

20. Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 232, 61 N. E. 197, *quoted* in note 10 *supra*; Hartzell *v.* Louisville, N. A. & C. R. Co., 15 Ind. App. 417, 44 N. E. 315; Pittsburgh, C. C. & St. L. R. Co. *v.* Welch, 12 Ind. App. 433, 40 N. E. 650; Indianapolis P. & C. R. Co. *v.* Caudle, 60 Ind. 112.

21. Note 11 *supra*.

22. Rusch *v.* Davenport, 6 Iowa 443, 451-452.

23. State *v.* Maine Cent. R. Co. 76 Me. 357; Com. *v.* Boston & L. R. Co., 126 Mass. 61, 69.

24. In an action by a person who was riding in a buggy as a guest of another for injuries received by be-

in charge of his servant.[25] The necessity of affirmatively proving freedom from contributory negligence is not removed because the defendant has pleaded it as a defense.[26] The mere fact that defendant's negligence has been established by a presumption from the nature of his act or omission, or by evidence independent of a presumption, does not relieve plaintiff from the burden of proof.[27] Nor is the rule relaxed where the only witnesses to the care exercised by a person for whose death an action is brought are dead.[28] This rule is founded, as sometimes stated, on the idea that the gravamen of a complaint charging negligence is that the injury was caused by defendant's negligence, without contributory fault on the part of the person damnified,[29] or, as elsewhere stated, on the presumption

ing struck at a highway crossing by a railway train, plaintiff must show her own freedom from contributory negligence. Aurelius *v.* Lake Erie & W. R. Co., 19 Ind. App. 584, 49 N. E. 857.

In an action brought by the guest of the driver of a sleigh for the running down of the sleigh by a train at a highway crossing, where it appears that the driver was negligent, in order that plaintiff may recover it must appear that plaintiff had no control over the conveyance, that the same was in charge of one whom plaintiff believed to be a careful and competent driver, and that the plaintiff himself was without fault. Lake Shore & M. S. R. Co. *v.* Boyts (Ind. App.), 43 N. E. 667.

In an action for injuries by the upsetting of a carriage on a defective roadway, in order to make out his case plaintiff must affirmatively show that the driver was exercising proper care at the time of the injury. Gleason *v.* Bremen, 50 Me. 222.

25. In an action for damages to plaintiff's sleigh by being struck by defendant's street car, the burden is on plaintiff to show the freedom from negligence of his employe in charge of the sleigh. Hoffman *v.* Syracuse Rapid-Transit R. Co., 50 App. Div. 83, 63 N. Y. Supp. 442.

26. Hawes *v.* Burlington C. R. & N. R. Co., 64 Iowa 315, 20 N. W. 717.

27. Wahl *v.* Shoulders, 14 Ind. App. 665, 43 N. E. 458.

28. Day *v.* Boston & M. R. R., 96 Me. 207, 215, 52 Atl. 771.

So in an action for the drowning of one of a boatload of persons, all of whom were drowned, alleged to be due to the unseaworthy condition of the boat, a failure to show that decedent did not contribute to the disaster by his negligence is fatal to plaintiff's cause of action, although there was no eye-witness or survivor. "The rule herein affirmed may seem to work a hardship in such a case as this, where the plaintiff is prevented from compliance with the rule by the suddenness and magnitude of the disaster itself sweeping away all possible evidence, but if the rule were otherwise it would work equal hardship to a defendant." McLane *v.* Perkins, 92 Me. 39, 42 Atl. 255, 43 L. R. A. 487.

29. Mayo *v.* Boston & M. R. R., 104 Mass. 137; Teipel *v.* Hilsendegen, 44 Mich. 461, 7 N. W. 82; Lake Shore & M. S. R. Co. *v.* Miller, 25 Mich. 274, 282.

"If plaintiff's negligence contributed to the accident, then it was not, in contemplation of law, caused by the defendant's negligence, and for that reason he must, as a condition to his right of recovery, make it appear affirmatively that he was without fault contributing to the injury." Cincinnati H. & I. R. Co. *v.* Butler, 103 Ind. 31, 39, 2 N. E. 138.

In Gulf, C. & S. F. R. Co. *v.* Shieder, 88 Tex. 152, 161, 30 S. W. 902, 28 L. R. A. 538, the court says that this reasoning is fallacious because "it assumes that plaintiff cannot recover unless it appears that the injury was caused solely by the negligence of defendant, when the law is that he may recover when defendant's negligence is only one of several contributing causes, the defendant being able to defend, where

that men are careless of, as often as careful for, their safety.[30]

D. Of Negligence Accentuating Injury. — The burden of proof rests on defendant to show that injury arising through his negligence was accentuated by the failure of the person damnified to exercise due care.[31]

E. Conflict of Law as to Burden of Proof. — The rules as to burden of proof on questions of negligence applicable to state courts do not govern the federal courts,[32] nor is the rule in a state court

one of such causes is plaintiff's negligence, not on the ground that his own negligence was not the sole cause of the injury, but upon the ground that the law will not allow plaintiff to recover where it is shown that his own wrongful or negligent act contributed to the injury."

In Kansas Pac. R. Co. *v.* Pointer, 14 Kan. 37, another court, in similar strain, says: "If it is shown that a party has done wrong, and caused injury thereby, is not a *prima facie* case for compensation made? Logically, the wrongdoer should always compensate, and the wrong and the injury always entitle to relief. . . . But if the wrongdoer ought always to compensate for the injury he has wrought, and is relieved from the obligation to compensate only by the fact that the wrong of the injured party helped to cause the injury, it is incumbent upon him to show such wrong. It is matter of defense, to avoid the consequences of his own wrong."

And in Bradwell *v.* Pittsburg & W. E. Pass. R. Co., 139 Pa. St. 404, 20 Atl. 1046, we have the statement of a reputable court, referring to the necessity of a plaintiff negativing contributory negligence: "No reputable authority can be found anywhere to sustain such a proposition."

30. Reynolds *v.* New York C. & H. R. R. Co., 58 N. Y. 248; McLane *v.* Perkins, 92 Me. 39, 42 Atl. 255, 43 L. R. A. 487.

In Giberson *v.* Bangor & A. R. Co., 89 Me. 337, 36 Atl. 400, where a person was struck by a train at a highway crossing, the court supports the ruling on the ground that "the mere collision is *prima facie* evidence of the plaintiff's want of due care."

Under similar facts the Indiana supreme court elaborates this idea: "Thousands of persons pass safely over a given crossing over which thousands of trains are run, under every variety of circumstances, before one is injured, and therefore it may be said a presumption arises that the crossing may be safely passed by all those who observe such care as prudent persons ordinarily observe. . . . This presumption is at least sufficient to require from him an explanation of his relation to the occurrence, and an affirmative showing that the circumstances were such, and his conduct such, that he was not in fault, and as his own conduct and his relation to the occurrence are peculiarly known to himself, and may be unknown to the railroad company, the requirement is a reasonable one." Cincinnati H. & L. R. Co. *v.* Butler, 103 Ind. 31, 40, 2 N. E. 138.

Comparative Negligence. — In establishing the relative degrees of negligence of a person who sustained an injury and of the defendant charged with causing it, the burden is not thrown on the defendant. Chicago B. & Q. R. Co. *v.* Harwood, 90 Ill. 425. (It should be noted that Illinois is a state where the burden is on plaintiff of showing freedom from contributory negligence.)

31. Goshen *v.* England, 119 Ind. 368, 377-378, 21 N. E. 977, 5 L. R. A. 253; Wissler *v.* Atlantic, 123 Iowa 11, 98 N. W. 131; Gulf, C. & S. F. R. Co. *v.* Hudson, 77 Tex. 494, 14 S. W. 158 (where cattle were run down on an unfenced railroad, and defendant claimed the damage was enhanced by plaintiff's failure to care for the injured cattle, the burden rested on defendant to show it).

32. Hemingway *v.* Illinois Cent. R. Co., 52 C. C. A. 477, 114 Fed. 843; Chicago, G. W. R. Co. *v.* Price, 38 C. C. A. 239, 97 Fed. 423.

governed by the law of the place of injury, the local law applying.[33]

2. Sufficiency of Evidence To Sustain Burden. — It is sufficient to make a *prima facie* case for the party affirming negligence when the point is proved by a preponderance of evidence, including that of the adverse party.[34]

33. Where in an action for negligence plaintiff's contributory negligence is set up, and the accident occurred in Illinois, where contributory negligence must be negatived by plaintiff, yet in a trial in Indiana the burden is on defendant to affirmatively show plaintiff's contributory negligence. Chicago Terminal Trans. R. Co. *v.* Vandenberg (Ind.), 73 N. E. 990.

34. Defendant's Negligence. While plaintiff may create a presumption of defendant's negligence under the maxim "*res ipsa loquitur*," which if wholly uncontradicted would entitle him to a verdict, yet when the evidence is all in it must still preponderate in plaintiff's favor to a legally sufficient extent. Atkinson *v.* Goodrich Transp. Co., 69 Wis. 5, 31 N. W. 164.

"The general burden of proof is upon the plaintiff to show that her injury was caused by negligence of the defendant's. She avers it, and must prove it. Nor, in a strict sense, does the burden of proof change. . . . But it may be aided and sustained by a presumption that arises upon the facts." Stevens *v.* E. & N. A. Ry., 66 Me. 74.

Freedom From Contributory Negligence. — To satisfy the burden of proving freedom from contributory negligence it is sufficient that such fact appear from all the facts and circumstances in evidence, irrespective of who put in such evidence. Lesan *v.* Maine Cent. R. Co., 77 Me. 85.

Guilt of Contributory Negligence. To satisfy the burden of proving contributory negligence resting on defendant it is sufficient that it appear from plaintiff's evidence, or is admitted. Where it does not so appear, evidence sufficiently tending to show it must be introduced by defendant.

United States. — Hemingway *v.* Illinois Cent. R. Co., 52 C. C. A. 477, 114 Fed. 843; Chicago, G. W. R. Co. *v.* Price, 38 C. C. A. 239, 97 Fed. 423.

Arkansas. — Texas & St. L. R. Co. *v.* Orr, 46 Ark. 182, 193.

Colorado. — Denver & R. G. R. Co. *v.* Ryan, 17 Colo. 98, 28 Pac. 79; Kansas Pac. R. Co. *v.* Twombly, 3 Colo. 125.

Indiana. — Cleveland, C. C. & St. L. R. Co. *v.* Coffman, 30 Ind. App. 360, 66 N. E. 179 (denying rehearing of 64 N. E. 233); Indianapolis St. R. Co. *v.* Taylor, 158 Ind. 274, 63 N. E. 456; Howard *v.* Indianapolis St. R. Co., 29 Ind. App. 514, 64 N. E. 890.

Kansas. — Chicago, R. I. & P. R. Co. *v.* Lee, 66 Kan. 806, 72 Pac. 266; Missouri, K. & T. R. Co. *v.* Merrill, 61 Kan. 671, 60 Pac. 819; Dewald *v.* Kansas City, Ft. S. & G. R. Co., 44 Kan. 586, 24 Pac. 1101.

Maryland. — Frech *v.* Philadelphia, W. & B. R. Co., 39 Md. 574.

Minnesota. — Wilson *v.* Northern Pac. R. Co., 26 Minn. 278, 3 N. W. 333; Hocum *v.* Weitherick, 22 Minn. 152.

New Jersey. — New Jersey Exp. Co. *v.* Nichols, 33 N. J. L. 434.

Oregon. — Grant *v.* Baker, 12 Or. 329, 7 Pac. 318.

Pennsylvania. — Sopherstein *v.* Bertels, 178 Pa. St. 401, 35 Atl. 1100; Baker *v.* Westmoreland & C. Nat. Gas Co., 157 Pa. St. 593, 601, 27 Atl. 789; Pennsylvania Tel. Co. *v.* Varnau, 15 Atl. 624; Cleveland & P. R. Co. *v.* Rowan, 66 Pa. St. 393.

Utah. — Silcock *v.* Rio Grande W. R. Co., 22 Utah 179, 61 Pac. 565; Harrington *v.* Eureka Hill Min. Co., 17 Utah 300, 53 Pac. 737.

Virginia. — Baltimore & O. R. Co., *v.* Whittington, 30 Gratt. 805.

Wisconsin. — Waterman *v.* Chicago & A. R. Co., 82 Wis. 613, 634, 52 N. W. 247.

So an instruction that conveys the idea that if the evidence offered on plaintiff's behalf shows his own contributory negligence it nevertheless

3. Degree of Proof. — As on most issues in civil actions, so on questions of negligence raised therein the burden of proof is satisfied in most jurisdictions[35] by proof of each point by a preponderance of

could not avail the defendant, is error. St. Louis & S. F. R. Co. *v.* Burrows, 62 Kan. 89, 61 Pac. 439.

Thus plaintiff must make out a case that is clear of contributory negligence. Brown *v.* White, 206 Pa. St. 106, 55 Pac. 848; Bradwell *v.* Pittsburg & W. E. Pass. R. Co., 139 Pa. St. 404, 20 Atl. 1046.

In many cases in the statement of this rule the "burden of evidence" is confused with the "burden of proof" proper, and it is said that the burden of proof is on the defendant to prove contributory negligence *unless it appears from plaintiff's evidence or is admitted* — meaning thereby that if contributory negligence sufficiently appears on all the evidence in the case, *including that introduced by plaintiff*, the defendant has satisfied the burden of proof resting upon him.

Alabama. — Pullman Palace Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921; Bromley *v.* Birmingham M. R. Co., 95 Ala. 397, 11 So. 341.

Arkansas. — St. Louis, I. M. & S. R. Co. *v.* Martin, 61 Ark. 549, 33 S. W. 1070.

California. — Daly *v.* Hinz, 113 Cal. 366, 45 Pac. 693; MacDougall *v.* Central R. Co., 63 Cal. 431; Nehrbas *v.* Central Pac. R. Co., 62 Cal. 320, 334; Robinson *v.* Western Pac. R. Co., 48 Cal. 409, 426.

Colorado. — Platte & Denver Canal & Mill. Co. *v.* Dowell, 17 Colo. 376, 30 Pac. 68.

Dakota. — Sanders *v.* Reister, 1 Dak. 151, 171-172, 46 N. W. 680.

Florida. — Louisville & N. R. Co. *v.* Yniestra, 21 Fla. 700, 727-728.

Kansas. — Burns *v.* Metropolitan St. R. Co., 66 Kan. 188, 71 Pac. 244.

Maryland. — Baltimore & O. R. Co. *v.* Stumpf, 97 Md. 78, 90-92, 54 Atl. 978; Price *v.* Philadelphia, W. & B. R. Co., 84 Md. 506, 36 Atl. 263, 36 L. R. A. 213; State *v.* Baltimore & P. R. Co., 58 Md. 482.

Mississippi. — Simms *v.* Forbes, 38 So. 546.

Montana. — Nelson *v.* Helena, 16 Mont. 21, 39 Pac. 905.

North Carolina. — Jordan *v.* Asheville, 112 N. C. 743, 16 S. E. 760.

Ohio. — Schweinfurth *v.* Cleveland, C. C. & St. L. R. Co., 60 Ohio St. 215, 223, 54 N. E. 89. *Compare* Baltimore & O. R. Co. *v.* Whitacre, 35 Ohio St. 627.

Pennsylvania. — Coolbroth *v.* Pennsylvania R. Co., 209 Pa. St. 433, 58 Atl. 808.

South Dakota. — Kelley *v.* Anderson, 15 S. D. 107, 87 N. W. 579.

Tennessee. — Stewart *v.* Nashville, 96 Tenn. 50, 33 S. W. 613.

Texas. — Gulf, C. & S. F. R. Co. *v.* Shieder, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538; Dallas & W. R. Co. *v.* Spicker, 61 Tex. 427, 48 Am. Rep. 297.

Utah. — Holland *v.* Oregon S. L. R. Co., 26 Utah 209, 72 Pac. 940.

Virginia. — Southern R. Co. *v.* Bryant, 95 Va. 212, 220-221, 28 S. E. 183.

Wisconsin. — Conrad *v.* Ellington, 104 Wis. 367, 80 N. W. 456; Hoyt *v.* Hudson, 41 Wis. 105, 22 Am. Rep. 714.

"Plaintiff's evidence sometimes obviates the necessity of proof by the defendant that the injury was due to contributory negligence, but even in such case it is inaccurate and misleading to say that the burden is on the plaintiff or is not on the defendant." Birmingham M. R. Co. *v.* Wilmer, 97 Ala. 165, 11 So. 886.

35. In some jurisdictions it appears that the proof must be sufficient to reasonably satisfy or convince the minds of the jury. Pullman Palace Car Co. *v.* Adams, 120 Ala. 581, 24 So. 921; Birmingham M. R. Co. *v.* Wilmer, 97 Ala. 165, 11 So. 886; Baltimore & O. R. Co. *v.* Shipley, 39 Md. 251.

So an instruction that the plaintiff must sustain his cause by a "*preponderance*" of evidence is misleading and properly refused. Kansas City, M. & B. R. Co. *v.* Henson, 132 Ala. 528, 31 So. 590.

the evidence.[36] On the other hand, a mere equipoise of evidence

36. Proof of Negligence by Fair Preponderance of Evidence Sufficient. — *Colorado.* — Denver & R. G. R. Co. *v.* Ryan, 17 Colo. 98, 28 Pac. 79.

Delaware. — Goldstein *v.* People's R. Co., 60 Atl. 975; Cox *v.* Wilmington City R. Co., 4 Pen. 162, 53 Atl. 569; Boyd *v.* Blumenthal, 3 Pen. 564, 52 Atl. 330; Adams *v.* Wilmington & N. E. R. Co., 52 Atl. 264; Tully *v.* Philadelphia W. & B. R. Co., 3 Pen. 455, 50 Atl. 95; Martin *v.* Baltimore & P. R. Co., 2 Marv. 123, 42 Atl. 442; Wilkins *v.* Wilmington, 2 Marv. 132, 42 Atl. 418; Maxwell *v.* Wilmington City R. Co., 1 Marv. 199, 40 Atl. 945; Louth *v.* Thompson, 1 Pen. 149, 39 Atl. 1100.

Illinois. — Chicago & E. I. R. Co. *v.* Geary, 110 Ill. 383.

Indiana. — Huntingsburgh *v.* First, 22 Ind. App. 66, 53 N. E. 246; Miller *v.* Miller, 17 Ind. App. 605, 47 N. E. 338; Lake Erie & W. R. Co. *v.* Stick, 143 Ind. 449, 41 N. E. 365.

Iowa. — Cramer *v.* Burlington, 42 Iowa 315; Benton *v.* Central R. R., 42 Iowa 192.

North Carolina. — Asbury *v.* Charlotte Elec. R. & P. Co., 125 N. C. 568, 34 S. E. 654; Norwood *v.* Raleigh & G. R. Co., 111 N. C. 236, 16 S. E. 4; Jones *v.* North Carolina R. Co., 67 N. C. 122.

Utah. — Wells *v.* Utah Const. Co., 27 Utah 524, 76 Pac. 560.

Wisconsin. — Atkinson *v.* Goodrich Transp. Co., 69 Wis. 5, 31 N. W. 164; Whitney *v.* Clifford, 57 Wis. 156, 14 N. W. 927; Quaife *v.* Chicago & N. W. R. Co., 48 Wis. 513, 4 N. W. 658, 33 Am. Rep. 821.

Proof of Contributory Negligence by Preponderance of Evidence Sufficient. — *United States.* — Eddy *v.* Wallace, 1 C. C. A. 435, 49 Fed. 801; Indianapolis & St. L. R. Co. *v.* Horst, 93 U. S. 291.

Arkansas. — Texas & St. L. R. Co. *v.* Orr, 46 Ark. 182.

Colorado. — Denver & R. G. R. Co. *v.* Ryan, 17 Colo. 98, 28 Pac. 79.

Dakota. — Mares *v.* Northern Pac. R. Co., 3 Dak. 336, 21 N. W. 5.

Delaware. — Wilkins *v.* Wilmington, 2 Marv. 132, 42 Atl. 418; Louth *v.* Thompson, 1 Pen. 149, 39 Atl. 1100.

District of Columbia. — Harmon *v.* Washington & G. R. Co., 7 Mack. 255.

Georgia. — Georgia S. & F. R. Co. *v.* Young Inv. Co., 119 Ga. 513, 46 S. E. 644.

Indiana. — Diamond Block Coal Co. *v.* Cuthbertson, 73 N. E. 818, *affirming* (Ind. App.), 67 N. E. 558.

Indian Territory. — Chicago, R. I. & P. R. Co. *v.* Pounds, 1 Ind. Ter. 51, 35 S. W. 249.

Kansas. — Chicago, R. I. & P. R. Co. *v.* Lee, 66 Kan. 806, 72 Pac. 266; Burns *v.* Metropolitan St. R. Co., 66 Kan. 188, 71 Pac. 244.

Ohio. — Schweinfurth *v.* Cleveland C. C. & St. L. R. Co., 60 Ohio St. 215, 223, 54 N. E. 89.

Washington. — Steele *v.* Northern Pac. R. Co., 21 Wash. 287, 57 Pac. 820.

Proof of Freedom From Contributory Negligence by Preponderance of Evidence Sufficient.

Connecticut. — Ryan *v.* Bristol, 63 Conn. 26, 27 Atl. 309.

Illinois. — Chicago, B. & Q. R. Co. *v.* Levy, 160 Ill. 385, 43 N. W. 357; North Chicago St. R. Co. *v.* Louis, 138 Ill. 9, 27 N. E. 451.

Indiana. — Huntingburgh *v.* First, 22 Ind. App. 66, 53 N. E. 246; Miller *v.* Miller, 17 Ind. App. 605, 47 N. E. 338; Lake Erie & W. R. Co. *v.* Stick, 143 Ind. 449, 41 N. E. 365.

Iowa. — Cramer *v.* Burlington, 42 Iowa 315; Benton *v.* Central R. R., 42 Iowa 192.

New York. — Coleman *v.* New York C. & H. R. R. Co., 98 App. Div. 349, 90 N. Y. Supp. 264; Riordan *v.* Ocean S. S. Co., 124 N. Y. 655, 26 N. E. 1027; Hart *v.* Hudson River Bridge Co., 84, N. Y. 56.

A request to instruct the jury that plaintiff must prove negligence "to a moral certainty, to the exclusion of reasonable doubt," is properly refused. Cameron *v.* Vandergriff, 53 Ark. 381, 13 S. W. 1092. An instruction that it must appear *to the satisfaction of the jury* that plaintiff was not guilty of contributory negligence is erroneous. Stratton *v.* Central City H. R. Co., 95 Ill. 25.

is insufficient to satisfy the burden of proof,[37] nor is conjecture or theory or a bare possibility of the existence of the ultimate fact to be proved sufficient.[38] Where, however, there is inherent difficulty in the proof of a fact, it seems such difficulty may be taken into consideration in determining the sufficiency of the proof.[39]

4. Shifting the Burden. — A. In General. — Whenever a party has by the evidence or by admissions of the adverse party in pleading,[40] made a *prima facie* case on any question of negligence, the burden of proof rests on the other party.[41]

Plaintiff need not prove defendant's negligence so as to exclude all reasonable doubt. Schoepper *v.* Hancock Chem. Co., 113 Mich. 582, 71 N. W. 1081. Plaintiff need not show decedent's exercise of due care beyond cavil or question. Teipel *v.* Hilsendegen, 44 Mich. 461, 7 N. W. 82. Plaintiff is not required to prove to a certainty the conviction that defendant was negligent. Asbury *v.* Charlotte Elec. R. & P. Co., 125 N. C. 568, 34 S. E. 654.

37. Kansas City & S. R. Co. *v.* Phillibert, 25 Kan. 405; Hart *v.* Hudson River Bridge Co., 84 N. Y. 56; Jones *v.* North Carolina R. Co., 67 N. C. 122.

38. Atchison, T. & S. F. R. Co. *v.* MacFarland, 2 Kan. App. 662, 43 Pac. 788; Dame *v.* Laconia Car Co. Wks., 71 N. H. 407, 52 Atl. 864; Kay *v.* Metropolitan St. R. Co., 163 N. Y. 447, 57 N. E. 751; Caven *v.* Troy, 32 App. Div. 154, 52 N. Y. Supp. 804; Searles *v.* Manhattan R. Co., 101 N. Y. 661, 5 N. E. 66; Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 282, 290-291; Norwood *v.* Raleigh & G. R. Co., 111 N. C. 236, 16 S. E. 4; Balding *v.* Andrews, 12 N. D. 267, 96 N. W. 305.

39. Greenleaf *v.* Illinois R. Co., 29 Iowa 14.

In an action for a fire negligently set by defendant's locomotive, plaintiff may sufficiently prove defendant's negligence by evidence of circumstances bearing more or less directly upon the fact of negligence, which might not be satisfactory in other cases free from difficulty and open to clear proof. Garrett *v.* Chicago & N. W. R. Co., 36 Iowa 121; Gandy *v.* Chicago & N. W. R. Co., 30 Iowa 420.

In such an action slight proof of defendant's negligence is sufficient. Henderson *v.* Philadelphia & R. R. Co., 144 Pa. St. 461, 480, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 209.

Moreover, in such an action the means of rebutting evidence of defendant's negligence are so in his power that it is not unreasonable to expect that defendant's evidence in rebuttal shall be very complete. Huyett *v.* Philadelphia & R. R. Co., 23 Pa. St. 373.

In an action for death caused by negligence, slight circumstances may, in the absence of direct evidence, overcome the presumption which the law indulges, of decedent's freedom from contributory negligence. Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 233, 39 Am. Rep. 503.

Slighter evidence of freedom from contributory negligence on the part of the person injured is perhaps sufficient where the injured party is not alive and able to testify. Rodrian *v.* New York N. H. & H. R. Co., 125 N. Y. 526, 29 N. E. 741.

Due Care Presumed. — In the absence of evidence to the contrary there is a presumption that one who was killed exercised due care. The presumption is founded on a law of nature. Baltimore & P. R. R. Co., *v.* Landrigan, 191 U. S. 461, 473; Texas & P. R. Co. *v.* Gentry, 163 U. S. 353, 366.

40. Admission by Failure To Plead. — See Elwood *v.* Connecticut Ry. & Lighting Co., 77 Conn. 145, 58 Atl. 751.

41. Hopkins *v.* Utah Northern R. Co., 2 Idaho 277, 13 Pac. 343; Larkin *v.* Chicago & C. W. R. Co. (Iowa), 92 N. W. 891.

Likewise where the presumption arising from a fire set by a railway locomotive has been rebutted so that

B. Where Presumption of Primary Negligence Has Arisen. So where a presumption of defendant's negligence has arisen from the nature of the immediate cause of an injury, the burden rests on defendant to introduce evidence of his freedom from negligence sufficient to disprove plaintiff's *prima facie* case.[42] Such rebutting evidence must be as broad as the presumption, and cover every

defendant has made a *prima facie* case of due care in the operation of its locomotive, the burden of evidence then rests on plaintiff to disprove by further evidence the *prima facie* case of due care so made. Coates *v.* Missouri, K. & T. R. Co., 61 Mo. 38.

42. The following are merely some of the cases so holding:

United States. — Eddy *v.* Lafayette, 49 Fed. 807.

Alabama. — Western Ry. *v.* Williamson, 21 So. 827; Steele *v.* Townsend, 37 Ala. 247, 79 Am. Dec. 49.

Arkansas. — Tilley *v.* St. Louis & S. F. R. Co., 49 Ark. 535, 6 S. W. 8.

California. — Green *v.* Pac. Lumber Co., 130 Cal. 435, 62 Pac. 747; Butcher *v.* Vaca Val. & C. L. R. Co., 67 Cal. 518, 8 Pac. 174; Boyce *v.* California Stage Co., 25 Cal. 460, 468; Fairchild *v.* Cal. Stage Co., 13 Cal. 599.

Dakota. — Pattee *v.* Chicago M. & St. P. R. Co., 5 Dak. 267, 38 N. W. 435.

Illinois. — Chicago Union Traction Co. *v.* Newmiller, 215 Ill. 383, 74 N. E. 410; Chicago City R. Co. *v.* Barker, 209 Ill. 321, 70 N. E. 624; Johnson *v.* Barber, 10 Ill. 425, 50 Am. Dec. 416; Burton *v.* McClellan, 3 Ill. 434.

Indiana. — Indianapolis St. R. Co. *v.* Schmidt, 71 N. E. 201; Terre Haute & I. R. Co. *v.* Sheeks, 56 N. E. 434; Louisville N. A. & C. R. Co. *v.* Snyder, 117 Ind. 435, 20 N. E. 284, 3 L. R. A. 434; Anderson *v.* Schloey, 114 Ind. 553, 17 N. E. 125; Cleveland, C. C. & I. R. Co. *v.* Newell, 75 Ind. 542; Pittsburg C. & St. L. R. Co. *v.* Williams, 74 Ind. 462.

Kansas. — Meador *v.* Mo. Pac. R. Co., 61 Pac. 442.

Kentucky. — Southern R. Co. *v.* Forsythe, 64 S. W. 506, 23 Ky. Law Rep. 942.

Maryland. — Baltimore & O. R. Co. *v.* State, 63 Md. 135, 144; Annapolis & E. R. Co. *v.* Gantt, 39 Md. 115, 137; Baltimore & O. R. Co. *v.* Worthington, 21 Md. 275, 283, 289-290; Baltimore & S. R. Co. *v.* Woodruff, 4 Md. 242, 59 Am. Dec. 72.

Minnesota. — Karsen *v.* Milwaukee & St. P. R. Co., 29 Minn. 12; Wilson *v.* Northern Pac. R. Co., 26 Minn. 278, 3 N. W. 333.

Mississippi. — Tribette *v.* Ill. Cent. R. Co., 71 Miss. 212, 230, 13 So. 899; Chicago, St. L. & N. O. R. Co. *v.* Packwood, 59 Miss. 280.

Missouri. — Wilbur *v.* Southwestern Missouri Elec. R. Co. (Mo. App.), 85 S. W. 671; Robinson *v.* St. Louis & S. R. Co. (Mo. App.), 77 S. W. 493; Heyde *v.* St. Louis Transit Co., 102 Mo. App. 537, 77 S. W. 127; Hipsley *v.* Kansas City St. J. & C. B. R. Co., 88 Mo. 348; Kenney *v.* Hannibal & St. J. R. Co., 70 Mo. 243; Coale *v.* Hannibal & St. J. R. Co., 60 Mo. 227, 235; Clemens *v.* Hannibal & St. J. R. Co., 53 Mo. 366.

Nebraska. — Spellman *v.* Lincoln Rapid Transit Co., 36 Neb. 890, 900, 55 N. W. 270, 20 L. R. A. 316, 38 Am. St. Rep. 753; Burlington & M. R. R. *v.* Westover, 4 Neb. 268.

New York. — Seybolt *v.* New York L. E. & W. R. Co., 95 N. Y. 562, 47 Am. Rep. 75.

North Carolina. — Grant *v.* Raleigh & G. R. Co., 108 N. C. 462, 13 S. E. 209; Moore *v.* Parker, 91 N. C. 275.

Pennsylvania. — Philadelphia & R. R. Co. *v.* Anderson, 94 Pa. St. 351, 39 Am. Rep. 787.

Rhode Island. — Cheetham *v.* Union R. Co., 58 Atl. 881.

Tennessee. — Burke *v.* Louisville & N. R. Co., 7 Heisk. 451, 462, 19 Am. Rep. 618.

Texas. — Houston & T. C. R. Co. *v.* Cowser, 57 Tex. 293, 302.

So in an action for the negligent derailment of a train, causing

negligent act or omission that might reasonably or naturally have caused the damage.[43]

III. PRESUMPTIONS.

1. As to Primary Negligence. — A. From Mere Fact of Injury. From proof merely of the fact that a person has been damnified, no presumption arises that it was by an act or omission of a person joined as defendant and alleged to be responsible therefor,[44] nor that the act or omission was negligent.[45] Nor does a presumption of

the death of the fireman, that the defect in the track was the malicious act of a third party is an affirmative defense, and the burden of proving it rests on defendant. Marcom *v.* Raleigh & A. Air Line R. Co., 126 N. C. 200, 35 S. E. 423.

43. Karsen *v.* Milwaukee & St. P. R. Co., 29 Minn, 12, 11 N. W. 122. See also Alabama Gt. So. R. Co. *v.* McAlpine, 80 Ala. 73.

So in an action for running down livestock by defendant's train, defendant must prove the observance by it of all the statutory requirements — a constant lookout, the sounding of the cattle alarm, and every effort to stop the train — and of all other means to avoid the damage, in order to exonerate itself. Memphis & C. R. Co. *v.* Smith, 9 Heisk. (Tenn.) 860.

44. From the fact that a horse is found dead near a railroad track it cannot be presumed that it was killed on the track, nor that it was killed by a train, nor by the negligence of the owner or operator of the train. St. Louis & S. F. R. Co. *v.* Sageley, 56 Ark. 549, 20 S. W. 413.

In an action against a railroad company for the killing of stock by its trains it is clear that no presumption is indulged that it did the killing. That fact must be proven. Southern R. Co. *v.* Forsythe, 23 Ky. L. Rep. 942, 64 S. W. 506.

The mere isolated, single, segregated fact that an injury has happened does not of itself necessarily indicate the cause of the injury, nor the guilt of defendant of negligence. "Until you know *what* did occasion an injury you cannot say that defendant was guilty of some negligence that produced that injury. . . . When the *act* that caused the injury is wholly unknown or undisclosed, it is simply and essentially impossible to affirm that there was a negligent act; and neither the doctrine of *res ipsa loquitur* nor any other principle of presumption can be invoked to fasten a liability upon the party charged with having by negligence caused the injury for the infliction of which a suit has been brought." So where the evidence merely shows that a plaintiff while riding through a miniature scenic railroad in the car fell out of the back seat without the knowledge of the other persons in the car, and there was no defect discoverable in the car or in the tunnel after the accident, and the injured party put no light on the manner of its occurrence, the negligence of the owner of the scenic railroad cannot be presumed. Benedick *v.* Potts, 88 Md. 52, 40 Atl. 1067.

The fact of casual connection between an alleged negligent act or omission and an injury can no more be presumed than can the act or omission itself. Texas & P. R. Co. *v.* Shoemaker (Tex.), 84 S. W. 1049.

45. Chicago City R. Co. *v.* Barker, 209 Ill. 321, 70 N. E. 624; Indianapolis St. R. Co. *v.* Darnell, 32 Ind. App. 687, 68 N. E. 609; Sherlock *v.* Alling, 44 Ind. 184, 204; St. Louis & S. F. R. Co. *v.* Burrows, 62 Kan. 89, 61 Pac. 439; Pettigrew *v.* Lewis, 46 Kan. 78, 26 Pac. 458; Blanton *v.* Dold, 109 Mo. 74, 18 S. W. 1149; Gulf C. & S. F. R. Co. *v.* Shieder, 88 Tex. 152, 161, 30 S. W. 902, 28 L. R. A. 538.

Mere proof of injury sustained while a passenger on a train, without a collision, derailment or other cause or circumstance connected with the operation or equipment of a road, does not make a *prima facie* case of defendant's negligence. Fitch *v.*

negligence ordinarily arise from a showing that a proximate cause of the injury was an act or omission of a person joined as defendant.[46]

B. From Act Negligent in Itself. — Where, however, an act or omission of the defendant that is negligent in itself as matter of law constitutes a part of the *res gestae*, it will be presumed that it was also a proximate cause thereof.[47]

Mason City & C. L. Trac. Co. (Iowa), 100 N. W. 618.

It is error to instruct the jury that a presumption of negligence arises from the mere fact of injury to a passenger — it arises from the circumstances attending the fact. Western Maryland R. Co. *v.* State, 95 Md. 637, 53 Atl. 969.

In an action for death sustained while on defendant's railway bridge the circumstances of which are not shown, there is no presumption of negligence arising from the fact that the bridge was not floored, or otherwise, and the burden of proving negligence occasioning the injury is on plaintiff. State *v.* Philadelphia W. & B. R. Co., 60 Md. 555.

In an action against a surgeon for negligent treatment of plaintiff's dislocated shoulder, from the fact of failure to perfect a cure, defendant's negligence cannot be presumed. Craig *v.* Chambers, 17 Ohio St. 253.

"The mere proof that an injury was received on the train or vehicle is not sufficient to raise a presumption of negligence." Major *v.* Oregon S. L. R. Co., 21 Utah 141, 59 Pac. 522.

In an action by a railway passenger sitting at an open window for injuries by being struck by a stream of dirty water coming in with force as the train was moving rapidly, nothing further appearing, there is no presumption of the defendant's negligence. Spencer *v.* Chicago M. & St. P. R. Co., 105 Wis. 311, 81 N. W. 407.

In a few cases it is said that proof of personal injury to a passenger as such establishes a presumption that such injury happened through the carrier's negligence. Pattee *v.* Chicago M. & St. P. R. Co., 5 Dak. 267, 38 N. W. 435; Central Ry. *v.* Freeman, 75 Ga. 331, 339; Jeffersonville R. Co. *v.* Hendricks, 26 Ind. 228; Le Blanc *v.* Sweet, 107 La. 355, 369, 31 So. 766; United R. & Elec. Co. *v.* Beidelman, 95 Md. 480, 52 Atl. 913; Lincoln St. R. Co. *v.* McClellan, 54 Neb. 672, 74 N. W. 1074; Steele *v.* Southern R. Co., 55 S. C. 389, 33 S. E. 509.

In Spencer *v.* Chicago M. & St. P. R. Co., 105 Wis. 311, 81 N. W. 407, the court says: "While some of the earlier cases approved the doctrine that the mere happening of an accident on a railway raised a presumption of negligence in favor of the passenger, this doctrine is now abandoned, and it is quite universally held that the evidence must go further, and tend in some tangible way to show that the accident resulted from something connected with the operation of the railway." See also, particularly, notes 50, 55 and 60 *infra*.

46. Byrne *v.* Boodle, 2 H. & C. (Eng.) 722; Beasley *v.* San José Fruit Packing Co., 92 Cal. 388, 28 Pac. 485; Mitchell *v.* Western & A. R. Co., 30 Ga. 22; Terre Haute & I. R. Co. *v.* Clem, 123 Ind. 15, 23 N. E. 965, 18 Am. St. Rep. 303, 7 L. R. A. 588; La Fernier *v.* Soo River L. & W. Co., 129 Mich. 596, 89 N. W. 353; Early *v.* Lake Shore & M. S. R. Co., 66 Mich. 349, 33 N. W. 813; Raney *v.* Lachance, 96 Mo. App. 479, 70 S. W. 376; Swift *v.* Holoubek, 60 Neb. 784, 84 N. W. 249; Sheridan *v.* Foley, 58 N. J. L. 230, 33 Atl. 484; Bahr *v.* Lombard, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167; Curtis *v.* Rochester & S. R. Co., 18 N. Y. 534; Venbuvr *v.* Lafayette Worsted Mills, 27 R. I. 89, 60 Atl. 770; Wells *v.* Utah Const. Co., 27 Utah 524, 76 Pac. 560.

47. Northern Pac. R. Co. *v.* Lewis, 2 C. C. A. 446, 51 Fed. 658; Diamond *v.* Northern Pac. R. Co., 6 Mont. 580, 13 Pac. 367.

Failure to Equip Engine With Spark Arrester. — Henderson *v.* Philadelphia & R. R. Co., 144 Pa. St.

C. "Res Ipsa Loquitur." — Moreover, in some cases a presumption of negligence arises from the very nature of the cause of the damage sustained.[48] The meaning of the well-known maxim, "*res*

461, 447, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 290.

Failure To Give Statutory Signals on Approaching. — Georgia Pac. R. Co. *v.* Hughes, 87 Ala. 610, 6 So. 413; Chicago & N. W. R. Co. *v.* Dunleavy, 129 Ill. 132, 140, 22 N. E. 15; Roberts *v.* Wabash R. Co. (Mo. App.), 87 S. W. 601; Crumpley *v.* Hannibal & St. J. R. Co., 111 Mo. 152, 19 S. W. 820; Bishop *v.* Southern R. Co., 63 S. C. 532, 41 S. E. 808. *Contra*, Galena & C. U. R. Co. *v.* Loomis, 13 Ill. 548, 56 Am. Dec. 471.

Unlawful Speed. — Chicago & E. I. R. Co. *v.* Crose, 214 Ill. 602, 73 N. E. 865; United States Brew. Co. *v.* Stoltenberg, 211 Ill. 531, 71 N. E. 1081; Toledo P. & W. R. Co. *v.* Deacon, 63 Ill. 91. So also where an animal is killed by a train proceeding at a rate of speed prohibited by city ordinance the presumption arises. Chicago & A. R. Co. *v.* Engle, 58 Ill. 381.

Failure To Keep Lookout. — Philadelphia City Pass. R. Co. *v.* Henrice, 92 Pa. St. 431, where the driver of a street car that struck a child was asleep or intoxicated at the time of the accident.

It also arises where cattle are struck on a right of way not fenced as required by law. Dailey *v.* Chicago M. & St. P. R. Co., 121 Iowa 254, 96 N. W. 778; Lepp *v.* St. Louis I. M. & S. R. Co., 87 Mo. 139; Swearingen *v.* Missouri K. & T. R. Co., 64 Mo. 73; Brown *v.* Hannibal & St. J. R. Co., 33 Mo. 309.

Where, however, certain calves got on the track and were run down because defendant negligently left down the bars in the fence beside its right of way, the plaintiff must prove negligence. Perry *v.* Dubuque S. W. R. Co., 36 Iowa 102.

Other Instances. — In an action against an owner of abutting property for injuries sustained by falling down his trap door, the cover of which had been removed, from a showing that the door was open and unprotected, and that plaintiff fell into it, defendant's negligence will be presumed, at least where the door was constructed in an unlawful manner. "When the act is unlawful, or is in its character so hazardous as to be in the nature of a nuisance on account of the occasion for accident and injury which it continuously presents to innocent persons, then the party is liable, although the agency of a stranger may have contributed to some extent to the final catastrophe. At least, in such a case, the injured party ought not to be compelled to show affirmatively that there was no intervention of a third person which contributed to the result." Barry *v.* Terkildsen, 72 Cal. 254, 13 Pac. 657, 1 Am. St. Rep. 55.

In an action for injuries received by plaintiff's mules running away, from fright caused by the blowing of a locomotive whistle directly under the bridge over which they were passing, the blowing under a bridge constantly used by the traveling public is *prima facie* negligence. Mitchell *v.* Nashville C. & St. L. R. Co., 100 Tenn. 329, 45 S. W. 337, 40 L. R. A. 426.

Where a passenger has been injured in a collision between his train and animals on the track, the failure to fence is sufficient to take the case to the jury. International & G. N. R. Co. *v.* Thompson (Tex. Civ. App.), 77 S. W. 439.

Where it appeared that as a train approached a highway crossing at night it was cut in two to make a running switch, and the rear part ran ninety feet behind the first part without any lights on the forward part, and plaintiff, while driving across after the first part passed, was struck by the rear part, the presumption of negligence arises. Delaware L. & W. R. Co. *v.* Converse, 139 U. S. 469.

Where a person driving down a street on a street car track was struck by an electric sprinkling car coming behind with no one on it to control it, a presumption of negligence arises. Chicago City R. Co. *v.* Barker, 209 Ill. 321, 70 N. E. 624.

48. Benedick *v.* Potts, 88 Md. 52, 40 Atl. 1067.

ipsa loquitur," is simply that the nature of the event is such that the immediate efficient cause of the injury itself declares its negligent character, giving rise to this presumption of negligence.[49]

a. *Conditions of Operation of Maxim.* — That a presumption of negligence may arise from the very nature of the efficient cause of the damage, certain conditions precedent must concur, as follows:

(1.) Defendant's Control of Causative Force. — First, the immediate cause of the accident must clearly appear to be under the control of defendant or those for whom he is responsible.[50] Yet where the

49. "The meaning of the maxim '*res ipsa loquitur*' is that, while negligence is not, as a general rule, to be presumed, yet the injury itself may afford sufficient *prima facie* evidence of negligence, and the presumption of negligence may be created by the circumstances under which the injury occurred." Chicago City R. Co. *v.* Barker, 209 Ill. 321, 70 N. E. 624.

"Some catastrophes are of a nature to carry, in the mere statement of their occurrence, an implication of some neglect. In such event, 'the thing speaks for itself,' as some judges have expressed it, often in Latin, though the idea is none the less forcible or clear in our mother tongue." Blanton *v.* Dold, 109 Mo. 64, 18 S. W. 1149.

"'*Res ipsa loquitur*' imports that the plaintiff has made out a *prima facie* case without any direct proof of actionable negligence." Bien *v.* Unger, 64 N. J. L. 596, 46 Atl. 593.

"It is not the injury, but the manner and circumstances of the injury, that justify the application of the maxim and the inference of negligence. If a passenger in a car is injured by striking the seat in front of him, that of itself authorizes no inference of negligence. If it be shown, however, that he was precipitated against the seat by reason of the train coming into collision with another train, or in consequence of the car being derailed, the presumption of negligence arises. The '*res*,' therefore, includes the attending circumstances, and, so defined, the application of the rule presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversible or principal fact in issue, the defendant's negligence. . . . When the facts and circumstances from which the jury is asked to infer negligence are those immediately attendant on the occurrence, we speak of it as a case of '*res ipsa loquitur*;' when not immediately connected with the occurrence, then it is an ordinary case of circumstantial evidence." Griffen *v.* Manice, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922.

"The '*res*' . . . includes the attendant circumstances." Munzer *v.* Interurban St. R. Co., 45 Misc. 568, 91 N. Y. Supp. 121.

50. Carpue *v.* London & B. R. Co., 5 A. & E. (N. S.) (Q. B.) (Eng.) 747; Treadwell *v.* Whittier, 80 Cal. 574, 582, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498; Howser *v.* Cumberland & P. R. Co., 80 Md. 146, 30 Atl. 906, 45 Am. St. Rep. 332, 27 L. R. A. 154.

Where the circumstances of an injury to a passenger detailed in plaintiff's evidence show that the accident happened in some manner wholly beyond the control of the carrier or its servants, as where it appears that plaintiff was shot through a window by a person distant from the tracks, or that the train was struck by lightning, or that the passenger fell to the floor while the train was standing still, there is no presumption of defendant's negligence. St. Louis & S. F. R. Co. *v.* Burrows, 62 Kan. 89, 61 Pac. 439.

In an action for the fright of a passenger in defendant's street car by a horse coming up from behind the car and sticking its head through the rear window, the maxim does not apply. "It is only such a collision as could be prevented by the control of the car by the defendant's agents that justifies the application of the maxim. If it affirmatively ap-

pears, as a part of the plaintiff's case, that the collision was caused, not by the car colliding against an obstacle upon or in the neighborhood of the track, but by some other vehicle or animal running into the car, and it does not appear that those in charge of the car could have prevented it, then the circumstances surrounding the occurrence are not such as to justify the jury in inferring negligence." Grant *v.* Metropolitan St. R. Co., 91 N. Y. Supp. 202.

Where it appears that while an intending passenger was standing under the portico of the station waiting for the train a plank and roll of zinc fell therefrom and struck him, and the legs of a man also came through, there is no presumption of the railway company's negligence. "People who are employed to repair roofs are [normally] independent tradesmen and not mere servants; and the *onus* of proving that this man was a servant of the company was on plaintiff, and he not presumed to be so." *Per* Blackburn, J., in Welfare *v.* London & B. R. Co., L. R. 4 Q. B. 693.

The mere fact that a passenger at a railway station was bit by a dog that made a sudden incursion and then disappeared is no evidence of the railway's negligence. Smith *v.* Great Eastern R. Co., L. R. 2 C. P. 10.

In an action for injuries to a building by the explosion of a case of nitroglycerine which a common carrier took therein without knowing its contents, there is no presumption of defendant's negligence. The Nitroglycerine Case, 15 Wall (U. S.) 524, 537-538. An injury to a railway passenger in transit by an agency disconnected with the operation or apparatus of the road, as by a shot fired by a person without, does not give rise to a presumption of negligence. Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442, 458.

In an action against a racetrack association for injuries to a spectator while in the space reserved for spectators, received by being run down by a runaway horse, where it does not appear that the runaway was under the defendant's exclusive control, nor that the defendant had supplied insufficient hitching posts or barriers, no presumption of negligence arises. Hart *v.* Washington Park Club, 157 Ill. 9, 41 N. E. 620.

Where an intending passenger while walking beside the train toward the passenger coaches is struck by a bundle thrown from the train, but it appears that the bundle was thrown from the express car, no presumption of the railway company's negligence arises, because it was probably thrown by an express agent not under its control. Winship *v.* New York N. H. & H. R. Co., 170 Mass. 464, 49 N. E. 647.

Where it appeared that a railway passenger was injured by the breakage of the window by which she was sitting, throwing glass over her, but no foreign substance was found in the car after the accident, and there was only conjecture as to the cause of the breakage, no presumption of the carrier's negligence arises from the fact of injury. Ault *v.* Cowan, 20 Pa. Super. Ct. 616, 625-626.

In an action for damage to an oil well by defendant's negligently torpedoing it 200 feet from its bottom, where it appeared that defendant was engaged to torpedo the well; that before it was done the well was clear to the bottom, and afterward that it was obstructed 200 feet from the bottom, and that such obstruction would be likely to result from torpedoing it at that place instead of the bottom, no presumption of negligence arises. Zahniser *v.* Pennsylvania Torpedo Co., 190 Pa. St. 350, 42 Atl. 707.

Where a railway passenger in transit was killed by being struck by a rock that rolled down a hill, at the base of which the train was passing, proof thereof does not raise a presumption of defendant's negligence. Fleming *v.* Pittsburg C. C. & St. L. Ry., 158 Pa. St. 130, 27 Atl. 858.

A showing merely of the fact that one of a carload of eighteen horses died while en route over defendant's railroad, does not raise a presumption of the carrier's negligence. Pennsylvania R. Co. *v.* Raiordon, 119 Pa. St. 577, 13 Atl. 324.

Where a railway passenger is injured by a firearm, no presumption of the carrier's negligence arises. Williams *v.* Spokane Falls & N. R. Co. (Wash.), 80 Pac. 1100.

So from the mere fact that a per-

cause is under the defendant's control, the fact that some physical condition not under his control has indirectly co-operated in the injury does not render the maxim inapplicable.[51] Where, however, the immediate efficient cause of the injury is only a consequence of an act controlled by defendant, and not the act itself, the presumption does not arise, because the proximateness of the act is then brought in question.[52]

(2.) Co-operative Causative Forces Not Under Defendant's Control. Second, there must be no other equally proximate, apparent cause of the accident besides that for which defendant is responsible.[53] So where the acts or omissions of two or more independent persons are apparently equally immediate causes of an injury, the negligence of neither of such persons can be presumed.[54] This principle is pecu-

son falls or jumps off a conveyance no presumption of the carrier's negligence arises. Price *v.* St. Louis I. M. & S. R. Co. (Ark.), 88 S. W. 575; Tully *v.* Philadelphia W. & B. R. Co., 3 Pen. (Del.) 455, 50 Atl. 95; Pennsylvania Co. *v.* Marion, 104 Ind. 239, 3 N. E. 874; Fitch *v.* Mason City & C. L. Trac. Co. (Iowa), 100 N. W. 618; State *v.* United Rys. & Elec. Co. (Md.), 60 Atl. 249; Mitchell *v.* Chicago & G. T. R. Co., 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 566; Lincoln Trac. Co. *v.* Heller (Neb.), 102 N. W. 262, *reversing* on rehearing 100 N. W. 197.

So in an action for injuries received in alighting from a moving street car, plaintiff must prove that the defendant's negligence was the proximate cause of his injury. McDonald *v.* Montgomery St. Ry., 110 Ala. 161, 20 So. 317. *Contra,* Cooper *v.* Georgia C. & N. R. Co., 61 S. C. 345, 354, 39 S. E. 543.

51. Gleason *v.* Virginia M. R. Co., 140 U. S. 435, where in case of injuries to a passenger by the derailment of the train by striking a landslide in a cut where the earth had been softened by rain, a presumption of the railway company's negligence was held to arise.

52. In an action for damages to plaintiff's property by an explosion of illuminating gas, where it appears that plaintiff had dug an underground tunnel from his house to the street to lay a sewer, that the escape of gas being detected, defendant's employe came and made an examination on the surface of the street and lit a flame of gas there, and afterward attempted to extinguish the flame by covering it with dirt, and an explosion followed five minutes afterward in plaintiff's cellar, and that such employe did not know of the tunnel into the cellar, no presumption of negligence arises from the mere fact of the explosion. Littan *v.* New York, 36 App. Div. 189, 55 N. Y. Supp. 383.

53. Where an accident may have happened from a variety of causes, any of which is equally probable, and some of which may be due to defendant's default, while others are due to influences for which he is not responsible, liability is not fixed on defendant. Pieschel *v.* Miner, 30 Misc. 301, 63 N. Y. Supp. 508.

See also Chicago City R. Co. *v.* Rood, 163 Ill. 477, 485, 45 N. E. 238; Yerkes *v.* Sabin, 97 Ind. 141, 49 Am. Rep. 434; Case *v.* Chicago R. I. & P. R. Co., 64 Iowa 762, 21 N. W. 30.

54. In an action for the death of a pedestrian on a street by coming in contact with a live wire, where it appears that a wire of defendant telephone company fell to the ground and across a defectively insulated wire of defendant electric light and power company and thereby became heavily charged, there is no presumption of the negligence of either defendant. United Elec. Light & Power Co. *v.* State (Md.), 60 Atl. 248.

On a counter-claim for damages caused by two certain painters, while raising a staging on a house, permitted one end thereof to strike and shatter a plate glass window, where there is nothing in evidence to show whether it was the negligence of either singly, and if so of which of

liarly applicable in cases of injuries to passive occupants of vehicles in actions for injuries sustained in collisions between them.[55] Where, however, the immediate efficient cause of an injury is under the control of one person, the fact that an act of another person has indirectly contributed to produce the injury does not render the maxim inapplicable.[56] Likewise where an act of the damnified party

them, or of both together, that caused the accident, from the fact of accident the negligence of neither of them is presumed. Raney *v.* Lachance, 96 Mo. App. 479, 70 S. W. 376.

"The bed-rock of this principle of presumption arising from the fact of injury is that of probabilities, and in the very nature of things it cannot be made to apply in favor of a plaintiff seeking to recover damages for injuries against two defendants wholly independent of each other, it being an open question as to which defendant had control of the particular instrumentality that caused the injury." Harrison *v.* Sutter St. R. Co., 134 Cal. 549, 66 Pac. 787.

In an action for being struck by a part of a wagon that was knocked to pieces by being run into by defendant's car, there is no presumption of the carrier's negligence. Hawkins *v.* Front St. Cable R. Co., 3 Wash. 592, 28 Pac. 1021.

55. In an action for injuries to a street car passenger riding in an open car, on which the curtain was pulled down, by being hit by a pole of a wagon which came through the curtain, no presumption of the railway company's negligence arises. Potts *v.* Chicago City R. Co., 33 Fed. 610.

In case of a collision between a street car and another vehicle, where a boy of nine riding with the driver of the other vehicle was injured, there is no presumption that it was caused by the negligence of either the driver of the vehicle or the operator of the car. Hot Springs St. R. Co. *v.* Hildreth (Ark.), 82 S. W. 245.

In an action for the death of a street car passenger in a collision between the car and a wagon no presumption of the negligence of either arises. Harrison *v.* Sutter St. R. Co., 134 Cal. 549, 66 Pac. 787.

Where a passenger's foot on an open grip-car of a cable train became entangled in a wagon passing very close to the car no presumption of negligence arises therefrom. Chicago City R. Co. *v.* Rood, 163 Ill. 477, 45 N. E. 238.

Where a street car passenger was injured in a collision of the car with a wagon, there is no presumption of the negligence of either. Munzer *v.* Interurban St. R. Co., 45 Misc. 568, 91 N. Y. Supp. 21. To the same effect, Fagan *v.* Rhode Island Co., 27 R. I. 51, 60 Atl. 672.

Where a street car passenger whose arm was resting on the window sill was injured by its being struck by a passing load of hay no presumption of the carrier's negligence arises. Federal St. & P. R. Co. *v.* Gibson, 96 Pa. St. 83.

Contra, holding that the presumption arises. Maher *v.* Metropolitan St. R. Co., 102 App. Div. 517, 92 N. Y. Supp. 825; Loudoun *v.* Eighth Ave. R. Co., 162 N. Y. 380, 56 N. E. 988.

Compare also Olsen *v.* Citizens R. Co., 152 Mo. 426, 54 S. W. 470, where a street car passenger was injured by the car being struck by certain fire apparatus and a presumption of the carrier's negligence was said to arise. (This case might be distinguished on the ground that the fire apparatus had paramount right of way on the street.)

56. Where a railroad passenger was injured by the derailing of a train caused by running into some horses, a presumption of the carrier's negligence arises. Meador *v.* Missouri Pac. R. Co., 62 Kan. 865, 61 Pac. 442.

Where an employe of a construction company while riding on a train under a railway company's control was injured by its derailment from striking a mule, the burden is on defendant to show its freedom from negligence. Louisville N. O. & T. R. Co. *v.* Conroy, 63 Miss. 562, 573, 56 Am. Rep. 835.

Where a passenger on a freight train, riding on top of a loaded flat

is immediately associated with defendant's in the production of the accident, no presumption arises.[57] This rule seems to apply in cases of injuries to children.[58]

Where Act of Person Damnified Disassociated With Injury. — The mere fact, however, that the damnified party was not passive at the time he sustained the injury does not render the presumption of negligence inoperative where there is an apparent disassociation of his

car, is injured by the train striking a bull, a presumption of the carrier's negligence arises. Mexican Cent. R. Co. *v.* Lauricella, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103.

Where a street car passenger is injured by the car running into a railway train a presumption of the carrier's negligence arises. Osgood *v.* Los Angeles Trac. Co., 137 Cal. 280, 70 Pac. 169. See also Yazoo & M. V. R. Co. *v.* Humphrey, 83 Miss. 721, 36 So. 154.

Contra, holding that no presumption arises in such cases. Tompkins *v.* Clay St. R. Co., 66 Cal. 163, 4 Pac. 1165; Loudoun *v.* Eighth Ave. R. Co., 162 N. Y. 380, 56 N. E. 988; Falke *v.* Third Ave. R. Co., 38 App. Div. 49, 55 N. Y. Supp. 984.

57. The maxim does not apply where the accident, unexplained by attendant circumstances, might have resulted plausibly from negligence on the part of the passenger as the carrier. Price *v.* St. Louis I. M. & S. R. Co. (Ark.), 88 S. W. 575.

The presumption arising from an injury to a passenger arises only where the voluntary action of the passenger is excluded. Pennsylvania Co. *v.* Marion, 104 Ind. 239, 3 N. E. 874. See also Bosqui *v.* Sutro R. Co., 131 Cal. 390, 400-401, 63 Pac. 682.

Where a passenger is injured by his hand getting caught in the car door no presumption of negligence arises. Denver & R. G. R. Co. *v.* Fotheringham, 17 Colo. App. 410, 68 Pac. 978.

In an action for damages to a steam tug by running afoul of an obstruction placed in a river by defendant no presumption arises. Dyer *v.* Talcott, 16 Ill. 300.

Where plaintiff's sleigh was upset on a highway by the failure of defendant to give him half the road in passing there is no presumption. Walkup *v.* May, 9 Ind. App. 409, 36 N. E. 917.

Where it appeared that a person while rightfully on another's premises was injured by the fall of a piece of iron weighing seven hundred pounds, that had been securely leaning against a wall for three months, falling upon him when he gave it a slight and inadvertent push, the other's negligence cannot be presumed. Carter *v.* Boston & A. R. Co., 177 Mass. 228, 58 N. E. 694.

In an action for death caused by drinking poison out of a keg labeled poison which negligently was left beside a keg of water, plaintiff must prove defendant's negligence. Callahan *v.* Warne, 40 Mo. 131.

In an action for injuries caused by the explosion of a tank on a machine sold plaintiff by defendant, while being used to vaporize gasoline according to directions, where it was alleged that the materials were insufficient, no presumption of negligence arises from the fact of explosion. Talley *v.* Beever (Tex. Civ. App.), 78 S. W. 23.

Horses Rendered Unmanageable. Louisville & N. R. Co. *v.* Lee, 136 Ala. 182, 33 So. 897; Lowe *v.* Alabama & V. R. Co., 81 Miss. 9, 32 So. 907; Darling *v.* Westmoreland, 52 N. H. 401, 13 Am. Rep. 55; Kepner *v.* Harrisburg Trac. Co., 183 Pa. St. 24, 38 Atl. 416. *Contra,* Richmond R. & Elec. Co. *v.* Hudgins, 100 Va. 409, 41 S. E. 736; Yerkes *v.* Sabin, 97 Ind. 141, 49 Am. Rep. 434.

58. Goldstein *v.* People's R. Co. (Del.), 60 Atl. 975; Smith *v.* Kansas City Elev. R. Co., 61 Kan. 862, 60 Pac. 1059; Atchison T. & S. F. R. Co. *v.* McFarland, 2 Kan. App. 662, 43 Pac. 788; Louisville & P. Canal Co. *v.* Murphy, 9 Bush (Ky.) 522, 531; Culbertson *v.* Crescent City R. Co., 48 La. Ann. 1376, 20 So. 902; Siacik *v.* Northern Cent. R. Co., 92 Md. 213, 221, 48 Atl. 149.

conduct from the forces immediately producing the injury.[59] In some instances the presumption is strongly contested, however.[60]

59. Where a passenger was injured by a shock received on coming into contact with certain metal portions of a street car a presumption arises. Denver Tram. Co. *v.* Reid, 4 Colo. App. 53, 35 Pac. 269.

Where a driver, traveling on a freight train in charge of stock, was crushed by the closing up of the space between two freight cars, while he was descending the ladder between them to look after the stock, a presumption of negligence arises. New York C. & St. L. R. Co. *v.* Blumenthal, 160 Ill. 40, 43 N. E. 809.

Where a passenger is thrown to the ground by the giving away of the platform gate of a street car against which he was pushed by the crowd on the car, a presumption of negligence arises. Aston *v.* St. Louis Transit Co., 105 Mo. App. 226, 79 S. W. 999.

Where a passenger standing in a cable street car holding onto a strap was injured by a lurch of the car, and it appeared other passengers were affected by the lurch, a presumption of negligence arises. Dixey *v.* Philadelphia Trac. Co., 180 Pa. St. 401, 36 Atl. 924.

Contra, State *v.* Green, 95 Md. 217, 230-231, 52 Atl. 673, where one visiting a store on business while standing on a trap door in the floor was injured by the elevator coming up underneath him and lifting the trap door. See also Dufour *v.* Central Pac. R. Co., 67 Cal. 319, 7 Pac. 769; Herring *v.* Wilmington & R. R. Co., 32 N. C. 402.

Hidden Defect. — Wabash R. Co. *v.* De Hart (Ind. App.), 65 N. E. 192; Moore *v.* Platteville, 78 Wis. 644, 47 N. W. 1055.

Charged Wire. — Gannon *v.* Laclede Gaslight Co., 145 Mo. 502, 46 S. W. 968; Snyder *v.* Wheeling Elec. Co., 43 W. Va. 661, 28 S. E. 733, 64 Am. St. Rep. 922, 39 L. R. A. 499.

60. **Low-Hanging Object.** — "The fact that a telegraph wire is found swinging across a public way at such a height as to obstruct and endanger ordinary travel is in itself, unexplained and unaccounted for, some evidence of neglect on the part of the company." Thomas *v.* Western Union Tel. Co., 100 Mass. 156.

Where a person was brushed from his team by coming against a low wire across a highway, negligence in the care of the wire will not be presumed therefrom. Pennsylvania Tel. Co. *v.* Varnau, 15 Atl. 624, 5 Lanc. Law Rev. 401.

Person Leaning Outside Car. Baltimore & Y. Tpke. Road *v.* Leonhardt, 66 Md. 70, 5 Atl. 346 (passenger on open street car striking post two and three-fourths inches distant); McCord *v.* Atlanta & C. Air-Line R. Co., 134 N. C. 53, 45 S. E. 1031 (arm of passenger resting on window sill of car struck by mail pouch four or five inches from dead line of window sill).

Harbison *v.* Metropolitan R. Co., 9 App. D. C. 60 (passenger on running board of street car, facing backward, struck by passing car); Weaver *v.* Baltimore & O. R. Co., 3 App. D. C. 436, 452-453 (mail clerk while leaning out railroad car door to take in mail pouch struck by portion of bridge); Chicago, B. & Q. R. Co. *v.* Gregory, 58 Ill. 272 (railway fireman, while keeping lookout, struck by mail catcher too close to track); Allen *v.* Northern Pac. R. Co., 35 Wash. 221, 77 Pac. 204 (passenger boarding slowly, moving car striking against stationary post near track).

Person Injured by Starting of Train. — Dougherty *v.* Missouri Pac. R. Co., 81 Mo. 325, 51 Am. Rep. 239; Weber *v.* New Orleans & C. R. Co., 104 La. 367, 28 So. 892; Werbowlsky *v.* Ft. Wayne & E. R. Co., 86 Mich. 236, 48 N. W. 1097, 24 Am. St. Rep. 120; Michigan Cent. R. Co. *v.* Coleman, 28 Mich. 440; Brown *v.* Manhattan R. Co., 94 N. Y. Supp. 190 (Ingraham, J., *dissenting*); Barringer *v.* St. Louis I. M. & S. R. Co. (Ark.), 85 S. W. 94; City & Suburban R. Co. *v.* Svedborg, 20 App. D. C. 543; Killian *v.* Georgia R. & Bkg. Co., 97 Ga. 727, 25 S. E. 384; United R. & Elec. Co. *v.* Beidelman, 95 Md. 480, 52 Atl. 913; Gibson *v.* International Trust Co., 177 Mass. 100, 58 N. E. 278; Bradley

It seems that although an act of the damnified party was immediately associated in the production of the injury, the presumption may nevertheless become operative in the absence of this prerequisite, where evidence showing the exercise of due care by the injured party is introduced.[61]

Effect of Imminence of Danger as Prerequisite. — Where a person is injured in an attempt to avoid apparently imminent danger,[62] or by the attempt of others to escape the same,[63] the maxim applies.

(3.) Unusualness of Damage From Causative Force. — Third, the cause of the damage must be either an act of defendant's or of those for whom he is responsible that, if proper care is used, is ordinarily performed without damage to others, or the operation of a thing for which the defendant is responsible that is ordinarily, with proper care, operated without damage to others.[64]

v. Ft. Wayne & E. R. Co., 94 Mich. 35, 53 N. W. 915; Peck *v.* St. Louis Transit Co., 178 Mo. 617, 77 S. W. 736; Lincoln Trac. Co. *v.* Webb (Neb.), 102 N. W. 258; Paynter *v.* Bridgeton & M. Trac. Co., 67 N. J. L. 619, 52 Atl. 367. *Compare*, however, Gardner *v.* Detroit St. R. Co., 99 Mich. 182, 58 N. W. 49.

61. Where a passenger fell against a railway car seat, when the car gave a jerk, a showing of such facts raises a presumption of the railway company's negligence, where there is evidence that plaintiff at the time was in the exercise of due care. Railroad Co. *v.* Pollard, 22 Wall. (U. S.) 341.

Where a brakeman was injured while coupling cars, proof of his due care raises a presumption of the railway company's negligence. Savannah F. & W. Ry. *v.* Barber, 71 Ga. 644.

62. Where, a railway collision being imminent, the engineer jumped and was killed, where his exercise of due care is shown the want of due care of defendant's other employes will be presumed. Central R. & Bkg. Co. *v.* Roach, 64 Ga. 635.

Where a passenger jumped from a street car on a well-grounded fear that a collision was imminent a presumption of defendant's negligence arises. Palmer *v.* Warren St. R. Co., 206 Pa. St. 574, 56 Atl. 49, 63 L. R. A. 507.

In an action for injuries to a bicycle rider on a street in attempting to avoid a guy wire of a trolley wire that had fallen directly in front of his path, a presumption of negligence arises. Chattanooga Elec. R. Co. *v.* Mingle, 103 Tenn. 667, 56 S. W. 23, 76 Am. St. Rep. 703.

Contra, Taillon *v.* Mears, 29 Mont. 161, 74 Pac. 421, where a passenger by stage jumped therefrom because of the imminency of danger.

63. Where a fuse on an electric street car blew out, causing noise and flame and creating panic among the passengers, who rushed out of the car, pushing off plaintiff, who rushed out before them, a presumption of negligence arises. Chicago Union Trac. Co. *v.* Newmiller, 215 Ill. 383, 74 N. E. 410.

"The rush of the panic-stricken passengers, which threw the plaintiff off the car, was the result of the impending collision, and was in legal contemplation as much the effect of the collision as consequences which followed it." Magrane *v.* St. Louis & S. R. Co., 183 Mo. 119, 81 S. W. 1158.

Where it appears that a person was injured in a stampede of passengers to get out of an electric car that had caught on fire, the carrier must prove its freedom from negligence. Davis *v.* Paducah R. & L. Co., 68 S. W. 140, 24 Ky. L. Rep. 135.

64. *England.* — Scott *v.* London & St. K. Docks Co., 3 Hurl. & C. 596.

United States. — Inland & Seaboard Coasting Co. *v.* Tolson, 139 U. S. 551.

Arkansas. — Price *v.* St. Louis I. M. & S. R. Co., 88 S. W. 575.

California. — Kahn *v.* Triest-Ro-

Injuries to Persons by Appliances of Carriers. — Thus the maxim applies where an injury occurs to a passenger through the operation by defendant of the appliances of transportation.[65] But in some

senberg Cap Co., 139 Cal. 340, 73 Pac. 164; Dixon *v.* Plums, 98 Cal. 384, 33 Pac. 268, 35 Am. St. Rep. 180, 20 L. R. A. 698.

District of Columbia. — City & Suburban R. Co. *v.* Svedborg, 20 App. D. C. 543.

Illinois. — Chicago City R. Co. *v.* Carroll, 102 Ill. App. 202; Chicago City R. Co. *v.* Rood, 163 Ill. 477, 485, 45 N. E. 238.

Kansas. — St. Louis & S. F. R. Co. *v.* Burrows, 62 Kan. 89, 61 Pac. 439.

Missouri. — Redmon *v.* Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26; McCarty *v.* St. Louis & S. R. Co., 105 Mo. App. 596, 80 S. W. 7; Raney *v.* Lachance, 96 Mo. App. 479, 70 S. W. 376; Blanton *v.* Dold, 109 Mo. 64, 18 S. W. 1149.

Nebraska. — Lincoln Trac. Co. *v.* Webb, 102 N. W. 258.

New Jersey. — Sheridan *v.* Foley, 58 N. J. L. 230, 33 Atl. 484.

New York. — Langley *v.* Metropolitan St. R. Co., 36 Misc. 804, 74 N. Y. Supp. 857.

North Carolina. — Moore *v.* Parker, 91 N. C. 275; Lawton *v.* Giles, 90 N. C. 374.

Vermont. — Houston *v.* Brush, 66 Vt. 331, 342-347, 29 Atl. 380.

Virginia. — Richmond R. & Elec. Co. *v.* Hudgins, 100 Va. 409, 41 S. E. 736.

Peculiar Instances of Application of Rule. — Where it appears that a passenger, while sitting in a railway train with his arm on the window sill, but not outside the window, was injured by being struck by something loose on a passing freight train, a *prima facie* case of negligence arises. Breen *v.* New York C. & H. R. R. Co., 109 N. Y. 297, 16 N. E. 60. *Compare*, however, Chicago & E. I. R. Co. *v.* Reilly, 212 Ill. 506, 72 N. E. 454, where it appeared that a person standing close to a railway track, looking in the opposite direction, was struck by a projecting log on the car of a passing freight train, and the court held no presumption of the carrier's negligence arose.

Where it appeared that a mare was injured while being served by the defendant's stallion, in charge of his groom, by the entry of the rectum, an inference of the groom's negligence arises. Peer *v.* Ryan, 54 Mich. 224, 19 N. W. 961.

65. *England.* — Great Western R. Co. *v.* Braid, 1 Moore P. C. (N. S.) 101 (train fell into washout).

United States. — Minahan *v.* Grand Trunk W. R. Co., 138 Fed. 37 (train derailed by defective switch).

Colorado. — Denver & R. G. R. Co. *v.* Fotheringham, 17 Colo. App. 410, 68 Pac. 978; Denver Tram. Co. *v.* Reid, 4 Colo. App. 53, 35 Pac. 269; Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442, 457-458.

District of Columbia. — Kohner *v.* Capital Trac. Co., 22 App. D. C. 181, 62 L. R. A. 875 (street railway passenger struck in face by conductor who was reaching out to grasp something by which to recover his balance).

Illinois. — Chicago City R. Co. *v.* Rood, 163 Ill. 477, 45 N. E. 238; Toledo W. & W. R. Co. *v.* Beggs, 85 Ill. 80 (breakage of car wheel).

Indiana. — Terre Haute & I. R. Co. *v.* Sheeks, 155 Ind. 74, 56 N. E. 434; Bedford S. O. & B. R. Co. *v.* Rainbolt, 99 Ind. 551 (car fell through bridge).

Iowa. — Fitch *v.* Mason City & C. L. Trac. Co., 100 N. W. 618.

Kansas. — St. Louis & S. F. R. Co. *v.* Burrows, 62 Kan. 89, 61 Pac. 430.

Kentucky. — Davis *v.* Paducah R. & L. Co., 68 S. W. 140, 24 Ky. L. Rep. 135 (electric car got on fire).

Maryland. — Western Maryland R. Co. *v.* State, 95 Md. 637, 53 Atl. 969 (freight train wrecked by breakage of axle); Baltimore & O. R. Co. *v.* State, 63 Md. 135, 144; Baltimore & O. R. Co. *v.* Worthington, 21 Md. 275, 283, 289-290.

Minnesota. — Wilson *v.* Northern Pac. R. Co., 26 Minn. 278, 3 N. W. 333.

Missouri. — Thompson *v.* St. Louis & S. R. Co. (Mo. App.), 86 S. W. 465 (person boarding street car by front platform being struck by the

brake handle suddenly revolving, the brake having become unexpectedly unset); Sawyer *v.* Hannibal & St. J. R. Co., 37 Mo. 240, 258-259 (railway bridge destroyed).

New York. — Seybolt *v.* New York L. E. & W. R. Co., 95 N. Y. 562, 47 Am. Rep. 75 (derailment by misplaced switch); Curtis *v.* Rochester & S. R. Co., 18 N. Y. 534.

North Carolina. — Grant *v.* Raleigh & G. R. Co., 108 N. C. 462, 13 S. E. 209.

Pennsylvania. — McCafferty *v.* Pennsylvania R. Co., 193 Pa. St. 339, 44 Atl. 435 (defective roadbed); Fleming *v.* Pittsburg C. C. & St. L. Ry., 158 Pa. St. 130, 27 Atl. 858; Philadelphia & R. R. Co. *v.* Anderson, 94 Pa. St. 351, 39 Am. Rep. 787; Meier *v.* Pennsylvania R. Co., 64 Pa. St. 225.

Utah. — Major *v.* Oregon S. L. R. Co., 21 Utah 141, 59 Pac. 522 (defective roadbed).

Elevator Falls. — Treadwell *v.* Whittier, 80 Cal. 574, 582-583, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498 (McFarland, J., *dissenting*); Springer *v.* Ford, 189 Ill. 430, 59 N. E. 953, 52 L. R. A. 930 (where a passenger properly riding in a freight elevator was injured by its fall); Stewart *v.* Van Deventer Carpet Co. (N. C.), 50 S. E. 562.

Contra, Robinson *v.* Chas. Wright & Co., 94 Mich. 283, 53 N. W. 938, where the court said: "The sudden breaking or giving way of a piece of machinery, properly constructed, is not sufficient to justify the conclusion of negligence. Machinery well constructed, apparently safe, and having been tested by use, often gives way from some hidden cause or unknown defect."

In Boyd *v.* Blumenthal, 3 Pen. (Del.) 564, 52 Atl. 330, where a person was injured by coming in contact with a projecting joist while riding in defendant's elevator, the court merely said that negligence is never presumed, but must always be proved.

Stage Coach Breaks Down or Overturns. — Christie *v.* Griggs, 2 Campb. (Eng.) 79 (where the axletree broke and a passenger was thrown out); Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181 (overturning); Lawrence *v.* Green, 70 Cal. 417, 11 Pac. 750 (rear wheel broke and stage overturned); Boyce *v.* California Stage Co., 25 Cal. 460, 468 (overturning); Fairchild *v.* California Stage Co., 13 Cal. 599; Wall *v.* Livezay, 6 Colo. 465; Anderson *v.* Scholey, 114 Ind. 553, 17 N. E. 125 (overturning); Stockton *v.* Frey, 4 Gill. (Md.) 406, 416, 422 (overturning); McLean *v.* Burbank, 11 Minn. 277 (stage fell off ferry boat and passenger drowned); Ryan *v.* Gilmer, 2 Mont. 517, 25 Am. Rep. 744 (Wade, C. J., *dissenting*), (where bob-sled overturned).

Where Train Is Derailed.

England. — Flannery *v.* Waterford & L. R. Co., 11 Ir. C. L. 30; Carpue *v.* London & B. R. Co., 5 A. & E. (N. S.) (Q. B.) 747.

United States. — Southern R. Co. *v.* Myers, 87 Fed. 149.

California. — Bosqui *v.* Sutro R. Co., 131 Cal. 390, 400-401, 63 Pac. 682.

Indiana. — Chicago & E. I. R. Co *v.* Grimm, 25 Ind. App. 494, 57 N. E. 640; Louisville N. A. & C. R. Co. *v.* Jones, 108 Ind. 551, 558, 9 N. E. 476; Cleveland, C. C. & I. R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312; Pennsylvania Co. *v.* Marion, 104 Ind. 239, 3 N. E. 874; Cleveland C. C. & I. R. Co. Newell, 75 Ind. 542; Pittsburg C. & St. L. R. Co. *v.* Williams, 74 Ind. 462.

Iowa. — Whittlesey *v.* Burlington C. R. & N. R. Co., 90 N. W. 516.

Kansas. — Atchison T. & S. F. R. Co. *v.* Elder, 57 Kan. 312, 46 Pac. 310; Mo. Pac. R. Co. *v.* Johnson, 55 Kan. 344, 40 Pac. 641.

Kentucky. — Felton *v.* Holbrook, 21 Ky. L. Rep. 1824, 56 S. W. 506; Louisville & P. R. Co. *v.* Smith, 2 Duv. 556 (street car overturned).

Maine. — Stevens *v.* E. & N. A. Ry., 66 Me. 74.

Missouri. — Logan *v.* Metropolitan St. R. Co., 183 Mo. 582, 82 S. W. 126 (street car derailed); Hipsley *v.* Kansas City St. J. & C. B. R. Co., 88 Mo. 348.

Nebraska. — Spellman *v.* Lincoln Rapid Transit Co., 36 Neb. 890, 900, 55 N. W. 270, 38 Am. St. Rep. 753, 20 L. R. A. 316 (steam dummy street car derailed).

Rhode Island. — Cheetham *v.*

jurisdictions the maxim is held not to apply where the cause of the accident is to be expected in the ordinary operation of train or car.[96]

Union R. Co., 58 Atl. 881 (street car derailed).

Tennessee. — Illinois Cent. R. Co. *v.* Kuhn, 107 Tenn. 106, 64 S. W. 202 (sleeping car derailed).

Texas. — St. Louis S. W. R. Co. *v.* Harkey (Tex. Civ. App.), 88 S. W. 506.

"In the ordinary operation of defendant's railroad its cars would not have left the rails. It is a matter of common knowledge that the roadbed of a street railroad is so built and the cars so constructed, that, when there is no defect in either, and the cars are run with due care, the latter will remain upon the track; and consequently, proof of the derailment of a car, in the absence of evidence to the contrary, justifies the conclusion that it resulted either from improper construction, failure to keep in proper repair or negligent operation." Bergen Co. Trac. Co. *v.* Demarest, 62 N. J. L. 755, 42 Atl. 729.

Driver Loses Control of Car. Where a street car passenger is injured by the car in which he was riding getting beyond control of the driver on a descending grade when the track was slippery with snow, and colliding with another stationary car at the foot of the grade, a presumption of the carrier's negligence arises. Kay *v.* Metropolitan St. R. Co., 29 App. Div. 466, 51 N. Y. Supp. 724.

Sudden Stoppage of Car Producing Personal Injury. — St. Louis & S. F. R. Co. *v.* Burrows, 62 Kan. 89, 61 Pac. 439 (where a passenger in a caboose car on a freight train, while leaning from his seat toward the stove in order to spit, was thrown to the floor of the car by the sudden stoppage thereof); Redmon *v.* Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26 (where passenger on cable street car was injured by sudden stoppage by striking obstruction in grip slot); Langley *v.* Metropolitan St. R. Co., 36 Misc. 804, 74 N. Y. Supp. 857 (cable car came to sudden stop, throwing passenger through window); Murray *v.* Pawtuxet Val. St. R. Co., 25 R. I. 209, 55 Atl. 491 (where electric car came to sudden stop by falling of motor to ground). *Contra*, Hoffman *v.* Third Ave. R. Co., 45 App. Div. 586, 61 N. Y. Supp. 590 (sudden stoppage of cable street car).

Train Gives Unusual Jerk. Southern R. Co. *v.* Crowder, 130 Ala. 256, 30 So. 592 (where the sudden jerk of a car threw a passenger to the floor); Fitch *v.* Mason City & C. L. Trac. Co. (Iowa), 100 N. W. 618 (where a sudden lurch of an electric car threw a passenger off).

Compare Dresslar *v.* Citizens St. R. Co., 19 Ind. App. 383, 47 N. E. 651, where a passenger on the platform of the car, preparatory to alighting, was thrown to the ground by the sudden acceleration of the speed of the car, and no presumption of negligence was indulged.

66. Jerk of Freight Train. — Yazoo & Mississippi Val. R. Co. *v.* Humphrey, 83 Miss. 721, 36 So. 154 (where a passenger on a mixed train was thrown to the floor by the impact of coupling it at a way station); Young *v.* Missouri Pac. R. Co. (Mo. App.), 84 S. W. 175 (where a freight train in the caboose of which a passenger was riding came to a full stop at a station, and as he was walking across the floor to alight pulled ahead twenty feet with a heavy jerk).

Presumption Arises. — Sprague *v.* Southern R. Co., 92 Fed. 59, 34 C. C. A. 207 (where a passenger in caboose was thrown to floor by jerk in starting); Southern R. Co. *v.* Cunningham (Ga.), 50 S. E. 979 (where passenger in caboose while drinking at the water tank was thrown to floor by sudden backing of car).

Blowing Out of Fuse of Electric Car. — Cassady *v.* Old Colony St. R. Co., 184 Mass. 156, 68 N. E. 10, where the court said: "The fuse is expected to burn out when for any cause the electrical current exceeds its carrying capacity; and the evidence of the experts in this case shows that in the ordinary operation of cars properly wired and equipped such an event is liable often to happen without negligence on the part of anyone." In Kight *v.* Metropolitan R. Co., 21

The maxim is especially applicable to collisions between cars or trains or vessels or other vehicles of the same person causing injuries to passengers,[67] and to the collision of a vessel with a structure on land.[68]

Injuries to Property in Carriage or Storage. — Where property is lost or damaged while in the keeping of a carrier,[69] innkeeper[70] or warehouseman,[71] the presumption likewise arises.

Breakage and Defective Operation of Machinery. — In case of the breakage or defective operation of machinery other than that of car-

App. D. C. 494, 508, the court refused to apply the presumption, because the circumstances fully appeared in evidence.

Presumption Arises. — Chicago Union Trac. Co. *v.* Newmiller, 215 Ill. 383, 74 N. E. 410, where the fuse blew out, causing noise and flame and creating panic among the passengers.

Where a passenger sitting on a chair tipped back on two legs beside an open door in the side of a caboose car in which he was riding was thrown out by the movement of the car around a sharp curve on a down grade, no presumption of negligence arises. Norfolk & W. R. Co. *v.* Ferguson, 79 Va. 241.

67. *England.* — Skinner *v.* London B. & S. C. R. Co., 5 Exch. 787.

California. — Green *v.* Pacific Lumb. Co., 130 Cal. 435, 62 Pac. 747.

Illinois. — North Chicago St. R. Co. *v.* Cotton, 140 Ill. 486, 29 N. E. 899 (where passenger standing on rear platform of car was injured by the rear-end collision of another car with it).

Indiana. — Sherlock *v.* Alling, 44 Ind. 184, 204.

Kansas. — Southern Kansas R. Co. *v.* Walsh, 45 Kan. 653, 26 Pac. 45.

Kentucky. — Baltimore & O. S. W. R. Co. *v.* Hausman, 21 Ky. L. Rep. 1264, 54 S. W. 841.

Massachusetts. — Savage *v.* Marlborough St. R. Co., 186 Mass. 203, 71 N. E. 531.

Missouri. — Wilbur *v.* South Western Missouri Elec. R. Co. (Mo. App), 85 S. W. 671; Estes *v.* Missouri Pac. R. Co. (Mo. App.), 85 S. W. 627; Robinson *v.* St. Louis & S. R. Co., 103 Mo. App. 110, 77 S. W. 493; Heyde *v.* St. Louis Transit Co., 102 Mo. App. 537, 77 S. W. 127 (where one of the cars left the track at a turnout, running into the other car).

Pennsylvania. — Rowdin *v.* Pennsylvania R. Co., 208 Pa. St. 623, 632-633, 57 Atl. 1125; Pennsylvania R. Co. *v.* Brooks, 57 Pa. St. 339, 98 Am. Dec. 229 (where a habit of intoxication of one of the conductors of two colliding trains was also shown).

Virginia. — Southern R. Co. *v.* Dawson, 98 Va. 577, 36 S. E. 996 (where the two parts of a broken train collided).

Washington. — Williams *v.* Spokane Falls & N. R. Co., 80 Pac. 1100 (where moving cars ran into a standing car in which a mail clerk was).

Wisconsin. — Feldschneider *v.* Chicago M. & St. P. R. Co., 99 N. W. 1034 (where the two parts of a broken train collided).

68. Inland & Seaboard Coasting Co. *v.* Tolson, 139 U. S. 551, where a wharfinger was injured by a boat coming with force against a wharf, tearing up the planking.

69. Steele *v.* Townsend, 37 Ala. 247, 79 Am. Dec. 49; Bachelder *v.* Heagan, 18 Me. 32; Ryan *v.* Missouri K. & T. R. Co., 65 Tex. 13; Kirst *v.* Milwaukee L. S. & W. R. Co., 46 Wis. 489 (where a carboy of acid was broken in the course of switching).

Contra, Western Transp. Co. *v.* Downer, 11 Wall. (U. S.) 129, where plaintiff's goods were injured through the grounding of the boat in which they were being carried in entering a harbor in the Great Lakes, and no presumption was indulged.

70. Bachelder *v.* Heagan, 18 Me. 32.

71. Seals *v.* Edmondson, 71 Ala. 509.

riers, there is a difference of opinion as to the applicability of the maxim.[72]

72. Maxim Applicable. — Blanton *v.* Dold, 109 Mo. 74, 18 S. W. 1149 (where a servant in charge of a mill was injured by the unexpected movement of the grinding surfaces while he was extracting an obstruction from between them); Vorbrick *v.* Geuder & Paeschke Mfg. Co., 96 Wis. 277, 71 N. W. 434 (where an operator of a die-punching machine was injured by the unexpected and unaccountable falling of the trip-hammer without his placing his foot on the release lever).

Maxim Inapplicable. — Bien *v.* Unger, 64 N. J. L. 596, 46 Atl. 593 (where a servant was injured by the unaccountable falling of the trip-hammer of a machine, there being no evidence that it was out of repair or that the hammer had ever so fallen at any other time); Piehl *v.* Albany R. R., 30 App. Div. 166, 51 N. Y. Supp. 755 (Mervin, J., *dissenting*), *affirmed* without opinion, 162 N. Y. 617, 57 N. E. 1122 (where a fragment of a fly wheel flew from defendant's power-house across a street into a saloon on the opposite side thereof, killing decedent, who was therein, and the court said: "Such are the limitations upon human foresight that every reasonable care does not always prevent accidents, and . . . such is the nature of steam and electricity and of the engines by and upon which they operate, that, when such an explosion as this occurs, our experience, or even expert evidence, is not sufficiently uniform to justify us in presuming that negligence is the cause"); Stearns *v.* Ontario Spinning Co., 184 Pa. St. 519, 39 Atl. 292 (where an employe was hit by an axe head that flew from the axe another employe was using).

Explosions. — Steam Boiler. — *In re* California Nav. & Imp. Co., 110 Fed. 670 (where a steamboat passenger was killed by the explosion of the steam drum); Rose *v.* Stephens & Condit Transp. Co., 11 Fed. 438 (where a person was injured by the explosion of a steamboat boiler, and the court said: "As boilers do not usually explode when they are in a safe condition, and are properly managed, the inference that this boiler was not in a safe condition, or was not properly managed, was justifiable"); Illinois Cent. R. Co. *v.* Phillips, 49 Ill. 234 (where a bystander was injured by the explosion of the boiler of a locomotive standing at a railway station); Kelly *v.* Chicago & A. R. Co. (Mo. App.), 87 S. W. 583 (where a passenger was injured by the explosion of the locomotive boiler); Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 282, 291 (where a steamboat passenger was injured by the explosion of the boiler).

Compare Young *v.* Bransford, 12 Lea (Tenn.) 232, where it was said that the explosion of a steam boiler was enough to carry the case to the jury, although it did not create a presumption of negligence.

Contra, Kirby *v.* Delaware & H. Canal Co., 48 App. Div. 636, 62 N. Y. Supp. 1110 (where an intending passenger in a railway waiting room was injured by the explosion of the hot water heating apparatus in the building controlled by a third person, and the court held that the presumption of neither's negligence arose); Veith *v.* Hope Salt & Coal Co., 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410 (where plaintiff's property was damaged by the explosion of defendant's boiler, and the court said: "Such a rule as that contended for would be very dangerous, as it would make every user of a boiler an insurer against accident, and would almost put an embargo on the use of boilers in legitimate business").

Gasometer. — Cox *v.* Providence Gas Co., 17 R. I. 199, 21 Atl. 344.

Accidental or Intentional Explosion of Powder. — Judson *v.* Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718 (where a dynamite factory exploded, and the court said: "Appellant was engaged in the manufacture of dynamite. In the ordinary course of things an explosion does

Fires. — Where damage results from fire spread by a railroad locomotive, in most jurisdictions a presumption of negligence arises,[73]

not occur in such manufacture if proper care is exercised. An explosion did occur; *ergo*, the real cause of the explosion being unexplained, it is probable that it was occasioned by a lack of proper care"); Spear *v.* Philadelphia W. & B. R. Co., 119 Pa. St. 61, 12 Atl. 824 (where a steamboat passenger was killed by an explosion from an unknown cause).

Where decedent was killed by being struck by a rock hurled into his house by a blast set off by defendant at a point nine hundred and forty-six feet distant, and it appeared that rocks from defendant's blasts did not usually fly half so far, a presumption of negligence in the management of the blast arises. Klepsch *v.* Donald, 8 Wash. 162, 35 Pac. 621; Klepsch *v.* Donald, 4 Wash. 436, 30 Pac. 991.

Contra, Luria *v.* Cusick, 93 N. Y. Supp. 507, where in an action for damages to plaintiff's property by blasting operations on adjoining property plaintiff was required to prove defendant's negligence.

73. *England.* — Piggot *v.* Eastern Counties R. Co., 3 C. B. 229. See also Aldridge *v.* Great Western R. Co., 3 Man. & G. 515.

United States. — Chicago, St. P. M. & O. R. Co. *v.* Gilbert, 52 Fed. 711, 3 C. C. A. 264; Eddy *v.* Lafayette, 49 Fed. 807.

Alabama. — Louisville & N. R. Co. *v.* Reese, 85 Ala. 497, 5 So. 283.

Arkansas. — St. Louis & S. F. R. Co. *v.* Jones, 59 Ark. 105, 26 S. W. 595; Tilley *v.* St. Louis & S. F. R. Co., 49 Ark. 535, 6 S. W. 8.

California. — Butcher *v.* Vaca Valley & C. L. R. Co., 67 Cal. 518, 8 Pac. 174; Henry *v.* Southern Pac. R. Co., 50 Cal. 176; Hull *v.* Sacramento Valley R. Co., 14 Cal. 387. (In these cases evidence was also given that the spread of fire was not the probable result of the ordinary working of a locomotive under like circumstances.)

Illinois. — Illinois Cent. R. Co. *v.* Mills, 42 Ill. 407.

Iowa. — Babcock *v.* Chicago & N. W. R. Co., 62 Iowa 593, 13 N. W. 740, 17 N. W. 909; Small *v.* Chicago R. I. & P. R. Co., 50 Iowa 338. *Contra*, Garrett *v.* Chicago & N. W. R. Co., 36 Iowa 121; Gandy *v.* Chicago & N. W. R. Co., 30 Iowa 420.

Maryland. — Baltimore & O. R. Co. *v.* Shipley, 39 Md. 251; Annapolis & E. R. Co. *v.* Gantt, 39 Md. 115, 137; Baltimore & S. R. Co. *v.* Woodruff, 4 Md. 242, 253-254, 259, 59 Am. Dec. 72.

Minnesota. — Karsen *v.* Milwaukee & St. P. R. Co., 29 Minn. 12, 11 N. W. 122.

Mississippi. — Tribette *v.* Illinois Cent. R. Co., 71 Miss. 212, 230, 13 So. 899.

Missouri. — Kenney *v.* Hannibal & St. J. R. Co., 70 Mo. 243; Coates *v.* Missouri K. & T. R. Co., 61 Mo. 38; Coale *v.* Hannibal & St. J. R. Co., 60 Mo. 227, 235; Clemens *v.* Hannibal & St. J. R. Co., 53 Mo. 366; Fitch *v.* Pacific R. Co., 45 Mo. 322 *Contra*, Smith *v.* Hannibal & St. J. R. Co., 37 Mo. 287.

Montana. — Diamond *v.* Northern Pac. R. Co., 6 Mont. 580, 592-596, 13 Pac. 367.

Nebraska. — Burlington & M. R. R. *v.* Westover, 4 Neb. 268.

North Carolina. — Ellis *v.* Portsmouth & R. R. Co., 24 N. C. 138.

Oregon. — Koontz *v.* Oregon R. & Nav. Co., 20 Or. 3, 23 Pac. 820.

South Dakota. — Smith *v.* Chicago M. & St. P. R. Co., 4 S. D. 71, 55 N. W. 717; Cronk *v.* Chicago M. & St. P. R. Co., 3 S. D. 93, 52 N. W. 420.

Tennessee. — Burke *v.* Louisville & N. R. Co., 7 Heisk. 451, 462, 19 Am. Rep. 618.

Texas. — Galveston H. & S. A. R. Co. *v.* Horne, 69 Tex. 643, 9 S. W. 440; Ft. Worth & D. C. R. Co. *v.* Tomlinson (Tex. App.), 16 S. W. 866.

Vermont. — Cleaveland *v.* Grand Trunk R. Co., 42 Vt. 449.

Wisconsin. — Menominee River Sash & Door Co. *v.* Milwaukee & N. R. Co., 91 Wis. 447, 460, 65 N. W.

although in other jurisdictions no such presumption is indulged.[74] In cases of other fires, there is also a division of opinion as to the applicability of the maxim.[75]

176; Spaulding *v.* Chicago & N. W. R. Co., 30 Wis. 110, 123, 11 Am. Rep. 550.

See Atchison T. & S. F. R. Co. *v.* Stanford, 12 Kan. 354, 372, 15 Am. Rep. 362, where certain evidence as to the ordinary working of the locomotive causing the fire and of other locomotives was also required.

Rationale. — "Railroad companies, being authorized to employ the powerful and dangerous agency of steam, are required by law to use due and reasonable care to prevent injury to the property of others; as has often been said, a high degree of care. . . . Though no mechanical contrivance has been invented, or is in use, which can effectually prevent the escape of fire from locomotives at all times and under all circumstances, from which injury may result, experience has demonstrated that fire rarely escapes in such quantity or volume as to cause damage, when the engines are properly constructed, are supplied with the most improved appliances for preventing the escape of fire, and are managed with care. On the advanced progress in mechanical appliances, and the practical demonstration of their utility and efficiency, a reasonable inference may arise, when fire originates from sparks emitted by a locomotive in sufficient quantity or volume to occasion damage, that the engine was not properly constructed, or that it has not the improved appliances, or is not managed with care." Louisville & N. R. Co. *v.* Reese, 85 Ala. 497, 5 So. 283.

74. *Florida.* — Jacksonville T. & K. W. R. Co. *v.* Peninsular Land Transp. & Mfg. Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33 (*holding*, however, that where the circumstances of the emission are such as common experience, or the known efficiency of approved spark-arresters in general use, tells us would not exist if the arresters were properly used, as where the sparks are unusual in size, or both unusual in size and quantity, proof of such circumstances, together with proof of a fire, makes a *prima facie* case of negligence).

Indiana. — Toledo St. L. & W. R. Co. *v.* Fenstermaker, 72 N. E. 561; Ross, J., in dissenting opinion in Evansville & T. H. R. Co. *v.* Keith, 8 Ind. App. 57, 35 N. E. 296; Chicago & E. I. R. Co., *v.* Ostrander, 116 Ind. 259, 15 N. E. 227, 19 N. E. 110; Pittsburgh C. & St. L. R. Co. *v.* Hixon, 110 Ind. 225, 233, 11 N. E. 285; Indianapolis & C. R. Co. *v.* Paramore, 31 Ind. 143.

New York. — Davis, J., in Field *v.* New York Cent. R. Co., 32 N. Y. 339, 350; Fero *v.* Buffalo & State Line R. Co., 22 N. Y. 209; Hubbard, J., in Sheldon *v.* Hudson R. R. Co., 14 N. Y. 218, 67 Am. Dec. 155.

Ohio. — Ruffner *v.* Cincinnati H. & D. R. Co., 34 Ohio St. 96.

Pennsylvania. — Henderson *v.* Philadelphia & R. R. Co., 144 Pa. St. 461, 476, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299; Albert *v.* Northern Cent. R. Co., 98 Pa. St. 316; Philadelphia & R. R. Co. *v.* Yerger, 73 Pa. St. 121; Philadelphia & R. R. Co. *v.* Yeiser, 8 Pa. St. 366.

75. Presumption of Negligence Arises From Other Fire. — In an action for damages to plaintiff's property caused by defendant's firing the prairie and negligently tending the fire, plaintiff need only show such facts, and then defendant must show his due care. Johnson *v.* Barber, 10 Ill. 425, 50 Am. Dec. 416; Burton *v.* McClellan, 3 Ill. 434.

Where it appears that the tenants of a house set a stove up therein and ran the stovepipe through the wall without the use of any fire-proofing material, and that the fire started at that point, there is a *prima facie* case of negligence. Moore *v.* Parker, 91 N. C. 275.

In an action for fire set by sparks from the chimney of defendant's factory, the burden of showing his own due care rests on defendant, the

Falling Objects and the Like. — In case of the falling of an article upon a person,[76] or the rolling or hurling of one against him,[77] or

firing being shown. Lawton *v.* Giles, 90 N. C. 374.

Where plaintiff's house was burned by sparks from the fire pot of defendant's servants while they were on the roof repairing the same, a presumption of negligence arises. Shafer *v.* Lacock, 168 Pa. St. 497, 32 Atl. 44, 29 L. R. A. 254.

No Presumption of Negligence Arises From Fire. — Where it appears that a fire set by defendant in clearing its right of way spread to plaintiff's land, plaintiff must prove defendant's negligence. Gillson *v.* North Grey R. Co., 35 U. C. Q. B. 475, 480; Padgett *v.* Atchison T. & S. F. R. Co., 7 Kan. App. 736, 52 Pac. 578.

Where defendant permitted a fire on his premises to spread to plaintiff's land there is no presumption of defendant's negligence. Bachelder *v.* Heagan, 18 Me. 32; Tourtellot *v.* Rosebrook, 11 Metc. (Mass.) 460; McCully *v.* Clarke, 40 Pa. St. 399.

Where it appears that a person set a fire in his stubble field, or that a railroad set a fire on its right of way to clear it of combustible material, and that it spread to plaintiff's land, there is no presumption of negligence in the kindling or the management of the fire. Catron *v.* Nichols, 81 Mo. 80, 51 Am. Rep. 222.

Where it appears that the plaintiff's railway car was burned from a stove therein under the exclusive control of defendant, the plaintiff must also prove that the fire occurred from the negligent management thereof. Boston & M. R. R. *v.* Sargent, 72 N. H. 455, 466, 57 Atl. 688.

Where it appears that sparks from a steamboat set a building on fire no presumption of negligence arises. Atkinson *v.* Goodrich Transp. Co., 69 Wis. 5, 13, 31 N. W. 164.

76. *England.* — Kearney *v.* London B. & S. C. R. Co., L. R. 6 Q. B. 759, *affirming* L. R. 5 Q. B. 411 (Hannen, J., *dissenting*); Scott *v.* London & St. K. Docks Co., 3 H. & C. 596 (Earl, C. J., and Meller, J., *dissenting*); Byrne *v.* Boadle, 2 H. & C. 722.

United States. — The William Branfoot, 48 Fed. 914.

Arkansas. — St. Louis I. M. & S. R. Co. *v.* Hopkins, 54 Ark. 209, 15 S. W. 610, 12 L. R. A. 189.

California. — Dixon *v.* Pluns, 98 Cal. 384, 33 Pac. 268, 35 Am. St. Rep. 180, 20 L. R. A. 698.

Illinois. — Chicago City R. Co. *v.* Carroll, 102 Ill. App. 202.

Kansas. — Atchison *v.* Plunkett, 8 Kan. App. 308, 55 Pac. 677.

Massachusetts. — Lowner *v.* New York N. H. & H. R. Co., 175 Mass. 166, 55 N. E. 805. *Contra,* Wadsworth *v.* Boston Elev. R. Co., 182 Mass. 572, 66 N. E. 421.

Michigan. — Stoody *v.* Detroit G. R. & W. R. Co., 124 Mich. 420, 83 N. W. 26.

New Jersey. — Sheridan *v.* Foley, 58 N. J. L. 230, 33 Atl. 484.

New York. — Griffen *v.* Manice, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922 (Gray, J., & Parker, C. J., *doubting*); Hogan *v.* Manhattan R. Co., 149 N. Y. 23, 43 N. E. 403 (Haight & Vann, JJ., *dissenting*), *affirming* 6 Misc. 295, 26 N. Y. Supp 792; Volkmar *v.* Manhattan R. Co., 134 N. Y. 418, 31 N. E. 870 (Follett, C. J., Brown & Parker, JJ., *dissenting*). *Contra,* Wiedmer *v.* New York Elev. R. Co., 114 N. Y. 462, 21 N. E. 1041.

Pennsylvania. — Ahern *v.* Melvin, 21 Pa. Super. Ct. 462. *Contra,* Alexander *v.* Maryland Steel Co., 189 Pa. St. 582, 42 Atl. 286.

Rhode Island. — *Contra,* Laforrest *v.* O'Driscoll, 26 R. I. 547, 59 Atl. 923.

Tennessee. — Memphis St. R. Co. *v.* Kartright, 110 Tenn. 277, 75 S. W. 719.

Vermont. — Houston *v.* Brush, 66 Vt. 331, 342-347, 29 Atl. 380.

Wisconsin. — Carroll *v.* Chicago B. & N. R. Co., 99 Wis. 399, 75 N. W. 176; Cummings *v.* National Furnace Co., 60 Wis. 603, 611-612, 18 N. W. 742, 20 N. W. 665.

77. St. Louis I. M. & S. R. Co. *v.* Neely, 63 Ark. 636, 40 S. W. 130; Louisville & N. R. Co. *v.* Reynolds, 24 Ky. L. Rep. 1402, 71

the toppling over of a structure[78] or of an article resting against a structure,[79] the principle of *res ipsa loquitur* operates.

Escape of Gas or Water. — The maxim also applies in case of damage by the escape of gas[80] or water.[81]

S. W. 516; Julien *v.* Captain and Owners of Steamer Wade Hampton, 27 La. Ann. 377; Howser *v.* Cumberland & P. R. Co., 80 Md. 146, 30 Atl. 906, 45 Am. St. Rep. 332, 27 L. R. A. 154; Washington *v.* Missouri Kan. & Tex. R. Co., 90 Tex. 314, 38 S. W. 764; McCray *v.* Galveston H. & S. A. R. Co., 89 Tex. 168, 34 S. W. 95. *Contra*, Cleveland C. C. & St. L. R. Co. *v.* Berry, 152 Ind. 607, 53 N. E. 415, 46 L. R. A. 33; Case *v.* Chicago R. I. & P. R. Co., 69 Iowa 449, 29 N. W. 596; Murphy *v.* Deans, 101 Mass. 455, 463, 3 Am. Rep. 390; McConnell *v.* New York C. & H. R. R. Co., 63 App. Div. 545, 71 N. Y. Supp. 616; Groarke *v.* Laemmle, 56 App. Div. 61, 67 N. Y. Supp. 409.

When a Person Is Struck by Runaway Horse. — Where a person is run down by runaway horses that had become unfastened, the reasonable inference is that the horses were negligently fastened. Strup *v.* Edens, 22 Wis. 432.

In an action for being knocked down by defendant's runaway horse, a showing of such facts, together with proof that it was the third time that this horse had run away, raises a presumption of defendant's negligence. Thane *v.* Douglass, 102 Tenn. 307, 52 S. W. 155.

Contra, Rowe *v.* Such, 134 Cal. 573, 66 Pac. 862 (Beatty, C. J., *dissenting*), where it appeared that a person was struck by a runaway, but no evidence of the cause of the runaway was given and the negligence of the driver was not proven.

78. Hastorf *v.* Hudson River Stone Supply Co., 110 Fed. 669; Giles *v.* Diamond State Iron Co., 7 Houst. (Del.) 453, 8 Atl. 368; Mullen *v.* St. John, 57 N. Y. 567, 15 Am. Rep. 530; Patterson *v.* Joseph Schlitz Brew. Co., 16 S. D. 33, 91 N. W. 336; Mulcairns *v.* Janesville, 67 Wis. 24, 33, 29 N. W. 565. *Contra*, May *v.* Berlin Iron Bridge Co., 43 App. Div. 569, 60 N. Y. Supp. 550.

79. Briggs *v.* Oliver, 4 H. & C. (Eng.) 403 (Martin, B., *dissenting*), (where a packing case that had been placed against the wall fell over against a person, the court saying that as packing cases do not usually fall of themselves, unless there has been some negligence in setting them up, the facts of the case appear to be consistent only with the existence of negligence); Klitze *v.* Webb (Wis.), 97 N. W. 901 (where a door that had been leaning against the wall of defendant's store fell over upon a person standing upon the sidewalk, the court giving the same reason as in the previous case). *Contra*, McDonough *v.* James Reilly Repair & Supply Co., 90 N. Y. Supp. 358, and *s. c.*, 93 N. Y. Supp. 491, where an applicant for employment on defendand's premises was injured by the falling of a battering ram that had been leaning against the wall, the court saying: "This battering ram was not inherently a thing of danger; it became dangerous only when placed in such a manner that its fall might cause injury; and the insecure placing, with the consequent fall, through some agency, could not be found to be a negligent act, without more, from the mere fact that the instrument fell."

80. Where it appeared that a child of four was injured while asleep by gas escaping into its sleeping apartment from a defective gas pipe in an adjoining street, a *prima facie* case of negligence is made — at least, where there was evidence that the pipes were not laid with sufficient care. Smith *v.* Boston Gas Light Co., 129 Mass. 318. *Contra*, People's Gas Light & Coke Co. *v.* Porter, 102 Ill. App. 461 (where a person was injured by gas escaping from a defect in defendant's pipe in the basement of the house where he was sleeping).

81. Where it appeared that the tenant of the lower floor of a building was damaged from a leak in defendant's steam boiler on an upper

(4.) **Other Supposed Conditions. — Necessity of Evidence That Damage Ordinarily Not Produced.** — In order that the presumption, *res ipsa loquitur,* may arise, it is not necessary that evidence be given that in the ordinary course of its operation the thing that produced the damage in question does not produce it.[82]

Existence or Non-Existence of Evidence of Complete Cause of Damage. In some cases it is said that where the complete cause of the damage is shown without dispute, the presumption does not arise;[83] in others,

floor a presumption of negligence arises, evidence being given that the boiler had been operated for three or four years prior to the accident without injury. Kahn *v.* Triest-Rosenburg Cap Co., 139 Cal. 340, 73 Pac. 164.

Where damage to property by the breakage of a reservoir is shown defendant must exonerate himself from negligence. Larimer Co. Ditch Co. *v.* Zimmerman, 4 Colo. App. 78, 34 Pac. 1111.

82. In Judson *v.* Giant Powder Co., 107 Cal. 549, 560-561, 40 Pac. 1020, 48 Am. St. Rep. 146, 24 L. R. A. 718, the court, after noting that some early California cases held that where a fire is set by a locomotive a presumption of the railroad company's negligence arises, where expert evidence is also given that a perfect engine, properly equipped and properly run, will not ordinarily throw out sparks sufficient to start a fire, said: "For our purpose it is not necessary to enter into a prolonged investigation to determine why the evidence of the expert strengthened plaintiff's case. But, taking the converse of the proposition, let us assume that defendant's engine was a perfect engine, properly equipped and properly run, and that notwithstanding such conditions it would, ordinarily, when in use, throw out sparks of fire, leaving in its wake, as it passed through the country, property destroyed and possibly lives lost. Certainly this could hardly be tolerated in law. Hence we fail to fully appreciate the importance of this line of evidence. Such conduct upon the part of a railroad company would render it guilty of the commission of a nuisance, and liable in damages for property destroyed. Certainly it is no answer to such a condition of things to say that the legislative grant to the corporation to do business with the aid of steam locomotives carried with it the right to destroy the property of adjoining owners; but rather we must assume that the grant was made only after a prior determination by the same legislative power that a perfect locomotive engine, properly equipped and properly run, will not ordinarily throw out sufficient sparks to destroy adjoining property. It is only upon such a theory that the right to do business by the use of this character of implement was ever granted. And hence we again say that it may be considered doubtful if this class of evidence strengthens the plaintiff's case. *For it is but proving as a fact something of which the courts, and possibly all the world, take full notice.*"

83. Kight *v.* Metropolitan R. Co., 21 App. D. C. 494, 508; Parsons *v.* Hecla Iron Wks., 186 Mass. 221, 71 N. E. 572; Buckland *v.* New York, N. H. & H. R. Co., 181 Mass. 3, 62 N. E. 955; Gibson *v.* International Trust Co., 177 Mass. 100, 58 N. E. 278; Durham *v.* Wilmington & W. R. Co., 82 N. C. 352; Doggett *v.* Richmond & D. R. Co., 81 N. C. 459. See also an intimation to the same effect in Stevens *v.* E. & N. A. R. Co., 66 Me. 74; Patterson *v.* Joseph Schlitz Brew. Co., 16 S. D. 33, 91 N. W. 336.

Where the evidence shows the precise cause of an accident there is no room for the application of the doctrine of *res ipsa loquitur.* For "the real cause being shown, there is no occasion to inquire what the presumption would have been if the cause had not been shown. . . . But if at the close of the evidence the cause does not clearly appear, or if there is a dispute as to what it is, then it is open to the plaintiff to argue upon the whole evidence, and the jury are justified in relying upon a presump-

that the fact that the cause is known does not displace the presumption;[84] in others, that whenever the plaintiff does not produce all of the evidence of the cause of the injury reasonably in his power the presumption does not arise;[85] and in still another, that where no apparent cause for the accident appears there is no presumption;[86] but it is believed that these distinctions are without foundation.

Necessity of Contract Relation Between Injured and Injuring Party. It is not necessary, to render the maxim applicable, that a contract relation of any sort exist between the defendant and the injured party, but merely that they be subject to the common duties ordinarily applicable to everyone.[87]

tion unless they are satisfied that the cause has been shown to be inconsistent with it. An unsuccessful attempt to prove by direct evidence the precise cause does not estop the plaintiff from relying upon the presumptions applicable to it." Cassady *v.* Old Colony St. R. Co., 184 Mass. 156, 68 N. E. 10.

Where, however, what the acts resulting in the accident actually were is disputed, the presumption remains in force. Randall *v.* Richmond & D. R. Co., 104 N. C. 410, 10 S. E. 691.

84. Redmon *v.* Metropolitan St. R. Co. (Mo.), 84 S. W. 26; Logan *v.* Metropolitan St. R. Co., 183 Mo. 582, 82 S. W. 126; Fuller *v.* Port Royal & A. R. Co., 24 S. C. 132.

85. In an action against a warehouseman for the negligent destruction by fire of cotton stored in his warehouse, where the plaintiff knew of the fire and the attending circumstances, the burden of showing negligence is on plaintiff. Seals *v.* Edmondson, 71 Ala. 509.

In an action by a servant working in an oil refining plant for injuries received by an explosion in one of the rooms on the premises, in order to make a *prima facie* case of defendant's negligence plaintiff must show, (1) an injury from an unusual occurrence of such a nature as to indicate the defendant's negligence, and (2) such facts in respect to the occurrence as are reasonably in his power; so where he worked in the place for three years after the accident and knew by name other persons there employed who were acquainted with facts respecting the place and perhaps the cause of the injury, but fails to produce any of them at the trial, a non-suit is properly entered. Bahr *v.* Lombard, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167 (Beasley, J., *dissenting*).

86. Hoffman *v.* Third Ave. R. Co., 45 App. Div. 586, 61 N. Y. Supp. 590.

87. *United States.* — Rose *v.* Stephens & Condit Transp. Co., 11 Fed. 438. *Contra,* Lucas *v.* Richmond & D. R. Co., 40 Fed. 566.

Georgia. — Holland *v.* Sparks, 92 Ga. 753, 18 S. E. 990.

Iowa. — *Contra,* Case *v.* Chicago R. I. & P. R. Co., 64 Iowa 762, 21 N. W. 30.

Missouri. — *Contra,* Smith *v.* Hannibal & St. J. R. Co., 37 Mo. 287.

Nebraska. — Lincoln Trac. Co. *v.* Webb, 102 N. W. 258.

New York. — Griffen *v.* Manice, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922 (Gray, J., & Parker, C. J., *doubting;* the court holding: "The application of the principle depends on the circumstances and character of the occurrence, and not on the relation between the parties, except indirectly so far as that relation defines the measure of duty imposed on the defendant). *Contra,* McGinnes *v.* Third Ave. R. Co. (App. Div.), 93 N. Y. Supp. 787; Wodroczka *v.* Consol. Gas Co., 29 Misc. 637, 61 N. Y. Supp. 186; Cosulich *v.* Standard Oil Co., 122 N. Y. 118, 25 N. E. 259, 19 Am. St. Rep. 475.

Pennsylvania. — *Contra,* Stearns *v.* Ontario Spinning Co., 184 Pa. St. 519, 39 Atl. 292.

See, however, Ahern *v.* Melvin, 21 Pa. Super. Ct. 462; Howser *v.* Cumberland & P. R. Co., 80 Md. 146, 30 Atl. 906, 45 Am. St. Rep. 332, 27 L. R. A. 154; and many other cases to the contrary.

Operation in Case of Injuries to Defendant's Servant. — The maxim applies to the same extent in case of injuries to servants as in other cases of personal injury.[88] Where, however, the fellow-servant rule is apparently applicable to the injured servant, the maxim does not apply in an action for his injuries against his employer, for the employer is not responsible for the injury, and thus the first condition precedent to the operation of the maxim is not present.[89] Moreover, where an act of the servant is immediately associated in

Vermont. — Houston *v.* Brush, 66 Vt. 331, 345-346, 29 Atl. 380.

"We know of no sound reason, and have found none stated in the books, why this principle of presumption should be applicable to cases involving contractual relations and inapplicable to cases where no contractual relations exist. It is intimated . . . that the presumption arises, upon proof of the accident, by reason of the carrier's contract to safely deliver the passenger at his destination, but there is no such contract. The carrier is not an insurer of his passengers. . . . The carrier's contract with his passenger is simply to exercise a certain degree of care in his transportation. It is a duty which the law enjoins upon him; but the law also enjoins the duty upon . . . all others, in the conduct of their business, to exercise a certain degree of care toward . . . all mankind. The duty which the law enjoins in the two cases only differs in the degree of care to be exercised." Judson *v.* Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718.

88. Where a seaman was drowned by the sinking of the ship soon after leaving port in a tranquil sea, a presumption that the ship was unseaworthy arises. La Fernier *v.* Soo River Lighter & Wrecking Co., 129 Mich. 596, 89 N. W. 353.

In an action by an employe for the fall of an elevator in which he was riding, proof of the fact of the fall puts in operation the principle of law expressed in the maxim "*res ipsa loquitur.*" Stewart *v.* Van Deventer Carpet Co. (N. C.), 50 S. E. 562.

In an action by an employe of gas works for injuries received by the explosion of a gasometer, it seems a showing of such facts makes a *prima facie* case of negligence. Cox *v.* Providence Gas Co., 17 R. I. 199, 21 Atl. 344.

In an action for the death of a railway brakeman on a freight train by the falling of a steel rail from the car on which it was being carried, one end of it flying up and striking him, a showing of such facts in the absence of explanation would warrant a verdict for plaintiff. McCray *v.* Galveston H. & S. A. R. Co., 89 Tex. 168, 34 S. W. 95.

Where it appears that an employe working around a derrick with a mast fifty feet high with a tackle-block at the top of it is injured by the falling upon him of one of the wheels from the block by reason of the loosening of the pin holding the wheel, there is reasonable evidence of negligence. Houston *v.* Brush, 66 Vt. 331, 342-347, 29 Atl. 380.

In an action by a railway fireman for injuries in a collision of trains it seems that a presumption of defendant's negligence arises. Howe *v.* Northern Pac. R. Co., 30 Wash. 569, 577-580, 70 Pac. 1100.

In an action for the death of an employe while working in defendant's cistern by the falling inward of the wall thereof, a showing of such facts raises a presumption of defendant's negligence. Mulcairns *v.* Janesville, 67 Wis. 24, 33, 29 N. W. 565. *Contra*, Robertson *v.* Trammell (Tex. Civ. App.), 83 S. W. 258, 266, where in an action for injuries to a railway fireman in the collision of his train with some stationary cars it was held he must prove defendant's negligence.

89. *In re* California Nav. & Imp. Co., 110 Fed. 670; Dobbins *v.* Brown, 119 N. Y. 188, 23 N. E. 537 (where a miner was killed by the fall of the bucket in which he was being lowered down the shaft to his work).

the production of the injury, no presumption arises, by reason of the second condition precedent to the operation of the maxim.[90]

b. *Basis for Presumption.* — The presumption arises on the doctrine of probabilities.[91] Moreover, where the damage is occasioned in the operation of a thing under defendant's exclusive control, the necessity and justice of the presumption are reinforced by the fact that defendant has at hand knowledge of the facts relevant to the question of negligence, while the plaintiff either cannot gain such knowledge at all, or at best can do so only with great difficulty.[92]

90. In an action for the death of a railway brakeman by being crushed between two cars he was uncoupling, proof merely that decedent was killed while in the discharge of his duties without a further showing of the circumstances of the injury does not raise a presumption of the negligence of the railway company. Cincinnati, N. O. & T. P. R. Co. *v.* Cook, 24 Ky. L. Rep. 2152, 73 S. W. 765 (rehearing denied, 25 Ky. L. Rep. 356, 75 S. W. 218).

In an action for the death of a person laboring in a steam boiler by inhaling noxious gases that had accumulated therein, an instruction that put the burden of proof on the defendants, who were in the exclusive occupation and use of the premises on which the boiler was situated, to show their own freedom from negligence is error. Curran *v.* Warren Chemical & Mfg. Co., 36 N. Y. 153, 34 How. Pr. 250.

In an action for the death of an employe in a gas works by the flying out of a grate bar, which struck him when he opened the furnace door, a showing of such facts does not constitute *prima facie* proof of defendant's negligence. Broadway *v.* San Antonio Gas Co., 24 Tex. Civ. App. 603, 60 S. W. 270.

91. Judson *v.* Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718.

92. *England.* — Christie *v.* Griggs, 2 Camp. 79.

United States. — Whitney *v.* New York N. H. & H. R. Co., 43 C. C. A. 19, 102 Fed. 850.

Colorado. — Denver & R. G. R. Co. *v.* Fotheringham, 17 Colo. App. 410, 68 Pac. 978; Wall *v.* Livesay, 6 Colo. 465.

Illinois. — Illinois Cent. R. Co. *v.* Mills, 42 Ill. 407.

Indiana. — Cleveland C. C. & I. R. Co. *v.* Newell, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312; Bedford, S. O. & B. R. Co. *v.* Rainbolt, 99 Ind. 551.

Montana. — Diamond *v.* Northern Pac. R. Co., 6 Mont. 580, 592-596, 13 Pac. 367.

New York. — Griffen *v.* Manice, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922.

North Carolina. — McCord *v.* Atlanta & C. Air-Line R. Co., 134 N. C. 53, 45 S. E. 1031.

Oregon. — Koontz *v.* Oregon R. & Nav. Co., 20 Or. 3, 23 Pac. 820.

South Carolina. — Steele *v.* Southern R. Co., 55 S. C. 389, 33 S. E. 500.

Tennessee. — Chattanooga Elec. R. Co. *v.* Mingle, 103 Tenn. 667, 56 S. W. 23, 76 Am. St. Rep. 703.

Texas. — Galveston, H. & S. A. R. Co. *v.* Horne, 69 Tex. 643, 9 S. W. 440.

Washington. — Williams *v.* Spokane Falls & N. R. Co., 80 Pac. 1100.

Wisconsin. — Spaulding *v.* Chicago & N. W. R. Co., 30 Wis. 110, 121-122, 11 Am. Rep. 550.

So in case of a fire set by sparks from a locomotive, "if the plaintiff were required to prove affirmatively and specifically the condition of the particular smoke stack from which the fire escaped — if he were bound to show the specific negligence that permitted the escape — it would be equivalent to denying him relief altogether. The farmer along whose fields the train flies, from the nature of the case, can know nothing about these things." Fitch *v.* Pacific R. Co., 45 Mo. 322.

Similarly in cases of damage or loss of property in carriage, the presumption of negligence is supported by a similar reason. Steele *v.* Town-

Furthermore, in cases of injuries by carriers, the high standard of care required of them also furnishes a reason for a presumption of negligence in case of their default.[93]

D. Extensions of the Maxim "Res Ipsa Loquitur." — By statutory enactment and the policy of the law, the application of the maxim, "*res ipsa loquitur*," has been extended in some jurisdictions to cases where, because of the intervention of other immediate causes besides those controlled by defendant, it would not ordinarily apply.

a. *Cattle Run Down by Cars.* — In some jurisdictions, where it appears that any live stock is run down by a locomotive or cars, a presumption of the railroad's negligence arises.[94] This presumption is often founded on statutes, but in other cases is declared inde-

send, 37 Ala. 247, 258, 79 Am. Dec. 49; Ryan *v.* Missouri K. & T. R. Co., 65 Tex. 13.

93. Wall *v.* Livesay, 6 Colo. 465; Cleveland C. C. & I. R. Co. *v.* Newell, 101 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312; Memphis & Ohio River Packet Co. *v.* McCool, 83 Ind. 392, 43 Am. Rep. 71; Loudoun *v.* Eighth Ave. R. Co., 162 N. Y. 380, 56 N. E. 988; Fleming *v.* Pittsburg, C. C. & St. L. R. Co., 158 Pa. St. 130, 27 Atl. 858; Steele *v.* Southern R. Co., 55 S. C. 389, 33 S. E. 509.

94. *Arkansas.* — St. Louis, I. M. & S. R. Co. *v.* Norton, 71 Ark. 314, 73 S. W. 1095; Little Rock & F. S. R. Co. *v.* Wilson, 66 Ark. 414, 50 S. W. 995; Kansas City S. & M. R. *v.* Summers, 45 Ark. 295; St. Louis, I. M. & S. R. Co. *v.* Hagan, 42 Ark. 122 (the presumption applies as well when the injuries are not mortal as where they result in death); Little Rock & F. S. R. Co. *v.* Jones, 41 Ark. 157; Little Rock & F. S. R. Co. *v.* Finley, 37 Ark. 562; Memphis & L. R. R. *v.* Jones, 36 Ark. 87; Little Rock & F. S. R. Co. *v.* Payne, 33 Ark. 816, 824, 34 Am. Rep. 55.

Colorado. — Burlington & M. R. R. *v.* Campbell (Colo. App.), 59 Pac. 424. *Contra,* Burlington & M. R. R. Co. *v.* Shelter, 6 Colo. 246, 40 Pac. 157; Denver & R. G. R. Co. *v.* Henderson, 10 Colo. 1, 13 Pac. 910.

Georgia. — Atlantic & B. R. Co. *v.* J. B. Smith & Son, 51 S. E. 344; Macon & B. R. Co. *v.* Revis, 119 Ga. 332, 46 S. E. 418; Seaboard Air-Line Ry. *v.* Walthour, 117 Ga. 427, 43 S. E. 720; Western & A. R. Co. *v.* Robinson, 114 Ga. 159, 39 S. E. 950; Georgia S. & F. R. Co. *v.* Sanders, 111 Ga. 128, 36 S. E. 458; Western & A. R. Co. *v.* Jones, 65 Ga. 631; Atlantic & G. R. Co. *v.* Griffin, 61 Ga. 11; Georgia R. & Bkg. Co. *v.* Monroe, 49 Ga. 373; Georgia R. & Bkg. Co. *v.* Willis, 28 Ga. 317. *Contra.* Georgia R. & Bkg. Co. *v.* Anderson, 33 Ga. 110.

Kentucky. — Cincinnati, N. O. & T. P. R. R. *v.* Burgess, 84 S. W. 760; Grundy *v.* Louisville & N. R. Co., 8 Ky. L. Rep. 689, 2 S. W. 899.

Maryland. — Northern Cent. R. Co. *v.* Ward, 63 Md. 362; Western Maryland R. Co. *v.* Carter, 59 Md. 306.

Mississippi. — Vicksburg & M. R. Co. *v.* Hamilton, 62 Miss. 503; Memphis & C. R. Co. *v.* Orr, 43 Miss. 279; Raiford *v.* Mississippi Cent. R. Co., 43 Miss. 233, 241; Memphis & C. R. Co. *v.* Blakeney, 43 Miss. 218. *Contra,* Mobile & O. R. Co. *v.* Hudson, 50 Miss. 572; Mississippi Cent. R. Co. *v.* Miller, 40 Miss. 45.

New Hampshire. — Smith *v.* Eastern R. R., 35 N. H. 356, 367; White *v.* Concord R. R., 30 N. H. 188, 206-207.

North Carolina. — Carlton *v.* Wilmington & W. R. Co., 104 N. C. 365, 10 S. E. 516; Roberts *v.* Richmond & D. R. Co., 88 N. C. 560; Wilson *v.* Norfolk & S. R. Co., 90 N. C. 69; Doggett *v.* Richmond & D. R. Co., 81 N. C. 459; Pippen *v.* Wilmington C. & A. R. Co., 75 N. C. 54; Battle *v.* Wilmington & W. R. Co., 66 N. C. 343. In order for this presumption to arise the action for damages for the injury must be commenced within six months after the date thereof. Jones *v.* North Carolina R. Co., 67 N. C. 122. *Contra,* Scott

pendent of statutory enactment.[95] And in Arkansas and North Carolina it applies even though the animal was under the immediate control of the owner.[96] In Alabama it applies only where the damage is done at or near a public crossing, the crossing of two railroads,

v. Wilmington & R. R. Co., 49 N. C. 432.

South Carolina. — Joyner *v.* South Carolina R. Co., 26 S. C. 49, 1 S. E. 52; Walker *v.* Columbia & G. R. Co., 25 S. C. 141; Jones *v.* Columbia & G. R. Co., 20 S. C. 249 (nor does the fact that the cattle were unlawfully running at large render the presumption inapplicable). Danner *v.* South Carolina R. Co., 4 Rich. L. 329, 55 Am. Dec. 678; Roof *v.* Charlotte C. & A. R. Co., 4 S. C. 61 (Willard, J., *dissenting*); Murray *v.* South Carolina R. Co., 10 Rich. L. 227 (nor is the presumption overturned by the fact that the injury occurred in the night time).

South Dakota. — Sweet *v.* Chicago M. & St. P. R. Co., 6 S. D. 281, 60 N. W. 77.

Tennessee. — Memphis & C. R. Co. *v.* Smith, 9 Heisk. 860; Horne *v.* Memphis & O. R. Co., 1 Cold. 72.

Wisconsin. — Galpin *v.* Chicago & N. W. R. Co., 19 Wis. 604.

But in an action where it appeared that defendant's engineer on seeing some horses on the track slowed the train, but the horses ran ahead on the track and fell into a trestle and the train stopped one hundred feet before reaching them, the presumption does not arise. Ramsbottom *v.* Atlantic Coast Line R. Co. (N. C.), 50 S. E. 448. *Contra*, St. Louis, I. M. & S. R. Co. *v.* Bragg, 66 Ark. 248, 50 S. W. 273.

95. In some states, as Arkansas and Colorado, this presumption is statutory. See, for instance, Little Rock & F. S. R. Co. *v.* Payne, 33 Ark. 816, 824, 34 Am. Rep. 55; Burlington & M. R. R. Co. *v.* Shelter, 6 Colo. App. 246, 40 Pac. 157.

In other states, however, the presumption exists independently of statutory enactment, and in some of them, and also some of the former, is justified on reasons of which the following are typical.

The object of the statute is to protect the owner in his property, and prevent the destruction of stock by the careless conduct of railway employes. Grundy *v.* Louisville & N. R. Co, 8 Ky. L. Rep. 689, 2 S. W. 899.

"If a party shows himself to be in the rightful exercise of his property or privileges, and while so exercising them an injury or damage is done to his person or property by another, such injury is not presumed to be accidental or excusable." White *v.* Concord R. R., 30 N. H. 188, 206-207.

(1.) "The party doing the injury is especially presumed to have information as to all the facts and circumstances attending it, and there is no hardship in requiring him to bring these facts and circumstances forward to his exculpation, if they exist." (2.) "The tendency of the principle is directly toward the safety of passengers and the protection of the lives of those who travel on railroads. It is in their interest. Railroad cars are, perhaps, as frequently endangered and thrown from the track by running over cattle as from any other cause." Walker *v.* Columbia & G. R. Co., 25 S. C. 141.

"It would give dangerous license and indemnity to the destruction of cattle if the company and its engineers were protected by a presumption of law that the destruction is inevitable, and the *onus* were thrown on the plaintiff to repel this presumption by evidence of the particular manners and circumstances in which the cattle were destroyed." Danner *v.* South Carolina R. Co., 4 Rich. L. (S. C.) 329, 55 Am. Dec. 678.

96. St. Louis, I. M. & S. R. Co. *v.* Taylor, 57 Ark. 136, 20 S. W. 1083 (where a mule hitched to a dray and being driven across a railroad crossing was struck by a train); Randall *v.* Richmond & D. R. Co., 104 N. C. 410, 10 S. E. 691 (Merriman, C. J., *dissenting*); rehearing denied 107 N. C. 748, 12 S. E. 605 (Merriman, C. J., & Shepherd, J., *dissenting*), (where a yoke of oxen being driven along a road beside an unfenced railroad track became frightened by the approach of a train and got on the track).

a regular station or stopping place, or in a village, town or city.[97] In other jurisdictions there is no presumption of negligence from the fact that live stock is run down by a train,[98] at least when the injury occurs at places where the railroad is not required by law to fence.[99]

b. *Persons Run Down by Cars.* — Moreover, in a few jurisdictions, where a person is run down by a car or a locomotive, a presumption of the railroad's negligence arises.[1] In Alabama it seems this pre-

97. Kansas City, M. & B. R. Co. *v.* Henson, 132 Ala. 528, 31 So. 590; Alabama G. S. R. Co. *v.* Boyd, 124 Ala. 525, 27 So. 408.

Before an amendment to the code adopted in 1896, the rule in Alabama was as broad as in the cases cited in note 94, *supra.* Birmingham M. R. Co. *v.* Harris, 98 Ala. 326, 13 So. 377; Louisville & N. R. Co. *v.* Barker, 96 Ala. 435, 11 So. 453; Louisville & N. R. Co. *v.* Posey, 96 Ala. 262, 11 So. 423; Montgomery & E. R. Co. *v.* Perryman, 91 Ala. 413, 8 So. 699; Louisville & N. R. Co. *v.* Kelsey, 89 Ala. 287, 7 So. 648; Mobile & G. R. Co. *v.* Caldwell, 83 Ala. 196, 3 So. 445; South & North Alabama R. Co. *v.* Bees, 82 Ala. 340, 2 So. 752; Alabama G. S. R. Co. *v.* McAlpine, 80 Ala. 73; East Tennessee V. & G. R. Co. *v.* Deaver, 79 Ala. 216; East Tennessee V. & G. R. Co. *v.* Bayliss, 74 Ala. 150, 159.

Rule Does Not Apply to Dogs. Moore *v.* Charlotte Elec. R. L. & P. Co., 136 N. C. 554, 48 S. E. 822; Wilson *v.* Wilmington & M. R. Co., 10 Rich. L. (S. C.) 52, where the court said: "Surely no good reason can be assigned for including within the rule an animal that is not purely domestic, but whose nature is carnivorous; and if ever prompted by instinct or appetite to roam at large in the forest, it is fair to presume that it is either in pursuit of game, or is upon a sheep-killing expedition."

98. *United States.* — Eddy *v.* Lafayette, 1 C. C. A. 432, 49 Fed. 798.

Illinois. — Chicago & A. R. Co. *v.* Engle, 58 Ill. 381; Chicago & A. R. Co. *v.* Utley, 38 Ill. 410; Chicago & M. R. R. Co. *v.* Patchin, 16 Ill. 198, 61 Am. Dec. 65.

Indiana. — Indianapolis & C. R. Co. *v.* Means, 14 Ind. 30.

Louisiana. — Knight *v.* New Orleans O. & G. W. R. Co., 15 La. Ann. 105.

Maine. — Waldron *v.* Portland S. & P. R. Co., 35 Me. 422; Perkins *v.* Eastern R. Co., 29 Me. 307, 50 Am. Rep. 589.

Minnesota. — Best *v.* Great Northern R. Co., 103 N. W. 709.

Nebraska. — Burlington & M. R. Co. *v.* Wendt, 12 Neb. 76, 10 N. W. 456.

New Mexico. — Atchison T. & S. F. R. Co. *v.* Walton, 3 N. M. 319, 9 Pac. 351.

Oregon. — Eaton *v.* Oregon R. & Nav. Co., 19 Or. 391, 24 Pac. 415.

Vermont. — Lyndsay *v.* Connecticut & P. R. R. Co., 27 Vt. 643.

West Virginia. — Talbott *v.* West Virginia C. & P. R. Co., 42 W. Va. 560, 26 S. E. 311; Maynard *v.* Norfolk & W. R. Co., 40 W. Va. 331, 21 S. E. 733.

99. Likewise in jurisdictions where railroads are required by law to fence, there is no presumption of negligence in the killing of cattle at places where they are not required to fence. Schneir *v.* Chicago R. I. & P. R. Co., 40 Iowa 337; Plaster *v.* Illinois Cent. R. Co., 35 Iowa 449; Comstock *v.* Des Moines V. R. Co., 32 Iowa 376; Wallace *v.* St. Louis I. M. & S. R. Co., 74 Mo. 594; McKissock *v.* St. Louis K. C. & N. R. Co., 73 Mo. 456; Swearingen *v.* Missouri K. & T. R. Co., 64 Mo. 73; Weir *v.* St. Louis & I. M. R. Co., 48 Mo. 558; Southern Kansas R. Co. *v.* Cooper (Tex. Civ. App.), 75 S. W. 328; Bethje *v.* Houston & C. T. R. Co., 26 Tex. 604 (by a majority of the court).

1. *Arkansas.* — St. Louis & S. F. R. Co. *v.* Townsend, 69 Ark. 380, 63 S. W. 994; Little Rock & F. S. R. Co. *v.* Blewitt, 65 Ark. 235, 45 S. W. 548 (person struck by detached locomotive).

Georgia. — Kemp *v.* Central of

sumption has the same limited operation as in case of injuries to live stock.[2] But in most jurisdictions there is no presumption of primary negligence in such a case.[3] Furthermore, in a few jurisdictions the presumption of negligence extends to every case where the injury occurs in the course of the running of the locomotives and cars.[4]

2. As to Contributory Negligence. — A. From Mere Fact of

Georgia R. Co., 50 S. E. 465; Central R. R. *v.* Moore, 61 Ga. 151; Augusta & S. R. Co. *v.* McElmurry, 24 Ga. 75.

Mississippi. — New Orleans & N. E. R. Co. *v.* Brooks, 38 So. 40.

Tennessee. — East Tennessee V. & G. R. Co. *v.* Humphreys, 12 Lea 200 (boy of twelve asleep on track run down); Louisville & N. R. Co. *v.* Connor, 9 Heisk. 19 (child of eighteen months struck by train); Smith *v.* Nashville & C. R. Co., 6 Cold. 589.

2. Birmingham S. R. Co. *v.* Lintner (Ala.), 38 So. 363 (presumption applies whether injured party himself sues, or another sues for the loss sustained to such other by the injury). Where, however, a wagon is struck by a train coming down the street on which the wagon was, in an action by the driver for injuries received there is no presumption of the railway's negligence. Louisville & N. R. Co. *v.* Lewis (Ala.), 37 So. 587. Nor where the accident happens while cars are being backed within the limits of a city, town or village. Georgia Pac. R. Co. *v.* Hughes, 87 Ala. 610, 6 So. 413.

3. *United States.* — Washington & G. R. Co. *v.* Gladmon, 15 Wall. 401.

Delaware. — Reed *v.* Queen Anne's R. Co., 4 Pen. 413, 57 Atl. 529; Farley *v.* Wilmington & N. Elec. R. Co., 52 Atl. 543; Adams *v.* Wilmington & N. Elec. R. Co., 52 Atl. 264.

Illinois. — Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177.

Indiana. — Indianapolis St. R. Co. *v.* Bordenchecker (Ind. App.), 70 N. E. 995; Indianapolis St. R. Co. *v.* Darnell, 32 Ind. App. 687, 68 N. E. 609; Cincinnati H. & I. R. Co. *v.* Duncan, 143 Ind. 524, 42 N. E. 37.

Iowa. — Crawford *v.* Chicago G. W. R. Co., 109 Iowa 433, 80 N. W. 519; Carlin *v.* Chicago R. I. & P. R. Co., 37 Iowa 316.

Kansas. — Atchison T. & S. F. R. Co. *v.* McFarland, 2 Kan. App. 662, 43 Pac. 788.

Kentucky. — Louisville St. L. & T. R. Co. *v.* Terry, 20 Ky. L. Rep. 803, 47 S. W. 588; Paducah & M. R. Co. *v.* Hoehl, 12 Bush 41.

Louisiana. — Crisman *v.* Shreveport Belt R. Co., 110 La. 640, 34 So. 718.

Maine. — Lesan *v.* Maine Cent. R. Co., 77 Me. 85.

Maryland. — Garrick *v.* United R. & Elec. Co., 61 Atl. 138; Baltimore & O. R. Co. *v.* State, 63 Md. 135, 145; Philadelphia W. & B. R. Co. *v.* Stebbing, 62 Md. 504, 515; State *v.* Baltimore & O. R. Co., 58 Md. 221; Frech *v.* Philadelphia W. & B. R. Co., 39 Md. 574; Baltimore & O. R. Co. *v.* Bahrs, 28 Md. 647.

Missouri. — Hornstein *v.* United R. Co., 97 Mo. App. 271, 70 S. W. 1105.

Nebraska. — Spears *v.* Chicago B. & Q. R. Co., 43 Neb. 720, 62 N. W. 68.

New York. — Wieland *v.* President Etc. of Delaware & H. Canal Co., 167 N. Y. 19, 60 N. E. 234.

North Carolina. — Herring *v.* Wilmington & R. R. Co., 32 N. C. 402.

Pennsylvania. — Coolbroth *v.* Pennsylvania R. Co., 209 Pa. St. 433, 58 Atl. 808; Pennsylvania R. Co. *v.* Goodman, 62 Pa. St. 329.

Texas. — Texas & P. R. Co. *v.* Shoemaker, 84 S. W. 1049; Gulf C. & S. F. R. Co. *v.* Hall (Tex. Civ. App.), 80 S. W. 133; Lee *v.* International & G. N. R. Co., 89 Tex. 583, 36 S. W. 63.

4. Kirby's Digest (Ark.) § 6773; Barringer *v.* St. Louis I. M. & S. R. Co. (Ark.), 85 S. W. 94; St. Louis I. M. & S. R. Co. *v.* Taylor, 57 Ark. 136, 20 S. W. 1083; Killian *v.* Georgia R. & Bkg. Co., 97 Ga. 727, 25 S. E. 384; Central R. Co. *v.* Brinson, 64 Ga. 475; Yazoo & M. V. R. Co. *v.* Humphrey, 83 Miss. 721, 36 So. 154; Zemp *v.* Wilmington & M. R. Co., 9 Rich. L. (S. C.) 84.

Injury. — From the mere fact of injury to a person no presumption of his contributory negligence arises.[5]

B. From Injured Person's Joint Causation of Injury. Where, however, it appears that an act of the injured person is directly associated in the production of the injury, and that he knew, or with the exercise of due care would have known, of the danger, a presumption of contributory negligence arises.[6]

C. In Case of Railroads. — So where it appears from the evidence that a person run down by railroad cars would, by the exercise of due care, normally have seen or heard them approaching in time to avoid the injury, this shows contributory negligence.[7] Where,

5. Guggenheim *v.* Lake Shore & M. S. R. Co., 66 Mich. 150, 160, 33 N. W. 161; Gulf C. & S. F. R. Co. *v.* Shieder, 88 Tex. 152, 161, 30 S. W. 902, 28 L. R. A. 538.

6. City of Lafayette *v.* Fitch, 32 Ind. App. 134, 69 N. E. 414. Thus in Taillon *v.* Mears, 29 Mont. 161, 74 Pac. 421, where, danger being imminent, a passenger jumped from a stage coach, the court held that a presumption of contributory negligence arose. *Compare*, however, with note 62 *supra*, negativing the application of this rule to a case where a person acts by reason of the imminency of danger.

Defective Streets. — Stewart *v.* Nashville, 96 Tenn. 50, 33 S. W. 613 (where person walking on street, unattended, although blind, fell into a defect of which he well knew); Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311; Collins *v.* Janesville, 111 Wis. 348, 87 N. W. 241.

Where, however, a person had observed a broken plank some days before the accident, but not in the interim, the presumption does not arise, because people may rely to some extent upon the implied assurance that a sidewalk is reasonably safe, and that after the lapse of sufficient time to make repairs defects previously noticed have been remedied. Deland *v.* Cameron (Mo. App.), 87 S. W. 597.

Drinking Contaminated Water. Green *v.* Ashland Water Co., 101 Wis. 258, 77 N. W. 722, 43 L. R. A. 117, where the condition of the drinking water furnished by defendant was commonly and widely known through the public prints and otherwise.

7. *Indiana.* — Southern R. Co. *v.* Davis (Ind. App.), 72 N. E. 1053; Malott *v.* Hawkins, 159 Ind. 127, 63 N. E. 308; Cleveland C. C. & St. L. R. Co. *v.* Griffin, 26 Ind. App. 368, 58 N. E. 503; Aurelius *v.* Lake Erie & W. R. Co., 19 Ind. App. 584, 49 N. E. 857; Oleson *v.* Lake Shore & M. S. R. Co. (Ind. App.), 42 N. E. 736; Lake Erie & W. R. Co. *v.* Stick, 143 Ind. 449, 41 N. E. 365, Lamport *v.* Lake Shore & M. S. R. Co., 142 Ind. 269, 41 N. E. 586; Mann *v.* Belt R. & Stock Yard Co., 128 Ind. 138, 26 N. E. 819.

Iowa. — Crawford *v.* Chicago G. W. R. Co., 109 Iowa 433, 80 N. W. 519.

Missouri. — Kelsay *v.* Missouri Pac. R. Co., 129 Mo. 362, 30 S. W. 339 (where for twenty-five feet before entering upon the crossing the view was unobstructed).

New Jersey. — Pennsylvania R. Co. *v.* Righter, 42 N. J. L. 180.

New York. — Wilcox *v.* Rome W. & O. R. Co., 39 N. Y. 358, 100 Am. Dec. 440.

Ohio. — Bellefontaine R. Co. *v.* Snyder, 24 Ohio St. 670.

Pennsylvania. — Myers *v.* Baltimore & O. R. Co., 150 Pa. St. 386, 24 Atl. 747.

Washington. — Woolf *v.* Washington R. & Nav. Co., 79 Pac. 997.

Contra, Louisville, St. L. & T. R. Co. *v.* Terry, 20 Ky. L. Rep. 803, 47 S. W. 588.

In other cases it is held that where a person just entering upon a railroad crossing is struck by the cars a presumption of his negligence arises. State *v.* Maine Cent. R. Co., 76 Me. 357, 365-366; Detroit & M. R. Co. *v.* Van Steinburg, 17 Mich. 99, 110; Meek *v.* Pennsylvania Co., 38

however, a view along the track is obstructed, the presumption does not arise.[8]

D. Collision on Highway. — Where a person riding on a highway which affords plenty of room for two teams to pass collides with a team coming in the opposite direction and is injured, a presumption of his contributory negligence arises.[9]

3. As to Freedom From Contributory Negligence. — A. From Mere Fact of Injury. — From the mere fact of injury to a person no presumption of his freedom from contributory negligence arises.[10]

B. From Instinct of Self-Preservation. — Nor does such presumption arise from the instinct of self-preservation, even though, as held in some jurisdictions, no testimony of eye-witnesses as to the acts and conduct of the person injured leading up to the injury is

Ohio St. 632; Derk *v.* Northern Cent. R. Co., 164 Pa. St. 243, 30 Atl. 231; Pennsylvania R. Co. *v.* Mooney, 126 Pa. St. 244, 17 Atl. 590.

Rationale. — "To hold otherwise would violate the rule . . . that a traveler approaching a railroad crossing of a highway is presumed in law to have seen what he could have seen if he had looked attentively, and to have heard what he could have heard if he had listened attentively. The reason of this presumption is that it was the traveler's solemn duty to look attentively when approaching such a crossing, and listen attentively for a coming train. This duty only relates to coming trains or vehicles on the railroad track, and hence the presumption that he saw and heard what he might have seen or heard relates only to coming trains or vehicles on the railroad track."

Instances Where Rule Not Applied. — Where it appeared that a train was cut in two before reaching a highway crossing, so that there was an interval between the two parts when the train crossed it, and that plaintiff attempted to cross in a buggy after the first part had passed and was struck by the second, contributory negligence will not be presumed, although plaintiff's eyesight was good and her vision unobstructed for some way before entering upon the crossing. Baker *v.* Kansas City F. S. & M. R. Co., 147 Mo. 140, 48 S. W. 838 (Sherwood, Robinson & Marshall, JJ., *dissenting*).

Where it appeared that decedent was struck in the night time by an upbound train without a headlight which came along immediately upon the passage of a down train upon the other track, the law will not presume decedent's contributory negligence. Lehigh Valley R. Co. *v.* Hall, 61 Pa. St. 361.

No Signal of Locomotive's Approach. — Wilcox *v.* Rome W. & O. R. Co., 39 N. Y. 358, 100 Am. Dec. 440; Cadwallader *v.* Louisville, N. A. & C. R. Co., 128 Ind. 518, 27 N. E. 161 (where a watchman was employed).

Performance of Act Required by Statute. — Where a railway company is under the legal duty of keeping gates at a railway crossing over a highway, and of closing them upon the approach of a train, and a traveler on the highway, relying upon the fact that the gates are open, enters upon the railway crossing without looking and listening, no presumption of negligence on his part arises. "The fact that the gates were up was an affirmative assurance of safety, upon which a citizen might act without being chargeable with negligence." Pennsylvania Co. *v.* Stegemeier, 118 Ind. 305, 20 N. E. 843.

8. Schum *v.* Pennsylvania R. Co., 107 Pa. St. 8, 52 Am. Rep. 468; Pennsylvania R. Co. *v.* Weiss, 87 Pa. St. 447.

9. Waters *v.* Wing, 59 Pa. St. 211.

10. Ryan *v.* Bristol, 63 Conn. 26, 33-34 (where it also appeared that the injury was caused by negligence on defendant's part); Jeffersonville R. Co. *v.* Hendrick, 26 Ind. 228; Waldron *v.* Boston & M. R. R., 71 N. H. 362, 52 Atl. 443; Whalen *v.* Citi-

obtainable.[11] In other jurisdictions no such presumption arises where the testimony of eye-witnesses is available,[12] but where it cannot be obtained the presumption is indulged.[13]

zens Gas Light Co., 151 N. Y. 70, 45 N. E. 363.

11. Pittsburgh C. C. & St. L. R. Co. *v.* Bennett, 9 Ind. App. 92, 35 N. E. 1033; McLane *v.* Perkins, 92 Me. 39, 42 Atl. 255, 43 L. R. A. 487 (where there were no eye-witnesses); Riordan *v.* Ocean S. S. Co., 124 N. Y. 655, 26 N. E. 1027 (where there were no eye-witnesses, the court saying: "Human experience shows that persons exposed to danger will frequently forego ordinary precautions for safety"); Wiwirowski *v.* Lake Shore & M. S. R. Co., 124 N. Y. 420, 26 N. E. 1023 (no eye-witnesses); Warner *v.* New York Cent. R. Co., 44 N. Y. 465 (no eye-witnesses).

The instinct of self-preservation does not operate upon the minds of men until they can clearly see that they are endangered by their carelessness. It does not keep them from careless acts. The danger is often not seen until it is too late for them to be extricated from it. Thus in an action where there was no evidence of the conduct of decedent at the time of the accident, an instruction that the jury may consider the natural instincts of men to preserve themselves from injury puts the matter too strongly and is erroneous. Chase *v.* Maine Cent. R. Co., 77 Me. 62, 52 Am. Rep. 744.

In Chicago, B. & Q. R. Co. *v.* Gregory, 58 Ill. 272, however, the court said that where within a moment of the accident decedent is shown to have been in the exercise of due care and in his proper place (he being a railway fireman), it cannot be presumed, there being no eye-witness of his conduct at the time of the accident, that in the instant that intervened before the accident decedent was negligent, where there were no circumstances tending to establish negligence.

12. Golinvaux *v.* Burlington C. R. & N. R. Co. (Iowa), 101 N. W. 465; Ames *v.* Waterloo & C. F. Rapid Transit Co., 120 Iowa 640, 95 N. W. 161; Burk *v.* Walsh, 118 Iowa 397, 92 N. W. 65 (thus an instruction permitting the jury to take into account the instinct of self-preservation is error); Salyers *v.* Monroe, 104 Iowa 74, 73 N. W. 606; Reynolds *v.* Keokuk, 72 Iowa 371, 34 N. W. 167; Whitsett *v.* Chicago R. I. & P. R. Co., 67 Iowa 150, 25 N. W. 104; Dunlavy *v.* Chicago R. I. & P. R. Co., 66 Iowa 435, 23 N. W. 911; Mynning *v.* Detroit L. & N. R. Co., 67 Mich. 677, 35 N. W. 811; Waldron *v.* Boston & M. R. R., 71 N. H. 362, 52 Atl. 443.

What Constitutes Eye-Witness. Where it appeared that the most direct evidence of the conduct of a person who was killed by falling off a raised sidewalk was that of a witness who saw decedent standing near the edge of the sidewalk and a moment later saw him lying in the gutter, and in the interval while looking another way heard a clinking sound as though decedent's foot might have struck a ring in a staple on the walk, the jury may properly take into consideration the instinct of self-preservation. Schnee *v.* Dubuque, 122 Iowa 459, 98 N. W. 298.

The testimony of witnesses who saw decedent at the moment he was being struck by an approaching street car as he emerged from behind a wagon, which obstructed his view of the car track, is such direct evidence of the accident as renders inapplicable the presumption arising from the instinct of self-preservation. Ames *v.* Waterloo & C. R. Transit Co., 120 Iowa 640, 95 N. W. 161 (Weaver & Deemer, JJ., *dissenting*).

"The direct evidence as to what took place is of higher character than the mere inference to be drawn from the instinct of self-preservation." Bell *v.* Clarion, 113 Iowa 126, 84 N. W. 962.

13. *United States.* — Baltimore & P. R. R. *v.* Landrigan, 191 U. S. 461.

Iowa. — Golinvaux *v.* Burlington C. R. & N. R. Co., 101 N. W. 465; Bell *v.* Clarion, 84 N. W. 962 (*holding*, however, that the inference arising from this instinct does not amount to a presumption, but is

C. From Defendant's Conduct. — Where it appears that the defendant's conduct was such as to warrant a person of ordinary prudence in acting on the supposition that there was no danger, the injured person's freedom from contributory negligence may be inferred.[14]

D. Children. — There is no presumption that a child is free from contributory negligence, any more than in case of an adult.[15]

merely evidence to take the case to the jury); Salyers *v.* Monroe, 104 Iowa 74, 73 N. W. 606; Dalton *v.* Chicago R. I. & P. R. Co., 104 Iowa 26, 73 N. W. 349; Spaulding *v.* Chicago St. P. & K. C. R. Co., 98 Iowa 205, 216, 67 N. W. 227; Baker *v.* Chicago R. I. & P. R. Co., 95 Iowa 163, 63 N. W. 667; Hopkinson *v.* Knapp & Spalding Co., 92 Iowa 328, 60 N. W. 653; Whitsett *v.* Chicago R. I. & P. R. Co., 67 Iowa 150, 25 N. W. 104; Way *v.* Illinois Cent. R. Co., 40 Iowa 341.

Michigan. — Schoepper *v.* Hancock Chemical Co., 113 Mich. 582, 71 N. W. 1081; Adams *v.* Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270; Kwiotowski *v.* Grand Trunk R. Co., 70 Mich. 549, 38 N. W. 463; Mynning *v.* Detroit L. & N. R. Co., 64 Mich. 93, 102, 31 N. W. 151; Teipel *v.* Hilsendegen, 44 Mich. 461, 7 N. W. 82.

New Hampshire. — Huntress *v.* Boston & M. R. R., 66 N. H. 185, 34 Atl. 154 (where the presumption was indulged although the train was in full view when the decedent stepped upon the truck before being run down), (Allen & Carpenter, JJ., *dissenting*). See also Lyman *v.* Boston & M. R. R., 66 N. H. 200, 20 Atl. 976.

Rationale. — "The doctrine seems to be bottomed on the thought that, when there is or can be no evidence regarding one's conduct in a place of danger, the instinct of self-preservation implanted in every human breast will raise an inference that he was not guilty of any negligence which contributed to or brought about the injury. But where there is direct evidence as to his conduct there is no room for this inference, for the reason that his conduct is to be judged from what he in fact did, rather than from an inference as to what he might have done." Golinvaux *v.* Burlington C. R. & N. R. Co. (Iowa), 101 N. W. 465.

Evidentiary Force of Presumption. The presumption does not constitute affirmative proof of any specific act or the exercise of any specific care. Thus it cannot justify an inference, where the deceased's view of the street car track on which he was killed was obstructed by a wagon just before he entered upon it, that he looked and listened before reaching the point where his view was so obstructed. Ames *v.* Waterloo & C. F. Rapid Transit Co., 120 Iowa 640, 95 N. W. 161 (Weaver & Deemer, JJ., *dissenting*).

Where a person was killed by a train at a crossing, the presumption of his exercise of care cannot prevail against evidence which shows that he could not have exercised due care. Crawford *v.* Chicago G. W. R. Co., 109 Iowa 433, 80 N. W. 519.

The fact that a person killed at a railway crossing could by looking and listening see or hear the approaching train does not as matter of law overcome the presumption of care that arises. Dalton *v.* Chicago R. I. & P. R. Co., 104 Iowa 26, 73 N. W. 349.

14. Pittsburgh C. C. & St. L. R. Co. *v.* Bennett, 9 Ind. App. 92, 35 N. E. 1033.

15. There is no presumption that minors under the age of fourteen are without discretion and judgment. George *v.* Los Angeles R. Co., 126 Cal. 357, 58 Pac. 819, 46 L. R. A. 829, where a child of nine, while playing about an unused street car, was injured.

Where it appeared that a child of eleven was injured while on the track asleep, in the absence of evidence that he was without sufficient discretion and judgment to understand and appreciate the danger of his position it is error to submit the question to the

4. Evidentiary Force of Presumptions. — A. Of Formal Presumptions. — The formal presumptions as to questions of negligence, which are but converse statements of the rules governing the burden of proof proper on such questions, do not possess evidentiary weight when opposed by contrary evidence.[16]

B. Of Presumptions of Fact. — a. *Conclusive in Absence of Evidence to Contrary.* — A presumption of defendant's negligence arising from the nature of the immediate cause of an injury constitutes *prima facie* evidence of defendant's negligence and becomes conclusive thereof unless contradicted.[17] The same degree of con-

jury. St. Louis S. W. R. Co. *v.* Shiflet (Tex. Civ. App.), 84 S. W. 247. To the same effect, see St. Louis S. W. R. Co. *v.* Shiflet (Tex. Civ. App.), 58 S. W. 945.

In the absence of evidence to the contrary it will be presumed that the discretion of a child of eleven to exercise due care for his safety is equal to that of an adult. Over *v.* Missouri K. & T. R. Co. (Tex. Civ. App.), 73 S. W. 535.

"At fourteen an infant is presumed to have sufficient capacity and understanding to be sensible of danger, and to have the power to avoid it. And this presumption ought to stand until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of fourteen years of age." Nagle *v.* Allegheny Valley R. Co., 88 Pa. St. 35, 32 Am. Rep. 413.

16. Reed *v.* Queen Anne's R. Co., 4 Pen. (Del.) 413, 57 Atl. 529; Atchison T. & S. F. R. Co. *v.* Aderhold, 58 Kan. 293, 49 Pac. 83; Philadelphia W. & B. R. Co. *v.* Stebbing, 62 Md. 504, 518; Roberts *v.* Wabash R. Co. (Mo. App.), 87 S. W. 601; Woolf *v.* Washington R. & Nav. Co. (Wash.), 79 Pac. 997.

"The absence of fault on the part of the deceased can only be inferred from the general and known disposition of men to take care of themselves and to keep out of the way of difficulty and danger, when there is no reliable proof to negative the inference, or when there is rational doubt upon the evidence as to the acts and conduct of the parties." Western Maryland R. Co. *v.* State, 95 Md. 637, 653, 53 Atl. 969.

In an action for the destruction of a wagon by being run down by a train at a grade crossing it is error to exclude evidence offered to rebut the presumption that the whistle was blown for the crossing. E. Bradford Clarke Co. *v.* Baltimore & O. R. Co., 27 Pa. Super. Ct. 251.

Compare, however, the contrary holding in Northern Pac. R. Co. *v.* Spike, 57 C. C. A. 384, 121 Fed. 44, where it was held, in an action for being struck by a train, that the presumption of the decedent's exercise of due care applies where there are eye-witnesses of the accident as well as where there are none, and may be strong enough to overcome the testimony of an eye-witness and sustain a verdict for the plaintiff.

17. St. Louis I. M. & S. R. Co. *v.* Hagan, 42 Ark. 122; Osgood *v.* Los Angeles Trac. Co., 137 Cal. 280, 70 Pac. 169; Georgia Southern & F. R. Co. *v.* Sanders, 111 Ga. 128, 36 S. E. 458; Joyner *v.* South Carolina R. Co., 26 S. C. 49, 1 S. E. 52 (McIver, J., *dissenting*).

Thus the presumption from an injury to a railroad passenger by the derailment of the train stands with the force and efficiency of actual proof of the fact until negatived and overthrown by evidence of due care on defendant's part. Louisville N. A. & C. R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476; Cleveland, C. C. & I. R. Co. *v.* Newell, 104 Ind. 264, 273, 274, 3 N. E. 836, 54 Am. Rep. 312. To the same effect, Whittlesey *v.* Burlington C. R. & N. R. Co. (Iowa), 90 N. W. 516.

So where it appears that sparks from defendant's locomotive started a fire, the presumption which arises establishes negligence as a fact until evidence in contradiction thereof requires a different conclusion, and when evidence of due diligence is offered in opposition thereto it amounts

clusiveness attaches to presumptions of contributory negligence.[18]

b. *Effect When Contradictory Evidence Introduced.* — The presumption is not destroyed by the mere fact that evidence tending to show defendant's exercise of due care is given.[19]

c. *Presumptions Rebuttable.* — As a corollary of the preceding proposition it therefore follows that the presumption of primary negligence is not conclusive, but may be rebutted by other evidence;[20]

to a conflict of evidence which must be determined by the jury. Babcock *v.* Chicago & N. W. R. Co., 62 Iowa 593, 13 N. W. 740, 17 N. W. 909.

In some cases it is said, or intimated, that the maxim of *res ipsa loquitur* does not raise a presumption that becomes conclusive if not contradicted, but merely an inference of fact sufficient to take the case to the jury. See Flannery *v.* Waterford & L. R. Co., 11 I. C. L. 30.

Thus in Stewart *v.* Van Deventer Carpet Co. (N. C.), 50 S. E. 562, the court says: "The fact of the accident furnishes merely some evidence to go to the jury, which requires the defendant 'to go forward with his proof.' The rule of *res ipsa loquitur* does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor. . . . The law attaches no special weight, as proof, to the fact of an accident, but simply holds it to be sufficient for the consideration of the jury even in the absence of any additional evidence. . . . The evidence must be submitted to the jury, because the rule . . . gives the plaintiff the advantage of a footing in the case, or of a basis of recovery, and calls for proof from the defendant."

18. Lamport *v.* Lake Shore & M. S. R. Co., 142 Ind. 269, 41 N. E. 586.

19. *California.* — Kahn *v.* Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164.

District of Columbia. — Kohner *v.* Capital Trac. Co., 22 App. D. C. 181, 62 L. R. A. 875.

Illinois. — Chicago City R. Co. *v.* Barker, 209 Ill. 321, 70 N. E. 624.

Mississippi. — New Orleans & N. E. R. Co. *v.* Brooks, 38 So. 40.

Missouri. — Hipsley *v.* Kansas City St. J. & C. B. R. Co., 88 Mo. 348.

Nebraska. — Burlington & M. R. R. *v.* Westover, 4 Neb. 268.

New York. — Langley *v.* Metropolitan St. R. Co., 36 Misc. 804, 74 N. Y. Supp. 857.

Pennsylvania. — McCafferty *v.* Pennsylvania R. Co., 193 Pa. St. 339, 44 Atl. 435.

South Carolina. — Joyner *v.* South Carolina R. Co., 26 S. C. 49, 1 S. E. 52 (McIver, J., *dissenting*).

Wisconsin. — Carroll *v.* Chicago B. & N. R. Co., 99 Wis. 399, 75 N. W. 176.

Contra, Wall *v.* Livesay, 6 Colo. 465.

"It does not follow that, because an explanation is sufficient, therefore it is true; nor does it follow that, because it is true, it is sufficient to exonerate the defendant. The explanation may be true as far as it goes, and yet may not be sufficient to overcome the presumption of negligence raised from the circumstances of the accident. *The case is not one of uncontroverted testimony on the one side and no testimony, or no sufficient testimony, on the other side.* It is a case of testimony of circumstances on the one side from which negligence may be inferred, and testimony of circumstances on the other side from which it may be inferred that there was no negligence." Kohner *v.* Capital Trac. Co., 22 App. D. C. 181.

20. Mobile & G. R. Co. *v.* Caldwell, 83 Ala. 196, 3 So. 445; St. Louis & S. F. R. Co. *v.* Jones, 59 Ark. 105, 26 S. W. 595; Little Rock & F. S. R. Co. *v.* Finley, 37 Ark. 562; Georgia Southern & F. R. Co. *v.* Sanders, 111 Ga. 128, 36 S. E. 458; Bedford, S. O. & B. R. Co. *v.* Rainbolt, 99 Ind. 551; Western Maryland R. Co. *v.* State, 95 Md. 637, 648-649, 53 Atl. 969; Wilson *v.* Norfolk & S. R. Co., 90 N. C. 69; Spear *v.* Philadelphia W & B. R. Co., 119 Pa. St. 61, 12 Atl. 824; Meier *v.* Pennsylvania R. Co., 64 Pa. St. 225.

and so also may presumptions of contributory negligence.[21] Moreover, where uncontradicted testimony clearly shows the exercise of proper care in the construction, maintenance and operation of the thing causing the injury, the presumption, it seems, is rebutted.[22] In Georgia it is somewhat doubtful whether or not the evidence must make a clear case, but at least one decision expressly so states.[23]

IV. ADMISSIBILITY.

1. Direct and Circumstantial. — As the necessary instrument of proof on all points of negligence is the acts and conduct of the party whose negligence is in issue, and of those for whom he is responsible, accordingly as the evidence of such acts and conduct is direct or circumstantial the evidence of negligence is said to be direct or circumstantial,[24] and so of the damnified person's contributory

21. The presumption of contributory negligence arising from falling into a defect in a street, of which the injured person had knowledge, is subject to be rebutted by evidence of a reasonable excuse for forgetfulness. Collins *v.* Janesville, 111 Wis. 348, 87 N. W. 241; Lyons *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311.

Similarly the presumption of contributory negligence from being run down by a train the approach of which could be detected by sight or hearing is rebuttable. Chicago I. & L. R. Co. *v.* Turner (Ind. App.), 69 N. E. 484 (where fog prevented sight of the train, the slippery condition of the track and the down grade muffled sound, and no signals were given on approaching); Coolbroth *v.* Pennsylvania R. Co., 209 Pa. St. 433, 58 Atl. 808.

22. Southern Kansas R. Co. *v.* Walsh, 45 Kan. 653, 26 Pac. 45; Karsen *v.* Milwaukee & St. P. R. Co., 29 Minn. 12, 11 N. W. 122; Chicago St. L. & N. O. R. Co. *v.* Packwood, 59 Miss. 280; Cronk *v.* Chicago M. & St. P. R. Co., 3 S. D. 93, 52 N. W. 420; Vorbrich *v.* Geuder & Paeschke Mfg. Co., 96 Wis. 277, 71 N. W. 434; Menominee River Sash & Door Co. *v.* Milwaukee & N. R. Co., 91 Wis. 447, 460, 65 N. W. 176; Gibbons *v.* Wisconsin Valley R. Co., 62 Wis 546, 22 N. W. 533.

Thus the presumption of defendant's negligence arising from the falling upon a person standing on a sidewalk of a door that defendant had leaned against the abutting wall of his building is rebutted by uncontradicted evidence that the morning of the day on which the door fell at five in the afternoon it was stood against the wall with its base eighteen inches from the wall and the top immediately underneath a gas pipe that ran along the outside of the building, and nothing was left for the consideration of the jury. Klitze *v.* Webb, 120 Wis. 254, 97 N. W. 901.

23. Must Be Clear Case. — Southern R. Co. *v.* Earley, 105 Ga. 512, 31 S. E. 187. See, however, Georgia Southern & F. R. Co. *v.* Young Inv. Co., 119 Ga. 513, 46 S. E. 644.

24. *United States.* — Eddy *v.* Lafayette, 1 C. C. A. 432, 49 Fed. 798.

Alabama. — Bromley *v.* Birmingham M. R. Co., 95 Ala. 397, 11 So. 341.

Illinois. — United States Brew. Co. *v.* Stoltenberg, 211 Ill. 531, 71 N. E. 1081; Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177.

Indiana. — Chicago Terminal Trans. R. Co. *v.* Vandenberg, 73 N. E. 990; Toledo, St. L. & W. R. Co. *v.* Fenstermaker, 72 N. E. 561; Indianapolis St. R. Co. *v.* Bordenchecker (Ind. App.), 70 N. E. 995; Indianapolis St. R. Co. *v.* Darnell, 32 Ind. App. 687, 68 N. E. 609; Cincinnati, H. & D. R. Co. *v.* McMullen, 117 Ind. 439, 448, 20 N. E. 287, 10 Am. St. Rep. 67.

Iowa. — Babcock *v.* Chicago & N. W. R. Co., 62 Iowa 593, 13 N. W. 740, 17 N. W. 909.

Kansas. — Atchison T. & S. F. R. Co. *v.* Brassfield, 51 Kan. 167, 32

negligence[25] or freedom from contributory negligence.[26] In Massachusetts affirmative evidence of acts and conduct is necessary on the question of freedom from contributory negligence.[27] and also, it

Pac. 814; Atchison, T. & S. F. R. Co. *v.* Stanford, 12 Kan. 354, 370-372, 15 Am. Rep. 362.

Maryland. — Benedick *v.* Potts, 88 Md. 52, 40 Atl. 1067.

Michigan. — Schoepper *v.* Hancock Chem. Co., 113 Mich. 582, 71 N. W. 1081; Alpern *v.* Churchill, 53 Mich. 607, 19 N. W. 549.

Mississippi. — Yazoo & M. V. R. Co. *v.* Humphrey, 83 Miss. 721, 36 So. 154.

Missouri. — McKissock *v.* St. Louis, K. C. & N. R. Co., 73 Mo. 456.

New Jersey. — Bien *v.* Unger, 64 N. J. L. 596, 46 Atl. 593.

New York. — Dobbins *v.* Brown, 119 N. Y. 188, 23 N. E. 537; Hart *v.* Hudson River Bridge Co., 80 N. Y. 622.

Pennsylvania. — Jones *v.* Greensburg J. & P. St. R. Co., 9 Pa. Super. Ct. 65; Albert *v.* Northern Cent. R. Co., 98 Pa. St. 316.

South Carolina. — Joyner *v.* South Carolina R. Co., 26 S. C. 49, 1 S. E. 52.

25. Johnson *v.* Hudson River R. Co., 20 N. Y. 65, 75 Am. Dec. 375.

26. *Connecticut.* — Wood *v.* Danbury, 72 Conn. 69, 43 Atl. 554; Ryan *v.* Bristol, 63 Conn. 26, 27 Atl. 309.

Illinois. — United States Brew. Co. *v.* Stoltenberg, 211 Ill. 531, 71 N. E. 1081; Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177; Chicago B. & Q. R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708; Illinois Cent. R. Co. *v.* Cozby, 174 Ill. 109, 50 N. E. 1011; Illinois Cent. R. Co. *v.* Nowicki, 148 Ill. 29, 35 N. E. 358; Chicago, B. & Q. R. Co. *v.* Gregory, 58 Ill. 272.

Indiana. — Pittsburgh C. C. & St. L. R. Co. *v.* Parish, 28 Ind. App. 189, 62 N. E. 514; Wahl *v.* Shoulder, 14 Ind. App. 665, 43 N. E. 458; Pittsburgh, C. C. & St. L. R. Co. *v.* Bennett, 9 Ind. App. 92, 35 N. E. 1033; Miller *v.* Louisville, N. A. & C. R. Co., 128 Ind. 97, 27 N. E. 339; Cincinnati H. & D. R. Co. *v.* McMullen, 117 Ind. 439, 448, 20 N. E. 287, 10 Am. St. Rep. 67; Indiana B. & W. R. Co. *v.* Greene, 106 Ind. 279, 6 N. E. 603, 55 Am. Rep. 736; Cincinnati H. & I. R. Co. *v.* Butler, 103 Ind. 31, 40, 2 N. E. 138.

Iowa. — Yeager *v.* Spirit Lake, 115 Iowa 593, 88 N. W. 1095; Spaulding *v.* Chicago St. P. & K. C. R. Co., 98 Iowa 205, 216, 67 N. W. 227; Baker *v.* Chicago R. I. & P. R. Co., 95 Iowa 163, 63 N. W. 667; Cramer *v.* Burlington, 49 Iowa 213; Murphy *v.* Chicago R. I. & P. R. Co., 45 Iowa 661; Nelson *v.* Chicago R. I. & P. R. Co., 38 Iowa 564; Donaldson *v.* Mississippi & M. R. Co., 18 Iowa 281, 289; Rusch *v.* Davenport, 6 Iowa 443, 452.

Maine. — Chase *v.* Maine Cent. R. Co., 77 Me. 62, 52 Am. Rep. 744.

Michigan. — Billings *v.* Breinig, 45 Mich. 65, 7 N. W. 722.

New York. — Caven *v.* Troy, 32 App. Div. 154, 52 N. Y. Supp. 804; Dillon *v.* Forty-second St. M. & St. N. Ave. R. Co., 28 App. Div. 404, 51 N. Y. Supp. 145; Wiwirowski *v.* Lake Shore & M. S. R. Co., 124 N. Y. 420, 26 N. E. 1023; Cordell *v.* New York C. & H. R. R. Co., 75 N. Y. 330; Morrison *v.* New York C. & H. R. R. Co., 63 N. Y. 643; Johnson *v.* Hudson River R. Co., 20 N. Y. 65, 75 Am. Dec. 375.

27. In an action for the death of a person by being struck by a street car, where there is no evidence of the actions of the decedent for several minutes before he was struck by the car, his exercise of due care cannot be presumed. "For what decedent did in those few minutes, what care he exercised, whether he tried to cross in front of an approaching car and fell, whether he stood too near to the track with the intention of boarding the car, whether he was seized with heart disease or vertigo, are all matters upon which there is no evidence. Whether or not decedent was in the exercise of due care is all conjecture." Cox *v.* South Shore & B. St. R. Co., 182 Mass. 497, 65 N. E. 823.

Where in an action for running down a person while crossing a railway track no evidence is given of the decedent's conduct until the locomo-

seems, in New York, where the injury does not result in death.[28] Elsewhere positive evidence on any point of negligence is not essential.[29]

2. Evidence Descriptive of Place of or Thing Causing Accident.

A. Admissibility in General. — Evidence of the condition at the

tive was on the point of striking her, there is no evidence of want of contributory negligence on her part, and it is proper to direct a verdict for defendant. Moore *v.* Boston & A. R. Co., 159 Mass. 399, 34 N. E. 366.

Compare, however, the following earlier cases where a less rigorous rule was stated. Peverly *v.* Boston, 136 Mass. 366, 49 Am. Rep. 37; Mayo *v.* Boston & M. R. R., 104 Mass. 137; Adams *v.* Carlisle, 21 Pick. (Mass.) 146.

In Illinois, in Chicago, B. & Q. R. Co. *v.* Gregory, 58 Ill. 272, the court, however, says: "The law only requires the highest proof of which the case is susceptible, or that can reasonably be made. It does not require impossible things."

28. Where direct evidence of the acts and conduct of the person damnified is available it must be given. "It is only where the accident results in death, and there are no eye-witnesses of the occurrence, that it has been held in this state that freedom from contributory negligence may be established by circumstantial evidence. I know of no authority for the proposition that a plaintiff other than the representative of a deceased person can successfully support the burden of proof on this subject without some direct evidence that he did not see the threatened or apprehended danger." Seidman *v.* Long Island R. Co., 93 N. Y. Supp. 209.

In an action for falling on an icy place in a sidewalk, where no evidence is given as to the attention plaintiff was giving to her walking, to her speed, or to whether or not she saw the ice, a verdict in her behalf cannot be sustained. Weston *v.* Troy, 139 N. Y. 281, 34 N. E. 780 (Peckham & O'Brien, JJ., *dissenting*), *reversing* 46 N. Y. St. 963, 20 N. Y. Supp. 269. *Compare,* however, the New York cases cited under note 26 *supra.*

But where there are no eye-witnesses of the acts and conduct of the person killed, direct evidence thereof may be dispensed with. So in an action for death caused by a grating over defendant's hatchway closing down and catching decedent while delivering coal down the hatchway, there being no eye-witnesses, the court said that the jury "had the right to infer, from all the facts, that the deceased was called to the place in the performance of his duty, and had not omitted the precautions which a prudent man would take in the presence of the known danger." Galvin *v.* New York, 112 N. Y. 223, 19 N. E. 675 (Peckham & Gray, JJ., *dissenting*).

See also Lorickio *v.* Brooklyn Heights R. Co., 44 App. Div. 628, 60 N. Y. Supp. 247, where the court inferred that a decedent's exercise of due care might be proved without the testimony of eye-witnesses.

29. Baker *v.* Chicago R. I. & P. R. Co., 95 Iowa 163, 63 N. W. 667; Murphy *v.* Chicago R. I. & P. R. Co., 45 Iowa 661; Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177; Atchison T. & S. F. R. Co. *v.* Brassfield, 51 Kan. 167, 32 Pac. 814; Alpern *v.* Churchill, 53 Mich. 607, 19 N. W. 549; McKissock *v.* St. Louis K. C. & N. R. Co., 73 Mo. 456.

It is not necessary for plaintiff to prove his due care by directly affirmative evidence. The inference of such care may be drawn from the absence of the appearance of all fault, either positive or negative, on his part, in the circumstances under which the injury was received. Peverly *v.* Boston, 136 Mass. 366, 49 Am. Rep. 37; Mayo *v.* Boston & M. R. R., 104 Mass. 137. *Contra,* Wheelwright *v.* Boston & A. R. Co., 135 Mass. 225.

Where a child of four, for whose injury action was brought, and his mother went to sleep in their room at night in the usual manner, with nothing to indicate that there was unusual exposure to injury, and gas escaping from a leak in a pipe in an

time of accident of the place where an accident occurred,[30] or of the appliance that caused an accident,[31] is admissible.

B. Degree of Relevancy of Evidence. — The most satisfactory evidence of the condition of a place or thing at the time of accident is undisputed evidence of its condition at the moment immediately preceding the accident.[32] But such evidence often being unobtainable, it is sufficient to show its condition within such a reasonable time as will from the nature of the case fairly tend to show its condition at the moment preceding the accident.[33]

a. *Condition During Period Including Accident.* — Evidence of the condition of a place during a period of time covering the date of accident is admissible.[34]

b. *Condition After Accident.* — Where it may reasonably be assumed that during a given interval after an accident there has been no material change in the condition of the place or thing, evidence of its condition after that interval is admissible to show its condition at the time of accident,[35] especially where at the latter date its condi-

adjoining public way penetrated into the room where they were asleep and did the injury, it clearly appears that they exercised due care. Smith *v.* Boston Gaslight Co., 129 Mass. 318.

30. Pattee *v.* Chicago M. & St. P. R. Co., 5 Dak. 267, 38 N. W. 435 (condition of track and roadbed at place of derailment shown); Lorig *v.* Davenport, 99 Iowa 479, 68 N. W. 717 (age and condition of alleged defective sidewalk); Fitch *v.* Mason City & C. L. Trac. Co., 116 Iowa 716, 89 N. W. 33 (condition of track and roadbed at place of derailment); Haskell *v.* Des Moines, 74 Iowa 110, 37 N. W. 6 (fact that sidewalk tipped to one side); Daniels *v.* Lowell, 139 Mass. 56, 29 N. E. 222; Woodbury *v.* Owosso, 64 Mich. 239, 31 N. W. 130 (manner of support of floor of bridge that broke through); McSorley *v.* New York C. & H. R. R. Co., 60 App. Div. 267, 70 N. Y. Supp. 10; *Per* Miner, J., in Major *v.* Oregon Short Line R. Co., 21 Utah 141, 150, 59 Pac. 522 (rotten condition of railroad ties).

31. Evidence of the equipment of a locomotive that killed a mule by night, and of its condition and the character of the headlight it carried, is admissible. Central of Georgia R. Co. *v.* Hardin, 114 Ga. 548, 40 S. E. 738.

Likewise where a passenger in a railroad car was thrown from her seat by a sudden jerk, evidence of the construction and furnishings of the car is admissible. Southern R. Co. *v.* Crowder, 130 Ala. 256, 30 So. 592.

In Wormsdorf *v.* Detroit City R. Co., 75 Mich. 479, 42 N. W. 1000, 13 Am. St. Rep. 453, where a street car ran away by reason of defective brakes, the court held the admission of evidence that it was the first car used on the road error, because the railroad is not required to furnish new cars, but to keep those in use in good repair.

32. Chicago *v.* Dalle, 115 Ill. 386, 5 N. E. 578.

33. Stoher *v.* St. Louis I. M. & S. R. Co., 91 Mo. 509, 517, 4 S. W. 389.

34. Salladay *v.* Dodgeville, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541.

So a witness who is not able to specifically remember the condition of the walk on the day of the accident, but is able to remember its condition between certain dates which include the day of the accident, may properly testify that during that period it was free from ice. Neal *v.* Boston, 60 Mass. 518, 36 N. E. 308.

35. *Colorado.* — Colorado Mtge. & Inv. Co. *v.* Rees, 21 Colo. 435, 42 Pac. 42 (where a locksmith who repaired the lock of a door of an elevator shaft down which a person had fallen, the door being open because of the defectiveness of the lock, tes-

tified to the condition in which he found it).

Illinois. — Slack *v.* Harris, 200 Ill. 96, 113, 65 N. E. 669 (evidence of condition of elevator three-quarters of an hour after its failure to stop); Bloomington *v.* Osterle, 139 Ill. 120, 28 N. E. 1068 (condition of decayed sidewalk two weeks after accident); Jacksonville S. W. R. Co. *v.* Southworth, 135 Ill. 250, 25 N. E. 1093 (condition of railroad rails and ties six months after accident); Chicago *v.* Dalle, 115 Ill. 386, 5 N. E. 578.

Indiana. — Hopkins *v.* Boyd, 18 Ind. App. 63, 47 N. E. 480 (condition of projecting plank in pile beside railroad that projected too far, striking train, the morning after the accident); New York, C. & St. L. R. Co. *v.* Mushrush, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871 (condition of obstructions on railroad station platform ninety minutes after accident).

Iowa. — Jessup *v.* Osceola Co., 92 Iowa 178, 60 N. W. 485; Mackie *v.* Central R. R., 54 Iowa 540, 6 N. W. 723 (condition of gates through which cattle escaped onto railroad track two or three days after accident); Cramer *v.* Burlington, 49 Iowa 213 (condition of railing beside off-set in sidewalk four months after accident). *Compare*, however, Hoyt *v.* Des Moines, 76 Iowa 430, 41 N. W. 63, *holding* that evidence that at the time to which the evidence related the thing was in the same condition as at the time of the accident is prerequisite.

Kansas. — Abilene *v.* Hendricks, 36 Kan. 196, 13 Pac. 121.

Massachusetts. — Toland *v.* Paine Furniture Co., 179 Mass. 501, 61 N. E. 52 (condition on Monday morning of worn rubber mat in which person caught his toe on Saturday afternoon); Sheren *v.* Lowell, 104 Mass. 24.

Michigan. — Lindley *v.* Detroit, 131 Mich. 8, 90 N. W. 665; Brown *v.* Owosso, 130 Mich. 107, 89 N. W. 568; Fuller *v.* Jackson, 92 Mich. 197, 52 N. W. 1075; Shippy *v.* Au Sable, 85 Mich. 280, 288-289, 48 N. W. 584.

Minnesota. — Hall *v.* Austin, 73 Minn. 134, 75 N. W. 1121 (condition of wooden sidewalk two weeks after accident); Johnson *v.* St. Paul, 52 Minn. 364, 54 N. W. 735; Miller *v.* Northern Pac. R. Co., 36 Minn. 296, 30 N. W. 892.

Missouri. — Norton *v.* Kramer, 180 Mo. 536, 79 S. W. 699; Weldon *v.* Omaha K. C. & E. R. Co., 93 Mo. App. 668, 67 S. W. 698 (condition of hand-car that was derailed); Gutridge *v.* Missouri Pac. R. Co., 105 Mo. 520, 16 S. W. 943 (condition of defective hand-hold on car).

New York. — Tompert *v.* Hastings Pave. Co., 35 App. Div. 578, 55 N. Y. Supp. 177; Pettengill *v.* Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442.

Pennsylvania. — Lohr *v.* Philipsburg Borough, 165 Pa. St. 109, 30 Atl. 822.

Texas. — St. Louis S. W. R. Co. *v.* Arnold (Tex. Civ. App.), 87 S. W. 173 (absence on morning after accident of growth of weeds around derailing switch, obscuring it, the presence of the same being charged); Gulf C. & S. F. R. Co. *v.* Johnson, 83 Tex. 628, 19 S. W. 151 (condition ten days after accident of hand-car that was derailed).

Wisconsin. — Larson *v.* Eau Claire, 92 Wis. 86, 65 N. W. 731 (size and character of rut as it appeared two days after accident, when some men were digging and had dug out some coal ashes that had been put in it by another witness the day after the accident); Stewart *v.* Everts, 76 Wis. 35, 44 N. W. 1092, 20 Am. St. Rep. 17 (condition of railroad ties in summer following January when derailment occurred).

Rationale. — "Courts will take judicial notice of the fact that the decay of wood is a gradual process, and that the condition of the planks and stringers in that respect would not have greatly changed in so short a time" as a week or two. Hall *v.* Austin, 73 Minn. 134, 75 N. W. 1121.

Where evidence of the condition of a sidewalk a day or two after an accident is offered, the remark of the court in admitting it, in reply to an objection, that "a generally dilapidated condition don't generally take place in a day or two," is not objectionable in that the jury must have inferred therefrom that it was the court's opinion that the sidewalk was in fact in a dilapidated condition. Wissler *v.* Atlantic, 123 Iowa 11, 98 N. W. 131.

tion is such as to negative any correct inference of recent changes.[36]

c. *Sameness of Condition Shown.* — Moreover, where evidence is offered to show that the condition has remained the same in the interval since the accident, evidence as to the condition of the place or thing at a subsequent date is admissible, without regard to the length of time that has elapsed.[37] In Alabama it seems that such preliminary evidence is always prerequisite to proof of the condition at a subsequent time.[38]

d. *Where Condition Probably Different.* — Where, however, the interval that has elapsed since the accident is so great that by reason of the nature of the thing there is a likelihood of a change in its condition, its condition at such subsequent time can afford no reliable indication of its condition at the time of the accident, and is not admissible.[39]

e. *Condition Before Accident.* — Similarly, evidence of the condition of the place or thing at a time so near before the accident that its condition at the moment of accident may reasonably be inferred

36. Langworthy *v.* Green, 88 Mich. 207, 50 N. W. 130; St. Louis S. W. R. Co. *v.* Arnold (Tex. Civ. App.), 87 S. W. 173; Chicago P. & St. L. R. Co. *v.* Lewis, 145 Ill. 67, 78, 33 N. E. 960.

37. *Alabama.* — Birmingham U. R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525.

Indiana. — Creamery Package Mfg. Co. *v.* Hotsenpiller, 159 Ind. 99, 64 N. E. 600; Indianapolis *v.* Scott, 72 Ind. 196 (condition of cross-walk more than one year after accident admitted).

Iowa. — Harrison *v.* Ayrshire, 123 Iowa 528, 99 N. W. 132; Morrison *v.* Chicago & N. W. R. Co., 117 Iowa 587, 91 N. W. 793 (height of alleged low fence beside railroad right of way six weeks after accident); Munger *v.* Waterloo, 83 Iowa 559, 49 N. W. 1028; Brooke *v.* Chicago R. I. & P. R. Co., 81 Iowa 504, 47 N. W. 74 (condition of unblocked switch fourteen months after accident); Cramer *v.* Burlington, 42 Iowa 315.

Michigan. — Arndt *v.* Bourke, 120 Mich. 263, 79 N. W. 190.

Missouri. — Smith *v.* Missouri & K. Tel. Co. (Mo. App.), 87 S. W. 71; Logan *v.* Metropolitan St. R. Co., 183 Mo. 582, 82 S. W. 126 (condition of switch in street car tracks eight days after the accident).

Vermont. — Cheney *v.* Ryegate, 55 Vt. 499 (condition as to narrowness of road three years after accident).

38. Davis *v.* Alexander City, 137 Ala. 206, 33 So. 863.

39. *Indiana.* — Lauter *v.* Duckworth, 19 Ind. App. 535, 48 N. E. 864 (condition of dry well into which exhaust steam was discharged, sixteen months after accident); Pennsylvania Co. *v.* Marion, 104 Ind. 239, 3 N. E. 874.

Iowa. — Keatley *v.* Illinois Cent. R. Co., 94 Iowa 685, 63 N. W. 560 (position one day after accident of ties of temporary bridge which were frequently moved in process of constructing permanent structure); Parkhill *v.* Brighton, 61 Iowa 103, 15 N. W. 853 (Beck, J., *dissenting*), (condition of board walk in spring following September in which accident occurred); Brentner *v.* Chicago M. & St. P. R. Co., 58 Iowa 625, 12 N. W. 615 (where length of time elapsed did not appear).

Kansas. — Ottawa *v.* Black, 10 Kan. App. 439, 61 Pac. 985 (condition of board walk nearly a year after the accident).

Michigan. — Lindley *v.* Detroit, 131 Mich. 8, 90 N. W. 665; Langworthy *v.* Green, 88 Mich. 207, 50 N. W. 130; Wolscheid *v.* Thome, 76 Mich. 265, 43 N. W. 12 (wet and muddy condition of floor five to seven years after injury said to be caused thereby); Woodbury *v.* Owosso, 64 Mich. 239, 31 N. W. 130 (condition

therefrom, is admissible.[40] It tends not only to show the nature of the thing at the time of the accident, but also to show notice to the person responsible for it of its defective condition.[41] Moreover, where a showing is made that the condition at any previous time was the same as at the time of accident, evidence as to the condition at that time is admissible.[42] Likewise such evidence is not admissible when too remote to show with fair probability the condition of the place or thing at the time of the accident.[43]

f. *Increased Latitude Where Trial Distant From Accident.* Where such time elapses between the accident and the trial that witnesses cannot well remember exact dates, more latitude is proper

of bridge three months after traction engine fell through it).

Missouri. — Newcomb *v.* New York C. & H. R. R. Co., 169 Mo. 409, 69 S. W. 348 (grease on railroad station platform two weeks after person slipped there); Stoher *v.* St. Louis I. M. & S. R. Co., 91 Mo. 509, 517, 4 S. W. 389, syllabus (condition of railroad roadbed one year after washout).

Vermont. — Whitney *v.* Londonderry, 54 Vt. 41 (condition of highway one year after accident).

40. *Illinois.* — Chicago *v.* Dalle, 115 Ill. 386, 5 N. E. 578.

Iowa. — McCartney *v.* Washington, 100 N. W. 80 (where witness testified to repairs previously made by him in a sidewalk); Parker *v.* Ottumwa, 113 Iowa 649, 85 N. W. 805; Frohs *v.* Dubuque, 109 Iowa 219, 80 N. W. 341 (where evidence that the walk was originally built of second-hand lumber was received); Hunt *v.* Dubuque, 96 Iowa 314, 65 N. W. 319 (where a witness testified that she saw a man stop and push down a loose board in a sidewalk).

Maryland. — Baltimore & O. R. Co. *v.* Shipley, 39 Md. 251 (condition of railroad locomotive alleged to have set fire, on day before fire, shown).

Massachusetts. — Burgess *v.* Davis Sulphur Ore Co., 165 Mass. 71, 42 N. E. 501.

Michigan. — Styles *v.* Decatur, 131 Mich. 442, 91 N. W. 622; Woodbury *v.* Owosso, 64 Mich. 239, 31 N. W. 130.

Minnesota. — Johnson *v.* St. Paul, 52 Minn. 364, 54 N. W. 735 (condition of sidewalk four weeks before accident).

Missouri. — Swadley *v.* Missouri Pac. R. Co., 118 Mo. 268, 24 S. W. 140, 40 Am. St. Rep. 366 (condition of railroad ties three weeks before accident).

New York. — Cook *v.* Champlain Transp. Co., 1 Denio 91, 101 (condition of fires of boat while at wharf, just before and as it took its departure, a fire having been caused by sparks thrown out by it immediately after it got under way).

Pennsylvania. — Pennsylvania Tel. Co. *v.* Varnau, 15 Atl. 624 (height of low wire over highway the Sunday before the accident).

Tennessee. — Williams *v.* Gobble, 106 Tenn. 367, 61 S. W. 51.

Washington. — Randall *v.* Hoquiam, 30 Wash. 435, 70 Pac. 1111.

41. Styles *v.* Decatur, 131 Mich. 442, 91 N. W. 622; Hunt *v.* Dubuque, 96 Iowa 314, 65 N. W. 319.

42. Hunt *v.* Dubuque, 96 Iowa 314, 65 N. W. 319 (evidence of condition of sidewalk one year before accident); Union Pac. R. Co. *v.* Hand, 7 Kan. 380, 389.

Where it is in dispute as to whether a switch was locked at the time of the derailment of a train, and there was evidence that the switch had been locked for six months before the accident, a witness may properly testify that he was in the railroad's employ until within two months of the accident, and during the time he was in the employ there were no locks used. Birmingham R. & Elec. Co. *v.* Baylor, 101 Ala. 488, 498, 13 So. 793.

43. Where a passenger in August, 1897, got on the wrong train at a railroad station, and in attempting to alight slipped and fell, evidence that there was grease on the platform in the March preceding, or that at that

in the admission of testimony as to the condition at other times than where the time is shorter.[44]

g. *Where Gradual Change in Conditions Occurs.* — Where the place of injury has undergone gradual natural changes, proof thereof and of its condition at various times is admissible to show by comparison its condition at the time of accident.[45]

Where Structure or Thing Destroyed by Accident. — Where, at the moment the accident transpired, the things involved in it were damaged or destroyed, evidence of the condition of the debris is admissible.[46] But, except for these purposes, it remains true that evidence of the condition of the place of accident when conditions were different is ordinarily inadmissible.[47]

h. *Non-Existence of Defect at Other Times.* — Moreover, it is competent to show the non-existence of a defect in the place of or thing causing the accident at a time prior to the accident.[48]

time no placards were displayed showing the destination of the trains, is too remote to be admissible on the question of the existence of those conditions at the time of accident. Newcomb *v.* New York C. & H. R. R. Co., 169 Mo. 409, 69 S. W. 348.

44. Abilene *v.* Hendricks, 36 Kan. 196, 13 Pac. 121.

45. Cook *v.* Barton, 66 Vt. 65, 28 Atl. 631.

Evidence of certain measurements made at different lengths of time after an accident caused by a depression in a roadway, to determine the depth of the depression, is admissible, where the measurements afford some *data* by their comparison for determining the depth of the depression at the time of the accident. Nesbit *v.* Garner, 75 Iowa 314, 39 N. W. 516, 9 Am. St. Rep. 486, 1 L. R. A. 152.

Where a washout was caused by reason of the insufficiency of a stone culvert under a highway, it is proper for a witness to state that he examined the culvert five years before the accident, and several times in the interim, and that he found on each successive examination that the opening had contracted, the walls being gradually forced together. Brown *v.* Swanton, 69 Vt. 53, 37 Atl. 280.

46. Seagel *v.* Chicago M. & St. P. R. Co., 83 Iowa 380, 49 N. W. 990 (where as supposed a train was derailed by ice that had been pushed on the track by an ice pack, and a witness testified as to whether any of the ice left after the accident appeared to have been struck by the train). Treusch *v.* Kamke, 63 Md. 278 (where evidence of the position of the remains of a building that had fallen was given).

47. Where an accident occurred by driving against the edge of a sidewalk, evidence of the condition of the highway before the sidewalk was laid is immaterial. Herbert *v.* Northampton, 152 Mass. 266, 25 N. E. 467.

Where a sidewalk was defective by reason of an uneven deposit of ice upon it, testimony as to its condition one week before the accident, there having been a snow storm and thaw in the interim, is properly excluded. Woodcock *v.* Worcester, 138 Mass. 268. To the same effect, Berrenberg *v.* Boston, 137 Mass. 231, 50 Am. Rep. 296.

Evidence of the condition of a sidewalk after a material change has been made is properly excluded. George *v.* Haverhill, 110 Mass. 506, 514.

Evidence of the position of barricades around an excavation after they had been moved is properly excluded. Port Jervis *v.* First Nat. Bank, 96 N. Y. 550-551.

Compare, however, Chicago *v.* Baker, 195 Ill. 54, 62 N. E. 892, where it was held proper to prove that sometime before the accident a fence alongside the raised sidewalk off which the plaintiff fell had been blown down.

48. Where it appeared that a per-

C. Competency of Witness. — In order that a witness may be competent to testify to the condition of the place of or thing causing an accident, it must first appear that his testimony relates to the identical place or thing in respect to which inquiry is being made.[49] In the course of his testimony it is proper for him to detail the circumstances that drew his attention to the alleged defect,[50] though the admission of such testimony is intrusted to the discretion of the trial court.[51]

3. Evidence Descriptive of Similar Places or Things. — According to some decisions, evidence of the condition of substantially similar things is admissible,[52] at least where the particular thing

son fell over a loose plank in a sidewalk it is proper for witnesses to testify in substance that they frequently passed over the walk, and that if there had been a loose plank before the accident they would have seen it, as negativing the fact of notice to defendant. McGrail *v.* Kalamazoo, 94 Mich. 52, 53 N. W. 955.

49. "That some boys pointed out a hole to the plaintiff's husband and said that it was the one into which the plaintiff fell, and that the husband afterward pointed out the same to another witness and said it was the hole into which his wife fell, is not competent evidence; but that a hole was found and examined by the witnesses at the street intersection where the plaintiff testified the hole was would be competent evidence, it not appearing that there was more than one hole at this street intersection." Brunswick Light & Water Co. *v.* Gale, 91 Ga. 813, 18 S. E. 11.

Where plaintiff in an action for falling on a loose plank in a sidewalk testifies that he showed another witness the place of accident, the other witness may properly testify that the plaintiff showed him the place of accident and that he saw loose planks in the walk at that place. Ruscher *v.* Stanley, 120 Wis. 380, 98 N. W. 223.

Policeman Competent. — The fact that a policeman is charged with the duty of reporting defects in sidewalks does not render him incompetent to testify to the condition of a walk. Lorig *v.* Davenport, 99 Iowa 479, 68 N. W. 717.

50. So in an action for injuries sustained by getting into a hole in a bridge, evidence of sundry witnesses as to the particular circumstance which directly called their attention to the hole, its size, character and position, as that the wheels of their vehicles actually ran into it, their horses shied at it, or seeing it they took pains to drive so as to avoid it, or that a wheel two and three quarter inches broad went into it to the depth of a foot, is admissible. "To exclude such facts would deprive a jury of most tangible evidence disclosing the existence, character and magnitude of the defect, and would at the same time take away one of the most important means of determining the value of testimony by weighing it with reference to the opportunities which each witness had to know and remember the facts and to judge accurately in regard to them." Tomlinson *v.* Derby, 43 Conn. 562.

It is proper to ask a witness who testified to the condition of a defective sidewalk how he discovered the bad condition of the walk, and to permit him to reply, "it was loose and jiggled under my feet and I stumbled over it, and had seen others stumble over it." Thompson *v.* Quincy, 83 Mich. 173, 47 N. W. 114, 10 L. R. A. 734.

51. Neal *v.* Boston, 160 Mass. 518, 36 N. E. 308.

52. Where plaintiff was injured by the fall of the electric light pole by reason of its having rotted off at the ground, evidence of the condition of other poles which had been planted at the same time as the pole in question, one year after the accident and six months after they had been taken up and left exposed to the atmosphere, is properly received as tending to show the condition of

causing the injury cannot be identified;[53] but evidence of the condition of similar places is irrelevant.[54]

4. Evidence Descriptive of General Condition of Immediate Vicinity. — The general condition of the immediate vicinity of the place of accident is admissible to show notice to the defendant of the defect.[55] Where, however, the question of notice is immaterial

the pole in suit at the time of the accident, where it appeared that the average life of such poles was fifteen or sixteen years. Emporia *v.* Kowalski, 66 Kan. 64, 71 Pac. 232. See also Styles *v.* Decatur, 131 Mich. 442, 91 N. W. 622, where a piece of wood, said to be a part of the stringer of a sidewalk from the immediate vicinity of the accident, was held competent.

53. Where a person was injured by a stone that fell from a cornice that was afterward taken down, all the stone being piled together so that the stone causing the injury could not be identified, it is error to exclude evidence in plaintiff's behalf of the character of the stones in the pile. Rose *v.* St. Louis, 152 Mo. 602, 54 S. W. 440.

Where a dog was killed by defendant's street car and plaintiff would have had no difficulty in identifying the particular car, it is error to admit evidence of the construction of the fenders on other cars. Moore *v.* Charlotte Elec. R. L. & P. Co., 136 N. C. 554, 48 S. E. 822.

54. Where plaintiff's mule that had willfully strayed on defendant's track was run down, notwithstanding the efforts of the person in control of the train, evidence of the condition of neighboring highway crossings on defendant's railroad is irrelevant. Mack *v.* South Bound R. Co., 52 S. C. 323, 29 S. E. 905.

55. *Illinois.* — Elgin *v.* Nofs, 200 Ill. 252, 65 N. E. 679 (where in case of a defect in a sidewalk on a bridge two hundred feet long the condition of the walk at other parts of the bridge was shown).

Iowa. — McCartney *v.* Washington, 100 N. W. 80; Harrison *v.* Ayrshire, 123 Iowa 528, 99 N. W. 132; Yeager *v.* Spirit Lake, 115 Iowa 593, 88 N. W. 1095; Smith *v.* Des Moines, 84 Iowa 685, 51 N. W. 77; Munger *v.* Waterloo, 83 Iowa 559, 49 N. W. 1028; McConnell *v.* Osage, 80 Iowa 293, 45 N. W. 550, 8 L. R. A. 778; Armstrong *v.* Ackley, 71 Iowa 76, 32 N. W. 180. *Contra*, Rugglea *v.* Nevada, 63 Iowa 185, 18 N. W. 866.

Michigan. — Styles *v.* Decatur, 131 Mich. 442, 91 N. W. 622; Will *v.* Mendon, 108 Mich. 251, 66 N. W. 58; Corcoran *v.* Detroit, 95 Mich. 84, 54 N. W. 692; Fuller *v.* Jackson, 92 Mich. 197, 205-206, 52 N. W. 1075; Campbell *v.* Kalamazoo, 80 Mich. 655, 45 N. W. 652. *Contra*, Dundas *v.* Lansing, 75 Mich. 499, 508, 42 N. W. 1011, 13 Am. St. Rep. 457, 5 L. R. A. 143 (Morse, J., *dissenting*).

Minnesota. — Gude *v.* Mankato, 30 Minn. 256, 15 N. W. 175.

North Dakota. — Chacey *v.* Fargo, 5 N. D. 173, 64 N. W. 932.

Tennessee. — Nashville, C. & St. L. R. Co. *v.* Johnson, 15 Lea 677.

Texas. — Missouri Pac. R. Co. *v.* Collier, 62 Tex. 318; Texas & P. R. Co. *v.* De Milley, 60 Tex. 194.

Wisconsin. — Shaw *v.* Sun Prairie, 74 Wis. 105, 42 N. W. 271; Spearbracker *v.* Larrabee, 64 Wis. 573, 25 N. W. 555.

"The propriety of such evidence and the latitude which may properly be allowed in its reception, must depend largely on the particular circumstances of each case, and be measurably within the discretion of the trial court, which undoubtedly ought to be cautiously exercised." Kellogg *v.* Janesville, 34 Minn. 132, 24 N. W. 359.

Where, however, a train was derailed at a particular spot, evidence as to the condition of the track over a space of several hundred feet in either direction is too broad, and its admission is error. Ohio Val. R. Co. *v.* Watson, 93 Ky. 654, 21 S. W. 244, 40 Am. St. Rep. 211, 19 L. R. A. 310.

Where it appeared that a plank on which plaintiff fell was good and

for any purpose it seems that such evidence should be excluded.[56]

5. Physical Environment of Accident. — Evidence as to the relative location of and the physical and topographical facts surrounding the place of accident at the time thereof is admissible to aid the jury in determining the question of negligence.[57] Climatic conditions may also be considered.[58] The distance at which an approaching train

sound, except that it had been broken down by a horse stepping on it, evidence that the walk in the vicinity of the place of accident was in a generally defective condition is erroneously received on the question of notice to defendant. For when the special defect is of such a character that the general condition of the walk would naturally draw attention to the precise defect complained of, such evidence is admissible, but not where the defect causing the injury has no relation whatsoever to a general defective condition of the walk. Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311.

In Cunningham *v.* Fair Haven & W. R. Co., 72 Conn. 244, 43 Atl. 1047, where a person was injured by the defective condition of a street railway track over which he was driving in the middle of the block, evidence of the condition of the track throughout the block was held inadmissible.

56. Olson *v.* Luck, 103 Wis. 33, 79 N. W. 29.

57. Where a person was run down by a train at a railroad crossing, evidence as to the location of the different houses near the crossing, and of the side-track and the cars that were standing on it near the crossing, is properly received. Memphis & C. R. Co. *v.* Martin, 117 Ala. 367, 23 So. 231.

Where it was claimed that a fire started on a railroad right of way, evidence that dry herbiage was permitted to remain there is admissible. Henry *v.* Southern Pac. R. Co., 50 Cal. 176.

Where plaintiff fell into a ditch known to her to exist near her residence, evidence touching the surroundings and the means of egress and ingress to her residence is proper. Bloomington *v.* Rogers, 13 Ind. App. 121, 41 N. E. 395.

Where a passenger at the bottom of a steamboat stairway was struck by a bale of cotton that fell down it, evidence of the location and steepness of the stairway and of its surroundings is competent. Memphis & Ohio River Packet Co. *v.* McCool, 83 Ind. 392, 43 Am. Rep. 71.

Where plaintiff's horse was frightened while passing a standing locomotive by a sudden discharge of steam therefrom, all the surroundings of the place of accident, including the height of the railroad track above the surface of the street, is proper on the question of plaintiff's due care in attempting to pass in the manner he did. Andrews *v.* Mason City & F. D. R. Co., 77 Iowa 669, 42 N. W. 513.

In an action for injuries to a passenger in jumping from a runaway horse car, evidence that the car was running beside a steep embankment over which it might be thrown is admissible on the question of his negligence in jumping. Dimmey *v.* Wheeling & E. R. Co., 27 W. Va. 32, 49-50, 55 Am. Rep. 292.

See also Alabama G. S. R. Co. *v.* Burgess, 116 Ala. 509, 22 So. 913; Martin *v.* Baltimore & P. R. Co., 2 Marv. (Del.) 123, 42 Atl. 442; Phelps *v.* Mankato, 23 Minn. 276; Presby *v.* Grand Trunk Ry., 66 N. H. 615, 22 Atl. 554.

58. Such evidence is especially applicable on the question whether a fire was negligently set or tended. Furlong *v.* Carroll, 7 Ont. App. 145, 162; Needham *v.* King, 95 Mich. 303, 312, 54 N. W. 891.

Climatic Phenomena at Other Times. — In an action for damage done by back-water because of the insufficiency of a culvert to carry off storm waters, evidence that an equally great freshet occurred at the place of accident at a date subsequent to the accident is properly excluded, as in determining the necessary size of the culvert only past experience could be looked to. Los

or vehicle can be seen[59] or heard[60] may also be taken into consideration. Testimony as to the sufficiency of light at the time and place of accident to enable one clearly to observe the danger is also admissible.[61]

6. Conditions. — Changed or Continuing. — A. Continuance in Same Condition. — a. *Before Accident.* — Evidence that the defect that caused the injury existed a considerable time before the accident is admissible to show notice to defendant of such defect.[62]

Angeles Cemetery Ass'n *v.* Los Angeles, 103 Cal. 461, 37 Pac. 375.

Where plaintiff was injured by a falling wall, and defendant defended on the ground that it was overthrown by a wind of such severity as to amount to an act of God, evidence that in the twenty-seven months between the accident and the trial the city had not been visited by so severe a storm is competent. Olsen *v.* Meyer, 46 Neb. 240, 64 N. W. 954.

59. Kansas City, M. & B. R. Co. *v.* Weeks, 135 Ala. 614, 34 So. 16; Martin *v.* Baltimore & P. R. Co., 2 Marv. (Del.) 123, 42 Atl. 442.

So in case of a collision between a street car and wagon, a witness may properly testify to the distance an approaching car could be seen by persons less favorably situated than was the driver of the wagon. Northrop *v.* Poughkeepsie City & W. F. Elec. R. Co., 93 N. Y. Supp. 602.

Where, however, a child was run down by a train while on a trestle, a witness cannot, to show how far the child could have been seen by the engineer, testify to the distance he could distinguish a child of that size when standing on the roadbed from which the train approached, the conditions being too different. Alabama G. S. R. Co. *v.* Burgess, 116 Ala. 509, 22 So. 913.

60. Where a passenger was injured by a collision between a street car and some fire apparatus, evidence of the distance the street car could have heard the gong of the apparatus before reaching the place of collision is competent. Olsen *v.* Citizens R. Co., 152 Mo. 426, 54 S. W. 470.

61. Such testimony is not inadmissible because an opinion. Colorado Mtge. & Inv. Co. *v.* Rees, 21 Colo. 435, 42 Pac. 42. And conceding it to be somewhat in the nature of a conclusion, it gives a more satisfactory description of the amount of light than would testimony as to the size of the windows and doors, the position and size of objects obstructing the light, and the like, would. Snyder *v.* Witwer Bros., 82 Iowa 652, 48 N. W. 1046.

Testimony of Sufficiency of Light at Other Times When Conditions Similar. — Where a person was killed by a detached locomotive running backward, a witness' testimony as to how far he could distinguish such an engine on a night of similar darkness two years afterward is admissible where it appears that the lights were arranged the same as on the night of the accident, but not otherwise. Houston & T. C. R. Co. *v.* Waller, 56 Tex. 331, 339.

Where a person fell into an open elevator shaft in a dimly lighted hall at two in the afternoon, a question put a witness as to the condition of that hall on dark days at two in the afternoon during the month of the accident, and as to the ability of a person to distinguish an object at the elevator shaft, is properly excluded. Muller *v.* Hale, 138 Cal. 163, 71 Pac. 81.

In an action for falling down an unguarded elevator shaft in a dimly lighted hall, evidence of the sufficiency of the light in the hall at other times is properly excluded. Parker *v.* Portland Pub. Co., 69 Me. 173, 31 Am. Rep. 262.

62. *Connecticut.* — Cunningham *v.* Fair Haven & W. R. Co., 72 Conn. 244, 43 Atl. 1047.

Indiana. — Chicago & E. R. Co. *v.* Thomas, 55 N. E. 861.

Iowa. — Bailey *v.* Centerville, 108 Iowa 20, 78 N. W. 831.

Massachusetts. — Shepard *v.* Creamer, 160 Mass. 496, 36 N. E. 475. *Contra,* Merrill *v.* Inhab-

b. *After Accident.* — The continuance of the defective condition after the accident, however, is only material in connection with testimony as to the subsequent condition of the place or thing,[63] or in connection with a view thereof by the court or jury,[64] in order to show that the evidence as to the subsequent condition correctly represented the condition at the time of accident.[65]

B. Changes in Condition. — a. *Prior Changes.* — The fact that changes had been made prior to the accident is immaterial as evidence.[66]

b. *Subsequent Changes.* — **(1.) The General Rule.** — (A.) Admissibility in General. — Evidence of alterations, repairs or additional safeguards after the accident is not ordinarily competent either to show the defective condition at the time of the accident or for other purposes.[67] Even where the evidence is put in by the de-

itants of Bradford, 110 Mass. 505.

Michigan.— Kraatz *v.* Brush Elec. L. Co., 82 Mich. 457, 465, 46 N. W. 787.

Minnesota. — Phelps *v.* Winona & St. P. R. Co., 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867; Kellogg *v.* Janesville, 34 Minn. 132, 24 N. W. 359; Waldron *v.* St. Paul, 33 Minn. 87, 22 N. W. 4.

New York. — Pettengill *v.* Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442.

Pennsylvania. — Potter *v.* Natural Gas Co., 183 Pa. St. 575, 591, 39 Atl. 7.

Washington. — Bell *v.* Spokane, 30 Wash. 508, 71 Pac. 31.

Wisconsin. — Hallum *v.* Omro, 99 N. W. 1051.

Opinion Evidence of Continuance of Condition. — Where a person was injured by a defect in a cross-walk, a witness shown to have followed the business of a civil engineer much of the time during twenty-five years, and to have had experience in judging of the soundness of timbers in bridges and similar structures, and to have handled woods since a boy, may properly give his opinion whether a certain sleeper in the cross-walk had rotted recently or whether the decay was a matter of some time. Indianapolis *v.* Scott, 72 Ind. 196.

63. Bailey *v.* Centerville, 108 Iowa 20, 78 N. W. 831.

64. Brown *v.* Swanton, 69 Vt. 53, 37 Atl. 280.

65. Cronk *v.* Wabash R. Co., 123 Iowa 349, 98 N. W. 884.

In Pennsylvania Co. *v.* Frund, 4 Ind. App. 469, 30 N. E. 1116, however, the court held that evidence that no change was made in a highway crossing between the time of injury and the time of trial is competent, but that the reason therefor could not be given.

Moreover, where a witness testifies as to the continuance of the alleged defective place or thing in the same condition for a while before the accident, it is not objectionable for him to testify as to its continuance in the same condition after the accident in connection with the former testimony. Bell *v.* Spokane, 30 Wash. 508, 71 Pac. 31; Hallum *v.* Omro (Wis.), 99 N. W. 1051.

66. So a question put a witness, "Was there any contrivance on the machine originally that was not on there at the time of the injury complained of?" is immaterial. Davis *v.* Korman (Ala.), 37 So. 789.

67. *England.* — Hart *v.* Lancashire & Y. Ry., 21 L. T. (N. S.) 261.

United States. — Southern Pacific Co. *v.* Hall, 41 C. C. A. 50, 100 Fed. 760, 768 (evidence that trap door into which person stepped was afterward removed or altered); Motey *v.* Pickle Marble & Granite Co., 20 C. C. A. 366, 74 Fed. 155; Atchison T. & S. F. R. Co. *v.* Parker, 5 C. C. A. 220, 55 Fed. 595 (evidence that alleged defective engine was after accident extensively repaired); Barber Asphalt Pavement Co. *v.* Odasz, 8 C. C. A. 471, 60 Fed. 71; Isaacs *v.* Southern Pacific Co., 49 Fed. 797 (evidence that when bridge that fell

was rebuilt longitudinal braces were added); Columbia & P. S. R. Co. *v.* Hawthorne, 144 U. S. 202.

Alabama. — Frierson *v.* Frazier, 37 So. 825 (where after wagon backed off ferry boat guard-rail was installed); Going *v.* Alabama Steel & Wire Co., 37 So. 784; Davis *v.* Kornman, 37 So. 789 (use of guard around machinery after accident).

Arkansas. — Prescott & N. R. Co. *v.* Smith, 70 Ark. 179, 67 S. W. 865 (where after an accident to a train that ordinarily ran rear end foremost it was run with the locomotive at the front end).

California. — Helling *v.* Schindler, 145 Cal. 303, 78 Pac. 710 (where the cutting edge of a machine was sharpened and the belt tightened immediately after an accident before it was again used); Limberg *v.* Glenwood Lumb. Co., 127 Cal. 598, 60 Pac. 176; Hager *v.* Southern Pacific Co., 98 Cal. 309, 33 Pac. 119 (evidence that after an accident at a railroad crossing the railroad installed an automatic bell); Sappenfield *v.* Main St. & A. P. R. Co., 91 Cal. 48, 61-63, 27 Pac. 590 (where after an accident to a street car driver by the pulling out of the pin holding the horse a safety pin was installed). *Contra*, Butcher *v.* Vaca Valley & C. L. R. Co., 67 Cal. 518, 8 Pac. 174, *affirming* on rehearing, 5 Pac. 359.

Colorado. — Zimmerman *v.* Denver Consol. Tram. Co., 18 Colo. App. 480, 72 Pac. 607 (it is proper to exclude a question asked a witness, whether the fender in use at the time of trial was like that used at the time of accident); Colorado Mtge. & Inv. Co. *v.* Rees, 21 Colo. 435, 42 Pac. 42 (a locksmith who went to a building after a person fell down an open elevator shaft cannot testify that he went there to repair the lock on the door of the shaft); Denver & R. G. R. Co. *v.* Morton, 3 Colo. App. 155, 32 Pac. 345; Colorado Elec. Co. *v.* Lubbers, 11 Colo. 505, 19 Pac. 479, 7 Am. St. Rep. 255 (where after employe was injured by electric current in wire he intended to repair, placards were put up warning employes not to touch the wires after 4 o'clock). *Compare*, however, Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442, 469, *holding* that where after a train was wrecked by a washout a larger culvert was constructed such fact may be shown as an admission that the first one was inadequate, but not that its construction was attended with negligence.

Connecticut. — Nalley *v.* Hartford Carpet Co., 51 Conn. 524, 50 Am. Rep. 47 (where the day after an employe fell through the torn-up floor of an anteroom upon stepping in, the door was nailed up).

Georgia. — Georgia S. & F. R. Co. *v.* Cartledge, 116 Ga. 164, 42 S. E. 405, 59 L. R. A. 118. *Contra*, Savannah F. & W. R. Co. *v.* Flannagan, 82 Ga. 579, 589, 9 S. E. 471, 14 Am. St. Rep. 183; Central R. R. *v.* Gleason, 69 Ga. 200; Augusta & S. R. Co. *v.* Renz, 55 Ga. 126.

Idaho. — Giffen *v.* Lewiston, 6 Idaho 231, 55 Pac. 545, 550-551; Holt *v.* Spokane & P. R. Co., 3 Idaho 703, 35 Pac. 39; Harvey *v.* Alturas Gold Min. Co., 3 Idaho 510, 31 Pac. 819, 825.

Illinois. — Howe *v.* Medaris, 183 Ill. 288, 55 N. E. 724; Bloomington *v.* Legg, 151 Ill. 9, 37 N. E. 696, 42 Am. St. Rep. 216 (where after a horse caught its bridle under the spout of a drinking fountain the spout was removed); Hodges *v.* Percival, 132 Ill. 53, 23 N. E. 423 (where after an elevator fell an air cushion was installed); Warren *v.* Wright, 103 Ill. 298 (where after its fall a sidewalk was rebuilt in a different manner). *Compare* Weber Wagon Co. *v.* Kehl, 139 Ill. 644, 29 N. E. 714, where, under the circumstances, the admission of the evidence was held to be harmless error. *Contra*, Chicago *v.* Dalle, 115 Ill. 386, 5 N. E. 578.

Indiana. — Jeffersonville *v.* McHenry, 22 Ind. App. 10, 53 N. E. 183; Pennsylvania Co. *v.* Witte, 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377; Terre Haute & I. R. Co. *v.* Clem, 123 Ind. 15, 23 N. E. 965, 18 Am. St. Rep. 303, 7 L. R. A. 588. See Lafayette *v.* Weaver, 92 Ind. 477. *Compare* Goshen *v.* England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253.

Iowa. — Beard *v.* Guild, 107 Iowa 476, 78 N. W. 201 (where after a person was thrown out of an open hack a door was placed upon it); Parkhill *v.* Brighton, 61 Iowa 103, 15

N. W. 853 (Beck, J., *dissenting*); Hudson *v.* Chicago & N. W. R. Co., 59 Iowa 581, 13 N. W. 735, 44 Am. Rep. 692; Cramer *v.* Burlington, 45 Iowa 627.

Kentucky. — Louisville & N. R. Co. *v.* Bowen, 18 Ky. L. Rep. 1099, 39 S. W. 31 (where a train ran down a horse, it is error to admit evidence that thereafter signboards were put up at a nearby crossing and the trains signaled on approaching); Standard Oil Co. *v.* Tierney, 92 Ky. 367, 17 S. W. 1025, 36 Am. St. Rep. 595, 14 L. R. A. 677 (where after a wooden barrel of naphtha took fire in carriage the manner of labeling the cars and branding the barrels was changed).

Maryland. — *Compare* Washington C. & A. Tpke. Co. *v.* Case, 80 Md. 36, 47, 30 Atl. 571 (where evidence that a bridge on which an accident occurred in April, 1892, was repaired in June, 1893, was excluded because too remote).

Massachusetts. — Whelton *v.* West End St. R. Co., 172 Mass. 555, 52 N. E. 1072 (where after an employe's foot was caught between the end of a rail on a moving car transfer table and the floor of the car house, the floor of the car house was raised); McGuerty *v.* Hale, 161 Mass. 51, 36 N. E. 682 (where six years after an employe's arm was caught in some gearing it was covered); Downey *v.* Sawyer, 157 Mass. 418, 32 N. E. 64; Shinners *v.* Proprietors of Locks & Canals on Merrimac River, 154 Mass. 168, 28 N. E. 10, 26 Am. St. Rep. 226, 12 L. R. A. 554 (where after the wall of a trench fell in on a digger additional shoring was put in). *Contra*, Readman *v.* Conway, 126 Mass. 374.

Michigan. — Zibbell *v.* Grand Rapids, 129 Mich. 659, 89 N. W. 563; Thompson *v.* Toledo, A. A. & N. M. R. Co., 91 Mich. 255, 51 N. W. 995 (where after an accident at a crossing of a railroad a building obstructing the vision was removed); Polzen *v.* Morse, 91 Mich. 208, 51 N. W. 940; Langworthy *v.* Green, 88 Mich. 207, 217-218, 50 N. W. 130; Lombar *v.* East Tawas, 86 Mich. 14, 48 N. W. 947; Fox *v.* Peninsular White Lead & Color Wks., 84 Mich. 676, 48 N. W. 203 (where after a workman's health was injured in the manufacture of poisonous substances the employes were required to sign contracts waiving liability for injuries to health, and danger signs were posted in the shop); Kraatz *v.* Brush Elec. L. Co., 82 Mich. 457, 465, 46 N. W. 787 (where an employe on an electric light pole was injured by a current caused by crossing wires, and evidence was offered that after the accident the method of hanging the wires was altered); Woodbury *v.* Owosso, 64 Mich. 239, 31 N. W. 130; Fulton Iron & Engine Wks. *v.* Kimball, 52 Mich. 146, 17 N. W. 733 (likewise evidence why certain additional precautions were taken should be excluded).

Minnesota. — Hammargren *v.* St. Paul, 67 Minn. 6, 69 N. W. 740; Morse *v.* Minneapolis & St. L. R. Co. 30 Minn. 465, 16 N. W. 358. *Contra*, Shaber *v.* St. Paul M. & M. R. Co., 28 Minn. 103, 9 N. W. 575; Kelly *v.* Southern Minnesota R. Co., 28 Minn. 98, 9 N. W. 588; Phelps *v.* Mankato, 23 Minn. 276; O'Leary *v.* Mankato, 21 Minn. 65.

Missouri. — Schermer *v.* McMahon, 108 Mo. App. 36, 82 S. W. 535 (where after a trench fell in on a workman the walls were shored up); Mahaney *v.* St. Louis & H. R. Co., 108 Mo. 191, 200, 18 S. W. 895; Alcron *v.* Chicago & A. R. Co., 14 S. W. 943, *affirmed* on rehearing in division, 16 S. W. 229 (where within twenty-four hours after a switchman caught his foot in a switch it was blocked up); Hipsley *v.* Kansas City St. J. & C. B. R. Co., 88 Mo. 348; Ely *v.* St. Louis K. C. & N. R. Co., 77 Mo. 34 (where evidence is received that after a washout a larger culvert was constructed, it is error to refuse to charge the jury that such evidence must not be considered in determining whether the original embankment was properly constructed).

New Hampshire. — Aldrich *v.* Concord & M. R. R., 67 N. H. 250, 29 Atl. 408 (where after a derailment a different kind of switch was installed). *Contra*, Martin *v.* Towle, 59 N. H. 31.

New York. — Getty *v.* Hamlin, 127 N. Y. 636, 27 N. E. 399; Corcoran *v.* Peekskill, 108 N. Y. 151, 15 N. E. 309 (Danforth, J., *dissenting*), (where after a person fell into an area a railing was put around it);

Dale *v.* Delaware, L. & W. R. Co., 73 N. Y. 468 (where after a passenger leaning from a car window was struck by the sheathing of a bridge a new and wider bridge was constructed); Dougan *v.* Champlain Transp. Co., 56 N. Y. 1 (where after a passenger on a boat slipped on the deck and slid off under the railing the opening was closed); Reed *v.* New York Cent. R. Co., 45 N. Y. 574 (Church, C. J., & Peckham, J., *dissenting*).

North Carolina. — Raper *v.* Wilmington & W. R. Co., 126 N. C. 563, 36 S. E. 115; Dillon *v.* Raleigh, 124 N. C. 184, 32 S. E. 548; Lowe *v.* Elliott, 109 N. C. 581, 14 S. E. 51 (where after a knife flew from a revolving castiron cutter a brass one was substituted for it).

Oregon. — Skottowe *v.* Oregon S. L. & U. N. R. Co., 22 Or. 430, 30 Pac. 222, 16 L. R. A. 593.

Pennsylvania. — Elias *v.* Lancaster, 203 Pa. St. 638, 53 Atl. 507 (after an iron plate in a cross-walk moved when plaintiff stepped on it defendant fastened it down); Baran *v.* Reading Iron Co., 202 Pa. St. 274, 51 Atl. 979 (where a boiler put up to take the place of one that exploded was differently set up, and further instructions given for its care); Fisher *v.* Paxson, 182 Pa. St. 457, 38 Atl. 407 (a culvert was covered after a passenger walking beside the track fell into it.) *Contra,* Lederman *v.* Pennsylvania R. R., 165 Pa. St. 118, 30 Atl. 725, 44 Am. St. Rep. 644; Derk *v.* Northern Cent. R. Co., 164 Pa. St. 243, 30 Atl. 231; Pennsylvania Tel. Co. *v.* Varnau, 15 Atl. 624; McKee *v.* Bidwell, 74 Pa. St. 218; West Chester & P. R. Co. *v.* McElwee, 67 Pa. St. 311 (where a wagon standing on public scales beside a railroad track was struck by a passing train, and it appeared that the track was afterward moved further from the scales, the court saying: "If the proximity of the track did not increase the danger, why was it moved? And if it did not, then sufficient care was not used to avoid the collision"); Pennsylvania R. Co. *v.* Henderson, 51 Pa. St. 315.

Rhode Island. — McGarr *v.* National & P. Worsted Mills, 24 R. I. 447, 53 Atl. 320, 60 L. R. A. 122 (where after the lacing of a belt broke the belt was put together with a double lacing); Morancy *v.* Hennessey, 24 R. I. 205, 52 Atl. 1021.

South Carolina. — *Per* McIver, C. J., & Jones, J., in Farley *v.* Charleston Basket & Veneer Co., 51 S. C. 222, 241-244, 28 S. E. 193.

Tennessee. — Illinois Cent. R. Co. *v.* Wyatt, 104 Tenn. 432, 58 S. W. 308.

Texas. — St. Louis S. W. R. Co. *v.* Arnold (Tex. Civ. App.), 87 S. W. 173 (where after the derailment of a locomotive at a derailing switch defendant, as claimed by plaintiff, cleared the place of grass and weeds); Talley *v.* Beever (Tex. Civ. App.), 78 S. W. 23 (where after the explosion of a tank on a machine defendant constructed them of brass instead of iron); Texas Trunk R. Co. *v.* Ayres, 83 Tex. 268, 18 S. W. 684; St. Louis A. & T. R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104; St. Louis A. & T. R. Co. *v.* Jones, 14 S. W. 309 (where after injury from fall of loose board from raised platform it was fastened in place); Missouri Pac. R. Co. *v.* Hennessey, 75 Tex. 155, 12 S. W. 608; Gulf C. & S. F. R. Co. *v.* McGowan, 73 Tex. 355, 11 S. W. 336 (the accumulation of back-water was prevented after the damage had occurred by enlarging a culvert).

Washington. — Carter *v.* Seattle, 21 Wash. 585, 59 Pac. 500 (hole in which plaintiff stepped was afterward filled up); Bell *v.* Washington Cedar Shingle Co., 8 Wash. 27, 35 Pac. 405. *Contra,* Columbia & P. S. R. Co. *v.* Hawthorne, 3 Wash. Ter. 353, 19 Pac. 25, *reversed* 144 U. S. 202.

Wisconsin. — Kreider *v.* Wisconsin River Paper & Pulp Co., 110 Wis. 645, 86 N. W. 662 (where after an operative's clothes were caught on a set-crew on a revolving shaft the set-screw was counter-sunk); Jennings *v.* Albion, 90 Wis. 22, 62 N. W. 926; Lang *v.* Sanger, 76 Wis. 71, 44 N. W. 1095; Stewart *v.* Everts, 76 Wis. 35, 44 N. W. 1092, 20 Am. St. Rep. 17. *Contra,* Mulcairns *v.* Janesville, 67 Wis. 24, 36, 29 N. W. 565.

So in an action by an employe for injuries sustained because of the dangerous condition of the place

fendant it cannot be considered by the jury in determining whether or not the thing was in a defective condition at the time of the accident.[68] For such evidence has no legitimate tendency to show unsafeness before the accident,[69] and thus is irrelevant for the reason that the change may as well have been prompted by information gained from the accident as by information with which defendant was chargeable previously,[70] and accordingly the exercise of greater care after the accident does not reasonably tend to show a want of previous due care.[71]

(B.) Admissibility Where Subsequent Condition Shown. — Where, however, the condition of a place or thing at a subsequent time is shown to the jury by a map,[72] showing the position of a railing the

furnished him to work in, where it appeared that defendant had put up a guard just before the accident, that, however, proved to be insufficient, and evidence is introduced for defendant that the guard was intended to be permanent, it is error to permit plaintiff to show that the guard was taken out about two weeks after the accident and another arrangement substituted. Lally *v.* Crookston Lumb. Co., 82 Minn. 407, 85 N. W. 157.

In an action for a fall on a defective sidewalk it is error to specifically direct a witness' attention to repairs afterward made in the walk, although the person by whom they were made is not stated, and counsel asking the question stated it was only to identify the particular plank that was defective, and the place where it was at the time of the accident. Lombar *v.* East Tawas, 86 Mich. 14, 48 N. W. 947.

Where a street car passenger was injured in a collision between the car and a hook and ladder truck of the fire department, evidence that directly after the accident a brake was put onto the truck is not material in determining defendant's negligence. Heucke *v.* Milwaukee City R. Co., 69 Wis. 401, 34 N. W. 243.

68. Wagner *v.* Lamont (Mich.), 98 N. W. 1.

69. Atchison T. & S. F. R. Co. *v.* Parker, 5 C. C. A. 220, 55 Fed. 595; Barber Asphalt Pavement Co. *v.* Odasz, 8 C. C. A. 471, 60 Fed. 71; Columbia & P. S. R. Co. *v.* Hawthorne, 144 U. S. 202; Georgia Southern & F. R. Co. *v.* Cartledge, 116 Ga. 164, 42 S. E. 405, 59 L. R. A. 118; Hodges *v.* Percival, 132 Ill. 53, 23 N. E. 423; Alcorn *v.* Chicago & A. R. Co., 108 Mo. 81, 106-107, 18 S. W. 188, *affirming* on rehearing 14 S. W. 943; Getty *v.* Hamlin, 127 N. Y. 636, 27 N. E. 399; Illinois Cent. R. Co. *v.* Wyatt, 104 Tenn. 432, 58 S. W. 308.

70. Sappenfield *v.* Main St. & A. P. R. Co., 91 Cal. 48, 27 Pac. 590; Nalley *v.* Hartford Carpet Co., 51 Conn. 524, 50 Am. Rep. 47; Warren *v.* Wright, 103 Ill. 298; Langworthy *v.* Green, 88 Mich. 207, 217-218, 50 N. W. 130; Lombar *v.* East Tawas, 86 Mich. 14, 48 N. W. 947; Morse *v.* Minneapolis & St. L. R. Co., 30 Minn. 465, 16 N. W. 358; Aldrich *v.* Concord & M. R. R., 67 N. H. 250, 29 Atl. 408; Corcoran *v.* Peekskill, 108 N. Y. 151, 15 N. E. 309; Dougan *v.* Champlain Transp. Co., 56 N. Y. 1; Lowe *v.* Elliott, 109 N. C. 581, 14 S. E. 51; Baran *v.* Reading Iron Co., 202 Pa. St. 274, 51 Atl. 979.

71. *Per* Bramwell, B., in Hart *v.* Lancashire & Y. Ry., 21 L. T. (N. S.) (Eng.) 261; Prescott & N. R. Co. *v.* Smith, 70 Ark. 179, 67 S. W. 865; Colorado Elec. Co. *v.* Lubbers, 11 Colo. 505, 19 Pac. 479, 7 Am. St. Rep. 255; Hodges *v.* Percival, 132 Ill. 53, 23 N. E. 423; Alcorn *v.* Chicago & A. R. Co., 108 Mo. 81, 106-107, 18 S. W. 188; Ely *v.* St. Louis K. C. & N. R. Co., 77 Mo. 34.

72. Waterbury *v.* Waterbury Trac. Co., 74 Conn. 152, 166, 50 Atl. 3 (where the map showed the position of a railing before the accident, the accident being caused by the taking down of the railing, and where the witness testified to the different

removal of which caused the accident, or a diagram[73] or photograph[74] or evidence of measurements,[75] or by a view by the jury,[76] or by the testimony of witnesses,[77] it is proper to show what changes have taken place in the place or thing between the time of accident and the time to which the evidence relates.

(C.) Where Impracticability or Superfluity of Precautions Urged. Where evidence is given on defendant's behalf that an arrangement that would avoid the danger would be impracticable, or was unnecessary, evidence that after the accident the alteration was made is admissible.[78]

manner in which the railing was afterward put up).

73. Stouter *v.* Manhattan R. Co., 127 N. Y. 661, 27 N. E. 805; McRickard *v.* Flint, 114 N. Y. 222, 230, 21 N. E. 153.

74. St. Louis A. & T. R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104.

75. Choctaw O. & G. R. Co. *v.* McDade, 191 U. S. 64; Taylorville *v.* Stafford, 196 Ill. 288, 63 N. E. 624.

76. Lederman *v.* Pennsylvania R. R., 165 Pa. St. 118, 30 Atl. 725, 44 Am. St. Rep. 644; Bell *v.* Washington Cedar Shingle Co., 8 Wash. 27, 35 Pac. 405; Salladay *v.* Dodgeville, 85 Wis. 318, 326, 55 N. W. 696, 50 L. R. A. 541; Morton *v.* Smith, 48 Wis. 265, 4 N. W. 330, 33 Am. Rep. 811.

77. Where a passenger was injured by the derailment of a train, a witness' testimony as to the condition of the roadbed when he was employed in repairing it six months later is not rendered objectionable because incidentally referring to the repairs in a way not to suggest that they were made because of the accident. Jacksonville S. E. R. Co. *v.* Southworth, 135 Ill. 250, 25 N. E. 1093.

A witness who testified to the condition of the stringers in an alleged defective walk may, to explain how he derived his knowledge, incidentally state that after the injury the owner of the abutting lot took up the old sidewalk and laid a new one. Frohs *v.* Dubuque, 109 Iowa 219, 80 N. W. 341.

A witness' testimony that he was employed by the village soon after the accident to take up the sidewalk on which plaintiff fell, and that he found the stringers rotten and had no difficulty in lifting the boards therefrom, is admissible on plaintiff's behalf, where the point aimed at was the removal of the walk, affording the opportunity of examination, although *incidentally* it was drawn out that it was removed at the instigation of defendant. Alberts *v.* Vernon, 96 Mich. 549, 55 N. W. 1022.

78. Cincinnati H. & D. R. Co. *v.* Van Horne, 16 C. C. A. 182, 69 Fed. 139; Indianapolis & St. L. R. Co. *v.* Horst, 93 U. S. 291.

Where a section hand was killed by a collision of a train and the hand-car on which he was riding, and defendant's witness testifies that the rules governing the operation of hand-cars in vogue at the time of the accident were the best practicable, he may properly be asked whether since the wreck he had not made an order that before hand-cars start out the person in charge must inquire as to the movement of trains. Quinn *v.* New York N. H. & H. R. Co., 56 Conn. 44, 53-54, 12 Atl. 97, 7 Am. St. Rep. 284.

The fact that the supports of a bridge that stood in a highway diagonally, and into which plaintiff's horse ran, had since been removed, is admissible to show that the obstruction was unnecessary. Dillon *v.* Raleigh, 124 N. C. 184, 32 S. E. 548.

Where a train was derailed by sand that had washed onto the track, and defendant contended that the washing of the sand could not be prevented, evidence that the difficulty had been obviated by a change is admissible. St. Louis A. & T. R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104.

Where defendant testifies that there was no occasion to put a

(D.) To Show Cause. — Moreover, where it is denied that the alleged defect was the cause of the damage sustained, evidence that since the defect was removed there had been no recurrence of the damage is admissible.[79]

(E.) To Show Defendant's Control. — Likewise, where defendant denies his control of or responsibility for the structure or thing, evidence that after the accident he repaired it is proper.[80]

(F.) Where Good Repair at Time of Accident Claimed. — It is disputed whether the fact that defendant gives specific testimony that the structure or thing was in good repair at the time of the accident will warrant the admission of evidence of repairs after the accident to contradict him.[81] Where the evidence as to the condition of the structure or thing at the time of accident is in conflict, evidence of subsequent changes is admissible in corroboration of the testimony of witnesses that a defect existed there at the time of accident.[82]

guard-rail at the rear end of a ferry boat and that it was not customary, evidence that after plaintiff's team fell off he put a rail at the rear end of the boat is admissible. Frierson *v.* Frazier (Ala.), 37 So. 825.

79. The fact that after an obstruction was removed from the culvert under defendant's embankment the water immediately ran off, whereas prior thereto plaintiff's property had been damaged by backwater, is admissible to show the cause of the overflow. Texas & N. O. R. Co. *v.* Anderson (Tex. Civ. App.), 61 S. W. 424.

80. Poor *v.* Sears, 154 Mass. 539, 548-549, 28 N. E. 1046, 26 Am. St. Rep. 272; Brennan *v.* St. Louis, 92 Mo. 482, 2 S. W. 481; Skottowe *v.* Oregon S. L. & U. N. R. Co., 22 Or. 430, 30 Pac. 222, 16 L. R. A. 593.

Where, however, a stipulation admitting defendant's responsibility for the defect causing the accident is in evidence, it is error to receive evidence that defendant city sent a notice to the abutting owner requiring him to repair the defective sidewalk. Bailey *v.* Kansas City (Mo.), 87 S. W. 1182. *Contra,* Clapper *v.* Waterford, 131 N. Y. 382, 30 N. E. 240, holding such evidence not admissible to show defendant's control, or that it had funds on hand to repair it.

81. **Evidence Admissible.** Where on direct examination defendant's witness testifies that a certain belt-shifter, from the alleged inadequacy of which a machine suddenly started, was a safe and proper appliance, he may on cross-examination be asked whether after the injury he did not substitute another appliance for it. Going *v.* Alabama Steel & Wire Co. (Ala.), 37 So. 784.

Where a witness for defendant testifies that a certain walk was in good repair at the place of accident before, at the time of and after the accident, evidence of subsequent repairs is clearly competent to refute defendant's claim. Parker *v.* Ottumwa, 113 Iowa 649, 85 N. W. 805.

Evidence Inadmissible. — The fact that the testimony of subsequent repairs is brought out on the cross-examination of defendant's witness, who testified that at the time of accident the machinery was in good condition, does not render it admissible. Bell *v.* Washington Cedar Shingle Co., 8 Wash. 27, 35 Pac. 405.

82. Where some witnesses testified that there was a depression in the track where a locomotive was derailed, and others that there was not, evidence that a few minutes after the accident defendant's section gang came up and tamped dirt under the ties at that place is admissible on the question of the condition of the track. Kuhns *v.* Wisconsin, I. & N. R. Co., 76 Iowa 67, 40 N. W. 92.

Where it was in dispute as to whether or not a turn-table by which a child was injured was locked at the time of accident, evidence that after the accident the station agent locked the turn-table is admissible.

(a.) *Cross-Examination of Defendant.* — Where a defendant gives testimony that after the accident he ordered a change, it is proper to cross-examine him in respect to his motive therefor.[83]

(b.) *Changes by Third Parties.* — It seems, however, that the fact that alterations were afterward made by a third person is admissible.[84]

(2.) The Exceptional Rule. — In a few jurisdictions, evidence of alterations, repairs or additional safeguards put in after the accident is admissible as tending to show defective condition at the time of the accident, although not for the purpose of charging defendant with notice of the defect.[85] It is an admission of negligence from conduct, of some slight value, subject to explanation by the defendant.[86]

7. Existence or Non-Existence of Other Defects. — A. Evidence of Other Defects. — a. *Defects Contributing to the Accident.* The existence of defects other than the defect immediately causing the accident may always be shown in case they also contributed to the injury.[87]

Chicago B. & Q. R. Co. *v.* Krayenbuhl, 65 Neb. 889, 91 N. W. 880, 59 L. R. A. 920.

83. Murphy *v.* Stanley, 136 Mass. 133.

84. Jeffersonville *v.* McHenry, 22 Ind. App. 10, 53 N. E. 183.

85. Consolidated Kansas City Smelt. & Ref. Co. *v.* Tinchert, 5 Kan. App. 130, 48 Pac. 889 (where after certain boiler plates standing on edge had fallen over on an employe a stake was driven in front of them); Harter *v.* Atchison T. & S. F. R. Co., 55 Kan. 250, 38 Pac. 778 (where after the derailment of a locomotive at a switch the switch was repaired); Olathe *v.* Mizee, 48 Kan. 435, 29 Pac. 754, 30 Am. St. Rep. 308 (after a person fell into an excavation of a city street a warning light was placed in position); Atchison T. & S. F. R. Co. *v.* McKee, 37 Kan. 592, 603, 15 Pac. 484; St. Louis & S. F. R. Co. *v.* Weaver, 35 Kan. 412, 432-433, 11 Pac. 408, 57 Am. Rep. 176 (after a locomotive was derailed by the washout of a culvert the railroad replaced it with a larger one); Emporia *v.* Schmidling, 33 Kan. 485, 6 Pac. 893 (where the evidence came out incidentally); Atchison T. & S. F. R. Co. *v.* Retford, 18 Kan. 245 (after a baggageman on a train was struck by a structure beside the track while he was leaning out of a moving car, the track was moved further from the structure); St. Joseph & D. C. R. Co. *v.* Chase, 11 Kan. 47, 56 (after a fire was set by a locomotive the smoke stack was changed). *Contra*, Cherokee & P. Coal & Min. Co. *v.* Britton, 3 Kan. App. 292, 45 Pac. 100, 107-108.

86. Savannah F. & W. R. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183; Central R. R. *v.* Gleason, 69 Ga. 200; Augusta & S. R. Co. *v.* Renz, 55 Ga. 126; St. Louis & S. F. R. Co. *v.* Weaver, 35 Kan. 412, 432-433, 11 Pac. 408, 57 Am. Rep. 176; Atchison T. & S. F. R. Co. *v.* Retford, 18 Kan. 245; St. Joseph & D. C. R. Co. *v.* Chase, 11 Kan. 47, 56; O'Leary *v.* Mankato, 21 Minn. 65; Columbia & P. S. R. Co. *v.* Hawthorne, 3 Wash. Ter. 353, 19 Pac. 25.

87. Alabama G. S. R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722; Pattee *v.* Chicago M. & St. P. R. Co., 5 Dak. 267, 38 N. W. 435; Harrison *v.* Ayrshire, 123 Iowa 528, 99 N. W. 132 (where defendant claimed that plaintiff could not have broken through a plank in a sidewalk as claimed, evidence that a stringer under the walk at or near the place of accident was in such a condition as to allow the board to break is admissible); Holyoke *v.* Grand Trunk R. Co., 48 N. H. 541 (where, a train being derailed, evidence of the un-

b. *Non-Contributing Defects.* — Moreover, in some jurisdictions, other defects not so contributing, when of similar nature and in the vicinity of the defect causing the accident in suit, may also be shown,[88] at least when resulting from the same general cause,[89] in order to show notice to the defendant of the defective condition.[90] It is also said that such evidence is admissible to show defective construction and maintenance of the place in question,[91] but this

even condition of the track in the previous thirty-four miles was admitted to show that it might unfit the wheels of the train for use, it being in the discretion of the trial court whether or not such evidence was too remote for that purpose); Coates *v.* Canaan, 51 Vt. 131, 139.

88. *Colorado.* — Colorado City *v.* Smith, 17 Colo. App. 172, 67 Pac. 909.

Illinois. — Taylorville *v.* Stafford, 196 Ill. 288, 63 N. E. 624.

Indiana. — Ft. Wayne *v.* Coombs, 107 Ind. 75, 87, 7 N. E. 743, 57 Am. Rep. 82.

Michigan. — Snyder *v.* Albion, 113 Mich. 275, 71 N. W. 475; Moore *v.* Kalamazoo, 109 Mich. 176, 66 N. W. 1089; Edwards *v.* Three Rivers, 102 Mich. 153, 60 N. W. 454; Kraatz *v.* Brush Elec. L. Co., 82 Mich. 457, 46 N. W. 787; O'Neil *v.* West Branch, 81 Mich. 544, 45 N. W. 1023. *Contra,* Tice *v.* Bay City, 78 Mich. 209, 44 N. W. 52; Armstrong *v.* Medbury, 67 Mich. 250, 34 N. W. 566, 11 Am. St. Rep. 585.

Oregon. — Leonard *v.* Southern Pacific Co., 21 Or. 555, 563, 28 Pac. 887, 15 L. R. A. 221.

Pennsylvania. — Grier *v.* Sampson, 27 Pa. St. 183.

Tennessee. — Illinois Cent. R. Co. *v.* Wyatt, 104 Tenn. 432, 58 S. W. 308; Nashville C. & St. L. R. Co. *v.* Johnson, 15 Lea 677.

Texas. — Texas & P. R. Co. *v.* De Milley, 60 Tex. 194. *Compare,* however, Missouri Pac. R. Co. *v.* Mitchell, 75 Tex. 77, 12 S. W. 810, excluding such evidence.

Wisconsin. — Conrad *v.* Ellington, 104 Wis. 367, 80 N. W. 456; Propsom *v.* Leatham, 80 Wis. 608, 50 N. W. 586; Shaw *v.* Sun Prairie, 74 Wis. 105, 42 N. W. 271; Randall *v.* Northwestern Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17. *Contra,* where other defect at remote distance, Stewart *v.* Everts, 76 Wis. 35, 44 N. W. 1092, 20 Am. St. Rep. 17.

89. Brown *v.* Owosso, 130 Mich. 107, 89 N. W. 568; Duncan *v.* Grand Rapids, 121 Wis. 626, 99 N. W. 317. See also Columbus *v.* Anglin, 120 Ga. 785, 48 S. E. 318.

90. Colorado City *v.* Smith, 17 Colo. App. 172, 67 Pac. 909; Taylorville *v.* Stafford, 196 Ill. 288, 63 N. E. 624; Ft. Wayne *v.* Coombs, 107 Ind. 75, 87, 7 N. E. 743, 57 Am. Rep. 82; Cleveland C. C. & I. R. Co. *v.* Newell, 104 Ind. 264, 275-276, 3 N. E. 836, 54 Am. Rep. 312; Brown *v.* Owosso, 130 Mich. 107, 89 N. W. 568; Moore *v.* Kalamazoo, 109 Mich. 176, 66 N. W. 1089; Edwards *v.* Three Rivers, 102 Mich. 153, 60 N. W. 454; O'Neil *v.* West Branch, 81 Mich. 544, 45 N. W. 1023; Illinois Cent. R. Co. *v.* Wyatt, 104 Tenn. 432, 58 S. W. 308; Texas & P. R. Co. *v.* De Milley, 60 Tex. 194; Propsom *v.* Leatham, 80 Wis. 608, 50 N. W. 586; Shaw *v.* Sun Prairie, 74 Wis. 105, 42 N. W. 271.

"While a single defect might escape the observation of even a careful man, and be therefore but evidence of slight neglect, yet, if the defects were numerous and patent, their existence, if continued for any considerable time, would be evidence of gross neglect, weak or strong in proportion to the number and character of defects, the length of time they had continued, and their openness to observation." Texas & P. R. Co. *v.* De Milley, 60 Tex. 194.

91. Ft. Wayne *v.* Coombs, 107 Ind. 75, 87, 7 N. E. 743, 57 Am. Rep. 82; Cleveland C. C. & I. R. Co. *v.* Newell, 104 Ind. 264, 275-276, 3 N. E. 836, 54 Am. Rep. 312; Snyder *v.* Albion, 113 Mich. 275, 71 N. W. 475; Leonard *v.* Southern Pacific Co., 21 Or. 555, 563, 28 Pac. 887, 15 L. R. A. 221; Grier *v.* Sampson, 27 Pa. St. 183; Randall *v.* Northwestern

has been denied.[92] The fact that the defect was not discovered until after the accident in suit does not render evidence in respect to it inadmissible.[93] In other jurisdictions, evidence of other non-contributing defects is not admissible for any purpose,[94] except perhaps to show the impracticability, by reason of the number of defects, of avoiding the defect by which the party was damnified.[95] For this purpose such evidence is also admissible in the former group of jurisdictions.[96]

c. *Same Defect at Other Times.* — Where the defect in suit is transitory, evidence that at previous times under similar conditions the defect had existed is admissible to show that the particular defect in suit was caused by a permanent defective condition for which the defendant was liable, and of which he had notice.[97]

B. Good Condition in Other Respects. — The fact that the

Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17.

92. Hoffman *v.* North Milwaukee, 118 Wis. 278, 95 N. W. 274.

93. Alexandria Min. & Exploring Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680.

94. *Dakota.* — Pattee *v.* Chicago M. & St. P. R. Co., 5 Dak. 267, 38 N. W. 435.

Iowa. — Whittlesey *v.* Burlington C. R. & N. R. Co., 121 Iowa 597, 90 N. W. 516; Conklin *v.* Marshalltown, 66 Iowa 122, 23 N. W. 294. *Contra,* Ledgerwood *v.* Webster City, 93 Iowa 726, 61 N. E. 1089; Grahlman *v.* Chicago St. P. & K. C. R. Co., 78 Iowa 564, 43 N. W. 529, 5 L. R. A. 813.

Kansas. — Southern Kansas R. Co. *v.* Walsh, 45 Kan. 653, 26 Pac. 45.

Kentucky. — Louisville & N. R. Co. *v.* Fox, 11 Bush 495, 505-506.

Maryland. — United Elec. L. & P. Co. *v.* State, 60 Atl. 248.

Minnesota. — Morse *v.* Minneapolis & St. L. R. Co., 30 Minn. 465, 16 N. W. 358.

Missouri. — Hipsley *v.* Kansas City St. J. & C. B. R. Co., 88 Mo. 348.

North Carolina. — Grant *v.* Raleigh & G. R. Co., 108 N. C. 462, 13 S. E. 209.

Vermont. — Coates *v.* Canaan, 51 Vt. 131, 139.

In Bailey *v.* Centerville, 108 Iowa 20, 78 N. W. 831, however, where evidence of the defective condition of a walk on an entire block was given, it was held not error to permit evidence of its condition at a place two hundred feet from the place of accident.

95. Hollingworth *v.* Ft. Dodge (Iowa), 101 N. W. 455.

96. Galveston H. & S. A. R. Co. *v.* Matula (Tex.), 19 S. W. 376; Boyce *v.* Wilbur Lumb. Co., 119 Wis. 642, 97 N. W. 563.

97. Upham *v.* Salem, 162 Mass. 483, 39 N. E. 178 (where at other times during the same winter ridges of ice and snow collected at the same place on a sidewalk); Berrenberg *v.* Boston, 137 Mass. 231, 50 Am. Rep. 296; Brown *v.* Swanton, 69 Vt. 53, 37 Atl. 280 (where at other times in different years the water overflowed a certain culvert). *Compare,* however, Neal *v.* Boston, 160 Mass. 518, 36 N. E. 308, where similar evidence was excluded. It was also excluded in Gillrie *v.* Lockport, 122 N. Y. 403, 25 N. E. 357, and Crawford *v.* New York, 68 App. Div. 107, 74 N. Y. Supp. 261, *affirmed* without opinion, 174 N. Y. 518, 66 N. E. 1106, in which cases it does not, however, appear that it was offered for the specific purpose for which it was admitted in the cases cited at the beginning of this note.

A subsequent freshet, causing a similar flood, was, however, held inadmissible in City Council *v.* Lombard, 93 Ga. 284, 20 S. E. 312.

structure is in proper condition at places other than where the accident occurred cannot be shown.[98]

8. Other Defective or Sufficient Things or Appliances. — Where the particular locomotive that started the fire for which a suit is brought is not identified, evidence that many of defendant's locomotives were equipped with a defective type of spark-arrester,[99] or with the most approved appliances,[1] is admissible. Where, however, the appliance that caused the injury is identified, the fact that other appliances are in defective condition cannot be proved.[2]

9. Concomitant Acts and Circumstances. — In determining questions of negligence, all the concomitant facts and circumstances of the accident may be considered,[3] as the means taken to avoid the accident,[4] the conduct of the persons involved in the accident at the

98. Where a horse escaped from a pasture through a defect in a fence, evidence that at other points the fence was in proper condition is immaterial. Lucia *v.* Meech, 68 Vt. 175, 34 Atl. 695.

99. Gowen *v.* Glaser (Pa.), 10 Atl. 417.

It is, however, error to admit in evidence an old and discarded spark-arrester that had been picked up beside defendant's right of way several weeks before the accident. Kenney *v.* Hannibal & St. J. R. Co., 70 Mo. 243, 251-252.

1. Haley *v.* St. Louis K. C. & N. Ry., 69 Mo. 614 (Napton & Norton, JJ., *dissenting*).

2. Henderson *v.* Philadelphia & R. R. Co., 144 Pa. St. 461, 477-478, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299 (where the locomotive that set a fire was identified).

3. McGrail *v.* Kalamazoo, 94 Mich. 52, 53 N. W. 955; *Per* Earl & Rapallo, JJ., in McGrath *v.* New York C. & H. R. R. Co., 63 N. Y. 522; Lake Shore & M. S. R. Co. *v.* Herrick, 49 Ohio St. 25, 29 N. E. 1052; McVey *v.* Chesapeake & O. R. Co., 46 W. Va. 111, 32 S. E. 1012.

Where freight was burned up while awaiting delivery at a railroad station, evidence of the sufficiency of the freight room for the business, and of the manner in which it was occupied at the time of the fire, is admissible. Stowe *v.* New York B. & P. R. Co., 113 Mass. 521.

Weight of Vehicle Which Broke Through Bridge. — Fulton Iron & Engine Wks. *v.* Kimball Twp., 52 Mich. 146, 17 N. W. 733.

Where a child was run down by defendant's horse and buggy it is competent for plaintiff to prove that defendant was training his horse in the streets just prior to and at the time of the accident. Trow *v.* Thomas, 70 Vt. 580, 41 Atl. 652.

Extent of Travel at Place of Injury. — Highland Ave. & B. R. Co. *v.* Sampson, 112 Ala. 425, 20 So. 566 (travel at railroad crossing); Indianapolis U. R. Co. *v.* Boettcher, 131 Ind. 82, 28 N. E. 551 (where locomotive whistle was blown near street, and the amount of travel on the street at that point was shown); Marquet *v.* La Duke, 96 Mich. 596, 55 N. W. 1006 (where a child on certain hotel premises was seized by a bear kept thereon, and evidence that the place was frequented with the defendant's acquiescence was admitted).

Speed of Train or Car. — Nehrbas *v.* Central Pac. R. Co., 62 Cal. 320, 333; Golinvaux *v.* Burlington C. R. & N. R. Co. (Iowa), 101 N. W. 465; Stepp *v.* Chicago R. I. & P. R. Co., 85 Mo. 229.

Schedule Time. — Price *v.* Charles Warner Co., 1 Pen. (Del.) 462, 42 Atl. 699 (where a street car ran down a wagon); Killian *v.* Georgia R. & Bkg. Co., 97 Ga. 727, 25 S. E. 384 (where passenger was injured by starting of train without giving time to alight).

Length of Time Plank Walk Should Last. — McCartney *v.* Washington (Iowa), 100 N. W. 80; McConnell *v.* Osage, 80 Iowa 293, 45 N. W. 550, 8 L. R. A. 778.

4. Central of Georgia R. Co. *v.*

time thereof,[5] the cause of the act or omission that caused the injury,[6] the purpose for which an act co-operating to produce the injury was done,[7] the necessity for doing such act,[8] or the extent of the damage done by the accident.[9] The hours of service of defendant's servants cannot, however, be considered,[10] and it is questionable whether the number of miles of street for which defendant is

Bagley (Ga.), 49 S. E. 780 (where locomotive engineer testified to specific things he had done to avert a collision); Hasie *v.* Alabama & V. R. Co., 78 Miss. 413, 28 So. 941 (same facts).

5. Caveny *v.* Neely, 43 S. C. 70, 20 S. E. 806 (where negligent acts of driver of stage from time runaway started until the stage was upset are given); Dimmey *v.* Wheeling & E. G. R. Co., 27 W. Va. 32, 50, 55 Am. Rep. 292 (where testimony was given of how the driver of runaway horse car handled the lines and brake); Joslin *v.* Grand Rapids Ice & Coal Co., 53 Mich. 322, 19 N. W. 17 (similar facts); Holly *v.* Boston Gaslight Co., 8 Gray (Mass.) 123, 133, 69 Am. Dec. 233 (where child was injured by escape of gas from leak in defendant's pipe, and conduct of the child and her father was shown).

6. Where a horse driven by plaintiff was injured by rubbish washed down into a street by reason of the insufficiency of a certain culvert, it is error to exclude evidence of the origin and cause of the obstruction. Hazzard *v.* Council Bluffs, 79 Iowa 106, 44 N. W. 219.

Where it was claimed that plaintiff's cow, which was run down by a train, got on the track by reason of the opening of a gate when the cow pressed against it, evidence that there was a calf in the inclosure on the other side of the right of way is admissible as tending to show that the gate opened from pressure. Payne *v.* Kansas City St. J. & C. B. R. Co., 72 Iowa 214, 33 N. W. 633.

Where certain freight left exposed on a railroad freight platform was burned while awaiting delivery, evidence of the mode in which the fire occurred is clearly competent on the question of defendant's negligence. Stowe *v.* New York B. & P. R. Co., 113 Mass. 521.

7. Fogarty *v.* Bogert, 43 App. Div. 430, 60 N. Y. Supp. 81; Campion *v.* Rollwagen, 43 App. Div. 117, 59 N. Y. Supp. 308.

8. Where a teamster while delivering oil at a tank in a store from his oil wagon negligently held a light too close to the oil and it became ignited and burnt the store, testimony that on many previous occasions persons so delivering oil had used candles furnished by plaintiff with the plaintiff's acquiescence, is admissible to show the necessity for a light. Dore *v.* Babcock, 72 Conn. 408, 419, 44 Atl. 736.

In an action for collision between vehicles, testimony that plaintiff was without fault in occupying the position that he did with his buggy at and about the time of injury, what would have occurred had he done otherwise, and further that the driver of the other wagon was negligent in doing as he did, is admissible. Joslin *v.* Grand Rapids Ice & Coal Co., 53 Mich. 322, 19 N. W. 17.

Where a person was killed by the grating over a hatchway closing upon him as he was delivering coal down the hatchway, evidence that in the performance of his duty decedent was required to pass through the hatchway to get a signature to his delivery ticket is erroneously rejected. Galvin *v.* New York, 112 N. Y. 223, 19 N. E. 675.

9. Chicago St. L. & P. R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280; Mullin *v.* Boston Elev. R. Co., 185 Mass. 522, 70 N. E. 1021; [illegible] *v.* Missouri Pac. R. Co. (Mo. App.), 85 S. W. 627; Brusberg *v.* Milwaukee L. S. & W. R. Co., 55 Wis. 106, 12 N. W. 416.

10. Philadelphia City Pass. R. Co. *v.* Henrice, 92 Pa. St. 431 (where it was held error to permit evidence of the hours of service of the drivers and conductors in charge of defendant's street cars, one of which ran down a child, the evidence being too remote).

responsible can be shown either on question of notice or reasonable time for repairs.[11]

10. Occurrence or Non-Occurrence of Other Accidents. — A. From Same Place or Thing. — a. *Defective Operation of Appliance on Other Occasions.* — Defective operation of a mechanical appliance or contrivance on other occasions, when apparently in the same condition, is always admissible to show a defect in its construction or maintenance and notice to defendant that its operation is dangerous.[12] The defendant is at liberty to prove, if he can, that

11. Admissible. — Where a person fell on an icy sidewalk, evidence as to the number of miles of streets is admissible on the question of the defendant's negligence in failing to remove the ice, for the time within which the work can be done depends largely on the amount of it. Crawford *v.* New York, 68 App. Div. 107, 74 N. Y. Supp. 261, *affirmed* without opinion, 174 N. Y. 518, 66 N. E. 1106.

Inadmissible. — Where a person fell into a hole in a sidewalk, evidence as to the number of miles of city streets is not admissible on the question of notice to defendant, nor on what would constitute a reasonable time for repairs. Roanoke *v.* Shull, 97 Va. 419, 34 S. E. 34.

12. *Georgia.* — Georgia Cotton Oil Co. *v.* Jackson, 112 Ga. 620, 37 S. E. 873 (where similar defective operation of a machine one and three weeks after the accident caused other similar injuries).

Massachusetts. — Kingman *v.* Lynn & B. R. Co., 181 Mass. 387, 64 N. E. 79 (where a ring in a car floor frequently rose on edge when the car was in motion); Myers *v.* Hudson Iron Co., 150 Mass. 125, 138-139, 22 N. E. 631, 15 Am. St. Rep. 176.

New Hampshire. — Willey *v.* Portsmouth, 35 N. H. 303, 311.

New York. — Evans *v.* Keystone Gas Co., 148 N. Y. 112, 42 N. E. 513, 51 Am. St. Rep. 681, 30 L. R. A. 651 (where damage to other trees by the escape of gas from a gas main was shown); McCarragher *v.* Rogers, 120 N. Y. 526, 24 N. E. 812 (it is proper for a witness giving such testimony to add that the machine acted the same way at the time of the accident in suit as at the time to which he testified); Hoyt *v.* New York L. E. & W. R. Co., 118 N. Y. 399, 23 N. E. 565 (Bradley, J., *dissenting*), (where a witness was asked whether the same mishap happened to a wagon the next day); Baird *v.* Daly, 68 N. Y. 547 (where other instances where a scow proved unseaworthy were shown). *Compare*, however, Mailler *v.* Express Propeller Line, 61 N. Y. 312.

Ohio. — Findlay Brew. Co. *v.* Bauer, 50 Ohio St. 560, 35 N. E. 55 (Spear & Burkett, JJ., *dissenting*).

Pennsylvania. — Sopherstein *v.* Bertels, 178 Pa. St. 401, 35 Atl. 1000 (where the previous improper fall of the trip-hammer of a machine was shown).

Rhode Island. — Moran *v.* Corliss Steam Engine Co., 21 R. I. 386, 43 Atl. 874, 45 L. R. A. 267 (where electric shock communicated on another occasion by reason of the same defective insulation was shown); Butcher *v.* Providence Gas Co., 12 R. I. 149, 34 Am. Rep. 626 (where damage to another green house from the same leak in a gas pipe was shown).

Virginia. — Richmond R. & Elec. Co. *v.* Bowles, 92 Va. 738, 24 S. E. 388, where repeated breakings of defendant's trolley wire were shown.

"Inspection itself may indicate some defect of machine, affecting its safety or usefulness; but as is most usually the case, its defective character, whatever it may be, is more clearly observed in its operation. Experiment is the final and most conclusive test of its safety as well as its usefulness." Findlay Brew. Co. *v.* Bauer, 50 Ohio St., 560, 35 N. E. 55.

Thus in case of fire by sparks from a locomotive, evidence of other fires spread by the same locomotive is admissible.

Arkansas. — St. Louis & S. F. R. Co. *v.* Jones, 59 Ark. 105, 26 S. W. 595.

California. — Steele *v.* Pacific

a similar accident occurred from some other cause than a defect in the machinery. Where, however, it appears that the thing was in a substantially different condition at the time of the other accident such testimony is inadmissible.[13] It is not objectionable as raising collateral issues, for a fact cannot be said to be collateral when it tends directly to establish or disprove a principal fact in dispute.[14]

(1.) Fright of Horses on Other Occasions. — The fact that other horses were frightened by a certain structure or thing at a certain place, is admissible, except in Indiana,[15] as tending to show that the structure

Coast R. Co., 74 Cal. 323, 15 Pac. 851; Butcher *v.* Vaca Valley & C. L. R. Co., 67 Cal. 518, 8 Pac. 174, *affirming* on rehearing, 5 Pac. 359 (where the fact that a fire was caused by the same locomotive at a point one-quarter mile distant two weeks after the fire in question was put in evidence); Henry *v.* Southern Pac. R. Co., 50 Cal. 176.

Florida. — Jacksonville T. & K. W. R. Co. *v.* Peninsular Land Tranps. & Mfg. Co., 27 Fla 1, 104-105, 9 So. 661, 17 L. R. A. 33.

Illinois. — Lake Erie & W. R. Co. *v.* Middlecoff, 150 Ill. 27, 39, 37 N. E. 660.

Indiana. — *Per* Ross, J., in dissenting opinion in Evansville & T. H. R. Co. *v.* Keith, 8 Ind. App. 57, 35 N. E. 296.

Iowa. — Lanning *v.* Chicago B. & Q. R. Co., 68 Iowa 502, 27 N. W. 478; Slossen *v.* Burlington, C. R. & N. R. Co., 60 Iowa 214, 14 N. W. 244.

Massachusetts. — Loring *v.* Worcester & N. R. Co., 131 Mass. 469 (where the fire in suit was set Saturday afternoon, and evidence of a fire set by the engine on the return trip Monday morning was admitted).

Michigan. — Ireland *v.* Cincinnati W. & M. R. Co., 79 Mich. 163, 44 N. W. 426.

Mississippi. — Tribette *v.* Illinois Cent. R. Co., 71 Miss. 212, 234, 13 So. 899.

Missouri. — Patton *v.* St. Louis & S. F. R. Co., 87 Mo. 117, 56 Am. Rep. 446.

New York. — Jacobs *v.* New York C. & H. R. R. Co., 94 N. Y. Supp. 954. (See Collins *v.* New York C. & H. R. R. Co., 109 N. Y. 243, 16 N. E. 50, *holding* that where the fire offered in evidence occurred six months after the one in suit, evidence must be given that at the latter date the engine was in the same condition as at the former).

Virginia. — Brighthope R. Co. *v.* Rogers, 76 Va. 443.

Other Steam-Generating Appliances. — Carpenter *v.* Laswell, 63 S. W. 609, 23 Ky. L. Rep. 686; Hoyt *v.* Jeffers, 30 Mich. 181, 189-190; *Per* Sutherland, J., in Hinds *v.* Barton, 25 N. Y. 544; Myers *v.* Hudson Iron Co., 150 Mass. 125, 138-139, 22 N. E. 631, 15 Am. St. Rep. 176.

13. Menominee River Sash & Door Co. *v.* Milwaukee & N. R. Co., 91 Wis. 447, 462, 65 N. W. 176, where a locomotive set the fire in suit on September 30, and evidence that it caused fires in the preceding April, May and June was held not proper, where it appeared that the engine was thoroughly overhauled in July. Likewise evidence of fires set by it in November and December following is incompetent.

14. Findlay Brew. Co. *v.* Bauer, 50 Ohio St. 560, 35 N. E. 55 (Spear & Burkett, JJ., *dissenting*).

The evidence is not objectionable as raising a multitude of collateral issues any more than any other circumstantial evidence where the circumstances are equally numerous. Hoyt *v.* Jeffers, 30 Mich. 181, 189-190.

The fact that the testimony presents a collateral issue as to whether the former accident was attributable to the fault of the machine or of the operator thereof does not render it inadmissible. McCarragher *v.* Rogers, 120 N. Y. 526, 24 N. E. 812.

15. Cleveland, C. C. & I. R. Co. *v.* Wynant, 114 Ind. 525, 17 N. E. 118, 5 Am. St. Rep. 644.

"The only way in which knowl-

or thing was calculated to frighten ordinarily gentle horses.[16]

(2.) Other Injuries From Defective Grounds or Structures. — The fact that other persons have stumbled or fallen or been injured by the same defect as produced the injury in suit may, in many jurisdictions, be shown.[17] Where the other accident occurred before the

edge of this subject could ever be acquired is by observation of the effect of the object, or of similar objects, upon the animal. Inasmuch as no two flags hung in different places with different surroundings could ever present precisely the same appearance in different aspects to an unreasoning animal, the most satisfactory way of ascertaining the fact would be by observing the effect of this particular flag upon different horses. In all the observations and experiments, one factor in the problem, the swinging flag, would always be the same. The other factor, the horse, would always truly exhibit his real feelings, and the only possible difference in the results of different observations would arise from the difference in the horses." Bemis *v.* Temple, 162 Mass. 342, 38 N. E. 970, 26 L. R. A. 254.

16. *England.* — Brown *v.* Eastern & M. R. Co., 22 Q. B. Div. 391.

Connecticut. — House *v.* Metcalf, 27 Conn. 631.

Massachusetts. — Bemis *v.* Temple, 162 Mass. 342, 38 N. E. 970, 26 L. R. A. 254 (by a majority of the court).

Michigan. — Smith *v.* Sherwood Twp., 62 Mich. 159, 28 N. W. 806.

New Hampshire. — Darling *v.* Westmoreland, 52 N. H. 401, 13 Am. Rep. 55.

North Carolina. — Harrell *v.* Albemarle & R. R. Co., 110 N. C. 215, 14 S. E. 687.

Pennsylvania. — Potter *v.* Natural Gas Co., 183 Pa. St. 575, 590-591, 39 Atl. 7.

Texas. — International & G. N. R. Co. *v.* Mercer (Tex. Civ. App.), 78 S. W. 562 (the fact that the other horse concerning which testimony was given approached the object from the opposite direction does not render the testimony inadmissible).

17. *United States.* — District of Columbia *v.* Armes, 107 U. S. 519.

Alabama. — Davis *v.* Kornman, 37 So. 789; Birmingham U. R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525. *Contra.* — Davis *v.* Alexander City, 137 Ala. 206, 33 So. 863; Birmingham *v.* Starr, 112 Ala. 98, 20 So. 424.

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

Connecticut. — Bailey *v.* Trumbull, 31 Conn. 581.

Georgia. — Gilmer *v.* Atlanta, 77 Ga. 688; Augusta *v.* Hafers, 61 Ga. 48, 34 Am. Rep. 95.

Illinois. — Mobile & O. R. Co. *v.* Vallowe, 214 Ill. 124, 73 N. E. 416; Taylorville *v.* Stafford, 196 Ill. 288, 63 N. E. 624; Bloomington *v.* Legg, 151 Ill. 9, 37 N. E. 696, 42 Am. St. Rep. 216; Aurora *v.* Brown, 12 Ill. App. 122, 130-132.

Indiana. — Hopkins *v.* Boyd, 18 Ind. App. 63, 47 N. E. 480; Salem Stone & Lime Co. *v.* Griffin, 139 Ill. 141, 38 N. E. 411; Toledo St. L. & K. C. R. Co. *v.* Milligan, 2 Ind. App. 578, 28 N. E. 1019; Goshen *v.* England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; Delphi *v.* Lowery, 74 Ind. 520, 39 Am. Rep. 98.

Iowa. — Yeager *v.* Spirit Lake, 115 Iowa 593, 88 N. W. 1095; Smith *v.* Des Moines, 84 Iowa 685, 51 N. W. 77.

Compare the following cases, holding that such evidence is only admissible in connection with a witness' testimony as to the condition of the thing to show what had directed the witness' attention to the defect. Bailey *v.* Centerville, 88 N. W. 379; Frohs *v.* Dubuque, 109 Iowa 219, 80 N. W. 341. *Contra*, Langhammer *v.* Manchester, 99 Iowa 295, 68 N. W. 688; Mathews *v.* Cedar Rapids, 80 Iowa 459, 45 N. W. 894, 20 Am. St. Rep. 436; Hudson *v.* Chicago & N. W. R. Co., 59 Iowa 581, 13 N. W. 735, 44 Am. Rep. 692.

Kansas. — Junction City *v.* Blades, 1 Kan. App. 85, 41 Pac. 677; Missouri Pac. R. Co. *v.* Neiswanger, 41 Kan. 621, 21 Pac. 582, 13 Am. St. Rep. 304; Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933; Union Pac. R. Co. *v.* Hand, 7 Kan. 380, 389.

accident in suit, such evidence is admissible as showing defendant's notice of the defect.[18] It is also admitted as tending to show the dangerous character of the defect,[19] except in Indiana and Michigan,

Kentucky. — Yates *v.* Covington, 83 S. W. 592, 26 Ky. L. Rep. 1154.

Michigan. — Moore *v.* Kalamazoo, 109 Mich. 176, 66 N. W. 1089; Alberts *v.* Vernon, 96 Mich. 549, 55 N. W. 1022.

Minnesota. — Burrows *v.* Lake Crystal, 61 Minn. 357, 63 N. W. 745; Phelps *v.* Winona & St. P. R. Co., 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867; Morse *v.* Minneapolis & St. L. R. Co., 30 Minn. 465, 16 N. W. 358; Kelly *v.* Southern Minnesota R. Co., 28 Minn. 98, 9 N. W. 588; Phelps *v.* Mankato, 23 Minn. 276.

New Hampshire. — Cook *v.* New Durham, 64 N. H. 419, 13 Atl. 650; Bullard *v.* Boston & M. R. R., 64 N. H. 27, 5 Atl. 838, 10 Am. St. Rep. 367; Griffin *v.* Auburn, 58 N. H. 121. *Contra,* Hubbard *v.* Concord, 35 N. H. 52, 69 Am. Dec. 520.

New York. — Withers *v.* Brooklyn Real Estate Exchange, 94 N. Y. Supp. 328; Fordham *v.* Gouverneur Village, 160 N. Y. 641, 549, 55 N. E. 290; Auld *v.* Manhattan L. Ins. Co., 34 App. Div. 491, 54 N. Y. Supp. 222, *affirmed* without opinion, 165 N. Y. 610, 58 N. E. 1085; Evans *v.* Keystone Gas Co., 148 N. Y. 112, 42 N. E. 513, 51 Am. St. Rep. 681, 30 L. R. A. 651; Pomfrey *v.* Saratoga Springs, 104 N. Y. 459, 11 N. E. 43; Wooley *v.* Grand St. & N. R. Co., 83 N. Y. 121, 130.

Texas. — Ft. Worth & D. C. R. Co. *v.* Measles, 81 Tex. 474, 17 S. W. 124.

Vermont. — Walker *v.* Westfield, 39 Vt. 246; Kent *v.* Lincoln, 32 Vt. 591.

Washington. — Smith *v.* Seattle, 33 Wash. 481, 74 Pac. 674.

Compare, however, Bridger *v.* Asheville & S. R. Co., 27 S. C. 456, 3 S. E. 860, 13 Am. St. Rep. 653, where evidence of a former accident to a child on a turn-table was held inadmissible where it was not shown that knowledge thereof was brought home to defendant.

18. *United States.* — District of Columbia *v.* Armes, 107 U. S. 519.

Illinois. — Mobile & O. R. Co. *v.* Vallowe, 214 Ill. 124, 73 N. E. 416; Bloomington *v.* Legg, 151 Ill. 9, 37 N. E. 696, 42 Am. St. Rep. 216.

Indiana. — Hopkins *v.* Boyd, 18 Ind. App. 63, 47 N. E. 480; Salem Stone & Lime Co. *v.* Griffin, 139 Ind. 141, 38 N. E. 411; Toledo S. L. & K. C. R. Co. *v.* Milligan, 22 Ind. App. 578, 28 N. E. 1019; Goshen *v.* England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; Cleveland, C. C. & I. R. Co. *v.* Wynant, 114 Ind. 525, 17 N. E. 118, 5 Am. St. Rep. 644; Nave *v.* Flack, 90 Ind. 205, 214, 46 Am. Rep. 205; Delphi *v.* Lowery, 74 Ind. 520, 39 Am. Rep. 98.

Kansas. — Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933.

Kentucky. — Yates *v.* Covington, 83 S. W. 592, 26 Ky. L. Rep. 1154.

Michigan. — Moore *v.* Kalamazoo, 109 Mich. 176, 66 N. W. 1089; Alberts *v.* Vernon, 96 Mich. 549, 55 N. W. 1022.

Minnesota. — Burrows *v.* Lake Crystal, 61 Minn. 357, 63 N. W. 745; Phelps *v.* Mankato, 23 Minn. 276.

New York. — Withers *v.* Brooklyn Real Estate Exchange, 94 N. Y. Supp. 328; Auld *v.* Manhattan L. Ins. Co., 34 App. Div. 491, 54 N. Y. Supp. 222, *affirmed* without opinion, 165 N. Y. 610, 58 N. E. 1085.

Texas. — Ft. Worth & D. C. R. Co. *v.* Measles, 81 Tex. 474, 17 S. W. 124.

Washington. — Smith *v.* Seattle, 33 Wash. 481, 74 Pac. 674.

19. *United States.* — District of Columbia *v.* Armes, 107 U. S. 519.

Alabama. — Birmingham Union R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525.

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

Georgia. — Gilmer *v.* Atlanta, 77 Ga. 688.

Illinois. — Taylorville *v.* Stafford, 196 Ill. 288, 63 N. E. 624; Bloomington *v.* Legg, 151 Ill. 9, 37 N. E. 696, 42 Am. St. Rep. 216. *Contra,* Mobile & O. R. Co. *v.* Vallowe, 214 Ill. 124, 73 N. E. 416.

Iowa. — Smith *v.* Des Moines, 84 Iowa 685, 51 N. W. 77.

Kansas. — Junction City *v.* Blades,

where it is not admissible for such purpose, and where, consequently, evidence of accidents occurring after the accident in suit is excluded.[20] Such evidence is not, however, admissible to show other independent acts of negligence,[21] nor to show that any prudent man might sustain injuries thereat.[22] It is not objectionable as raising collateral issues,[23] nor as tending to mislead the jury,[24] nor as being in the nature of a surprise which the defendant might not be prepared to meet.[25] But where at the time of the other accident the grounds or structure were in a different condition the evidence is incompetent.[26] In other jurisdictions such facts are not admissible in evidence, because, it has been held, they would raise collateral issues, tending to surprise the adverse party and mislead and prejudice the jury.[27]

1 Kan. App. 85, 41 Pac. 677; Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933; Union Pac. R. Co. *v.* Hand, 7 Kan. 380, 389.

Kentucky. — Yates *v.* Covington, 83 S. W. 592, 26 Ky. L. Rep. 1154. ("The frequency of accidents at a particular place would seem to be good evidence of its dangerous character; at least, it is some evidence to that effect.")

Minnesota. — Phelps *v.* Winona & St. P. R. Co., 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867; Morse *v.* Minneapolis & St. L. R. Co., 30 Minn. 465, 16 N. W. 358.

New Hampshire. — Bullard *v.* Boston & M. R. R., 64 N. H. 27, 2 Atl. 838, 10 Am. St. Rep. 367; Griffin *v.* Auburn, 58 N. H. 121.

Vermont. — Kent *v.* Lincoln, 32 Vt. 591.

Washington. — Smith *v.* Seattle, 33 Wash. 481, 74 Pac. 674.

20. Cleveland, C. C. & I. R. Co. *v.* Wynant, 114 Ind. 525, 17 N. E. 118, 5 Am. St. Rep. 644; McGrail *v.* Kalamazoo, 94 Mich. 52, 53 N. W. 955.

21. Colorado Mtge. & Inv. Co. *v.* Rees, 21 Colo. 435, 42 Pac. 42; Bloomington *v.* Legg, 151 Ill. 9, 37 N. E. 696, 42 Am. St. Rep. 216; Morse *v.* Minneapolis & St. L. R. Co., 30 Minn. 465, 16 N. W. 358.

22. Aurora *v.* Brown, 12 Ill. App. 122, 131, *affirmed* Brown *v.* Aurora, 109 Ill. 165.

23. District of Columbia *v.* Armes, 107 U. S. 519; Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933; Morse *v.* Minneapolis & St. L. R. Co., 30 Minn. 465, 16 N. W. 358.

"It was not opening a collateral issue . . . but was direct to the material issue, viz.: What was the condition of the road? It involved no question of the care and diligence of the witness, or of any liability of the town by reason of what happened to the witness or his team. It was in part descriptive of the road as observed by the eye; and, in part, illustrative of the particulars of its condition, as by an experiment." Walker *v.* Westfield, 39 Vt. 246.

24. District of Columbia *v.* Armes, 107 U. S. 519.

25. For the character of the place of accident was one of the subjects of inquiry, and defendant should have been prepared to show its real character in the face of any proof bearing upon the subject. Smith *v.* Seattle, 33 Wash. 481, 74 Pac. 674.

26. Bloomington *v.* Legg, 151 Ill. 9, 37 N. E. 696, 42 Am. St. Rep. 216.

27. *California.* — Martinez *v.* Planel, 36 Cal. 578.

Florida. — Florida Cent. & P. R. Co. *v.* Mooney, 33 So. 1010.

Maine. — Bremner *v.* Newcastle, 83 Me. 415, 22 Atl. 382, 23 Am. St. Rep. 782; Branch *v.* Libbey, 78 Me. 321, 5 Atl. 71, 57 Am. Rep. 710; Parker *v.* Portland Pub. Co., 69 Me. 173, 31 Am. Rep. 262; Hubbard *v.* And. & Kin. R. Co., 39 Me. 506.

Maryland. — Wise *v.* Ackerman, 76 Md. 375, 390-392, 25 Atl. 424.

Massachusetts. — Marvin *v.* New Bedford, 158 Mass. 464, 33 N. E. 605; Menard *v.* Boston & M. R. Co., 150 Mass. 386, 23 N. E. 214; Blair *v.* Pelham, 118 Mass. 420; Kidder *v.*

b. *Non-Occurrence of Accidents.* — **(1.) Proper Operation on Other Occasions.** — When the proper construction or safe condition of machinery is in question, evidence that when apparently in the same condition it has worked properly is, in some cases, held to be competent.[28]

(2.) Freedom From Other Accidents. — In many jurisdictions, the fact of the non-occurrence of other accidents at the point of the alleged defect cannot be shown in evidence, for (as such courts hold) proof of such fact not only would tend to raise collateral issues, but further would have no tendency to disprove the dangerousness of the place.[29] But in other jurisdictions testimony that other persons while traversing the point of the alleged defect, apparently in the same manner as the person damnified, were not injured, is received to show the absence of a dangerous defect at that point (as such courts hold), and that the defect, if any there was, was not the

Dunstable, 11 Gray 342; Collins *v.* Dorchester, 6 Cush. 396.

Missouri. — Goble *v.* Kansas City, 148 Mo. 470, 50 S. W. 84.

New Jersey. — Temperance Hall Ass'n *v.* Giles, 33 N. J. L. 260.

Oregon. — Davis *v.* Oregon & Cal. R. Co., 8 Or. 172.

Virginia. — Moore *v.* Richmond, 85 Va. 538, 8 S. E. 387.

Wisconsin. — Kreider *v.* Wisconsin River Paper & Pulp Co., 110 Wis. 645, 86 N. W. 662; Richards *v.* Oshkosh, 81 Wis. 226, 51 N. W. 256; Phillips *v.* Willow, 70 Wis. 6, 34 N. W. 731, 5 Am. St. Rep. 114.

28. T. & H. Pueblo Bldg. Co. *v.* Klein, 5 Colo. App. 348, 38 Pac. 608; Tremblay *v.* Harnden, 162 Mass. 383, 38 N. E. 972. *Contra,* Hodges *v.* Bearse, 129 Ill. 87, 21 N. E. 613 (where in case of the injury of a passenger in an elevator by the fall thereof, evidence that no accident of any kind had happened to the elevator previous to the one in question during the four and one half years it had been in operation was held to be properly excluded as being immaterial and calculated to distract the jury by a multitude of collateral issues); Atkinson *v.* Goodrich Transp. Co., 69 Wis. 5, 31 N. W. 164 (where in case of a fire set by sparks from a steamboat funnel evidence that the same boat navigated the Chicago river among the lumber yards without setting any fires was held inadmissible).

Similarly evidence that sheep had on other occasions been dipped into a certain disinfectant without injury to their health is competent. Bair *v.* Struck, 29 Mont. 45, 54, 74 Pac. 69, 63 L. R. A. 481.

29. *California.* — Carty *v.* Boescke-Dawe Co., 2 Cal. App. Dec. 96.

Illinois. — Mobile & O. R. Co. *v.* Vallowe, 214 Ill. 124, 73 N. E. 416.

Indiana. — Bauer *v.* Indianapolis, 99 Ind. 56; Nave *v.* Flack, 90 Ind. 205, 46 Am. Rep. 205.

Maine. — Branch *v.* Libbey, 78 Me. 321, 5 Atl. 71, 57 Am. Rep. 810.

Massachusetts. — Burgess *v.* Davis Sulphur Ore Co., 165 Mass. 71, 42 N. E. 501; Marvin *v.* New Bedford, 158 Mass. 464, 33 N. E. 605; Peverly *v.* Boston, 136 Mass. 366, 49 Am. Rep. 37; Schoonmaker *v.* Wilbraham, 110 Mass. 134; Kidder *v.* Dunstable, 11 Gray 342; Aldrich *v.* Pelham, 1 Gray 510.

Missouri. — Newcomb *v.* New York C. & H. R. R. Co., 182 Mo. 687, 81 S. W. 1069.

Rhode Island. — Anderson *v.* Taft, 20 R. I. 362, 39 Atl. 191.

Vermont. — Sullivan *v.* Delaware & H. Canal Co., 72 Vt. 353, 47 Atl. 1084; Lucia *v.* Meech, 68 Vt. 175, 34 Atl. 695.

Failure of thing to frighten horses on other occasions cannot be shown. Bloor *v.* Delafield, 69 Wis. 273, 34 N. W. 115.

Also Tends To Surprise Other Party. — Branch *v.* Libbey, 78 Me. 321, 5 Atl. 71, 57 Am. Rep. 810.

proximate cause of the accident.[30] Where, however, the persons who avoided the injury traversed the immediate vicinity of the place of accident in such a manner as not to be subject to injury from the alleged point of danger, such evidence is not admissible.[31]

B. From Other Places, Things or Acts. — a. *Occurrence of Accidents.* — **(1.) Necessity of Similarity in Cause of Damage.** — In order that the fact that another accident has happened from a different cause may be shown, it is always necessary (in those jurisdictions where such evidence is admitted) that there appear to be a similarity between the other act, place or thing and that in suit, and in the absence of such apparent similarity the other accident cannot be shown.[32]

30. Birmingham U. R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525; Calkins *v.* Hartford, 33 Conn. 57, 87 Am. Dec. 194; Field *v.* Davis, 27 Kan. 400; Fulton Iron & Engine Wks. *v.* Kimball, 52 Mich. 146, 17 N. W. 733 (where thrashing machine broke through bridge, and evidence was received that the heaviest loads passing that way had safely traversed it for years, to determine how far at fault defendant was for not planning a stouter structure). *Compare* Langworthy *v.* Green, 88 Mich. 207, 215, 50 N. W. 130, where a question asked a witness by defendant, whether he had ever heard or known of any one having previously been injured by a certain stump in a road, was excluded.

31. Denver Tram. Co. *v.* Reid, 4 Colo. App. 53, 35 Pac. 269 (a person alighting from an electric train fell between the cars and was injured by an electric shock received on contact with the metal work, and evidence that no other passenger getting on or off the car at about the same time was injured by electricity was excluded); Lutton *v.* Vernon, 62 Conn. 1, 23 Atl. 1020 (a person on a road in the night backed the team off the road and for eleven feet beyond, there falling into a pond and being drowned, and evidence that for twenty years the road had been used without accident at that point was held inadmissible); Taylor *v.* Monroe, 43 Conn. 36 (plaintiff's horse ran away and the team struck the railing of a bridge across which it was going, hurling the rail against plaintiff, and evidence that no one had ever been hurt by reason of the insufficiency of the railing was excluded).

32. *Alabama.* — Louisville & N. R. Co. *v.* Miller, 109 Ala. 500, 508-509, 19 So. 989.

Arkansas. — St. Louis & S. F. R. Co. *v.* Jones, 59 Ark. 105, 26 S. W. 595.

Georgia. — Central of Georgia R. Co. *v.* Duffy, 116 Ga. 346, 42 S. E. 510.

Iowa. — Bach *v.* Iowa Cent. R. Co., 112 Iowa 241, 83 N. W. 959.

Kentucky. — Hutcherson *v.* Louisville & N. R. Co., 21 Ky. L. Rep. 733, 52 S. W. 955.

Maine. — Burbank *v.* Bethel Steam Mills Co., 75 Me. 373, 384, 46 Am. Rep. 400.

Michigan. — Jebb *v.* Chicago & G. T. R. Co., 67 Mich. 160, 34 N. W. 538.

Minnesota. — Clapp *v.* Minneapolis & St. R. Co., 36 Minn. 6, 29 N. W. 340, 1 Am. St. Rep. 629; Davidson *v.* St. Paul M. & M. R. Co., 34 Minn. 51, 24 N. W. 324.

Missouri. — Hipsley *v.* Kansas City St. J. & C. B. R. Co., 88 Mo. 348.

New Hampshire. — Lewis *v.* Eastern R. R., 60 N. H. 187.

New York. — Morrow *v.* Westchester Elec. R. Co., 67 N. Y. Supp. 21, 54 App. Div. 592, *affirmed* without opinion, 172 N. Y. 638, 65 N. E. 1119; Brady *v.* Manhattan R. Co., 127 N. Y. 46, 27 N. E. 368.

Texas. — Missouri Pac. R. Co. *v.* Mitchell, 75 Tex. 77, 12 S. W. 810.

Utah. — Hurd *v.* Union Pac. R. Co., 8 Utah 241, 30 Pac. 982.

A lapse of considerable time between the fire in suit that was set by

(2.) From Action or Operation of Similar Thing. — Where it appears that another accident happened from the action or operation of a similar thing, this fact may be shown as tending to prove the dangerous character of the thing causing it and notice to defendant of such character.[33]

(3.) Fires From Locomotives. — Likewise, in some jurisdictions, where it appears that a fire was set by a locomotive, evidence of fires set by other locomotives is admissible, irrespective of whether or not the locomotive causing the fire in suit was identified.[34] In other

a railroad locomotive, and the other fires offered in evidence, renders similarity of conditions improbable and the evidence inadmissible. See Baltimore & S. R. Co. *v.* Woodruff, 4 Md. 242, 253-255, 59 Am. Dec. 72; Davidson *v.* St. Paul, M. & M. R. Co., 34 Minn. 51, 24 N. W. 324; Henderson *v.* Philadelphia & R. R. Co., 144 Pa. St. 461, 487-489, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299. *Compare* Longabaugh *v.* Virginia City & T. N. Co., 9 Nev. 271, 290-291.

Where a person was killed from an explosion of gas that leaked from defendant's pipe, evidence of a similar subsequent explosion from a defect that existed from before the time of the former accident is admissible. Alexandria Min. & Exploring Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680.

Showing Similarity in Question to Witness. — A question put a witness as to a former accident need not embody a complete statement of conditions exactly similar to that of the accident in suit, nor need any particular answer; it is sufficient that the answers to all the various questions put the witness on a general subject taken as a whole show sufficient similarity of conditions. Atchison T. & S. F. R. Co. *v.* Stanford, 12 Kan. 354, 374-375, 15 Am. Rep. 362.

Where certain live stock was run down on a railroad track onto which they got because of the insufficiency of the cattle guards, a witness' testimony that he had seen a horse, a cow and some colts walk over the guard in question is not admissible on the ground "that the cattle guard was not for a particular species of animals, but for all animals." New York C. & St. L. R. Co. *v.* Zumbaugh, 11 Ind. App. 107, 38 N. E. 531.

On the necessity of similarity, *compare* Mobile & M. R. Co. *v.* Ashcraft, 48 Ala. 15, 32, where a car was derailed, and it was held proper to ask the conductor of the train whether the freight trains of which he was conductor had not run off the track seven or eight times in a month.

33. Birmingham R. L. & P. Co. *v.* Bynum, 139 Ala. 389, 36 So. 736; New York, C. & St. L. R. Co. *v.* Zumbaugh, 11 Ind. App. 107, 38 N. E. 531; Payne *v.* Kansas City St. J. & C. B. R. Co., 72 Iowa 214, 33 N. W. 633; Byard *v.* Palace Clothing House Co., 85 Minn. 363, 88 N. W. 998; Roberts *v.* Dover, 72 N. H. 147, 55 Atl. 895; Carson *v.* Godley, 26 Pa. St. 111, 121, 67 Am. Dec. 404; Waterhouse *v.* Jos. Schlitz Brew. Co., 16 S. D. 592, 94 N. W. 587. *Compare,* however, the remarks of the court in Little Rock & M. R. Co. *v.* Harrell, 58 Ark. 454, 469, 25 S. W. 117; and Illinois Cent. R. Co. *v.* Watson, 25 Ky. L. Rep. 1360, 78 S. W. 175, where evidence of other derailments of freight cars at other places was held not competent.

Escapes from danger caused by operation of similar thing under similar circumstances may be shown. Chicago & N. W. R. Co. *v.* Netolicky, 14 C. C. A. 615, 67 Fed. 665.

Other Horses Frightened by Locomotive. — Crocker *v.* McGregor, 76 Me. 282, 49 Am. Rep. 611; Lewis *v.* Eastern R. R., 60 N. H. 187; Gordon *v.* Boston & M. R. R., 58 N. H. 396.

34. *England.* — Piggot *v.* Eastern Counties R. Co., 3 C. B. 229 (where engine identified).

United States. — Gulf C. & S. F. R. Co. *v.* Johnson, 4 C. C. A. 447, 54 Fed. 474; Chicago, St. P. M. & O. R. Co. *v.* Gilbert, 3 C. C. A. 264, 52 Fed. 711; Northern Pac. R. Co. *v.*

jurisdictions such evidence is only admissible[35] where the locomotive

Lewis, 2 C. C. A. 446, 51 Fed. 658 (where engine identified); Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 470-471 (nor is it necessary to show that the other engines were similar to the one starting the fire in suit, or included that one, or their state of repair or management).

Alabama. — Louisville & N. R. Co. *v.* Malone, 109 Ala. 509, 20 So. 33.

California. — McMahon *v.* Hetch-Hetchy & Y. V. R. Co., 1 Cal. App. Dec. 825; Steele *v.* Pacific Coast R. Co., 74 Cal. 323, 15 Pac. 851.

Kansas. — St. Joseph & D. C. R. Co. *v.* Chase, 11 Kan. 47, 55.

Maine. — Thatcher *v.* Maine Cent. R. Co., 85 Me. 502, 27 Atl. 519.

Maryland. — Annapolis & E. R. Co. *v.* Gantt, 39 Md. 115.

Montana. — Diamond *v.* Northern Pac. R. Co., 6 Mont. 580, 13 Pac. 367.

Nevada. — Longabaugh *v.* Virginia City & T. N. R. Co., 9 Nev. 271.

New York. — Jacobs *v.* New York C. & H. R. R. Co., 94 N. Y. Supp. 954 (where engine identified); Crist *v.* Erie R. Co., 58 N. Y. 638; Field *v.* New York Cent. R. Co., 32 N. Y. 339 ("The more frequent these occurrences, and the longer time they had been apparent, the greater the negligence of the defendants; and such proof would disarm the defendants of the excuse that on the particular occasion the dropping of fire was an unavoidable accident"); Sheldon *v.* Hudson River R. Co., 14 N. Y. 218, 67 Am. Dec. 155 (Comstock, T. A. Johnson & Wright, JJ., *dissenting*).

Oregon. — Koontz *v.* Oregon R. & Nav. Co., 20 Or. 3, 16-18, 23 Pac. 820 (where it was held that as prerequisite to the admission of this class of evidence it should appear that the other locomotives were similar in appearance and construction and under the same general management).

Rhode Island. — Smith *v.* Old Colony & N. R. Co., 10 R. I. 22.

Texas. — Missouri Pac. R. Co. *v.* Donaldson, 73 Tex. 124, 11 S. W. 163 (where engine identified).

Vermont. — Hoskinson *v.* Central Vermont R. Co., 66 Vt. 618, 626-627, 30 Atl. 24.

Other fires from other locomotives on other roads cannot be shown. Evansville & T. H. R. Co. *v.* Keith, 8 Ind. App. 57, 35 N. E. 296, the court saying: "It would lead to a never-ending controversy if the particular fires along the various railroads where different devices are in use should be arrayed against each other, and the jury compelled to consider a great mass of evidence in order to ascertain which one is best."

Longabaugh *v.* Virginia City & T. N. R. Co., 9 Nev. 271; Sheldon *v.* Hudson River R. Co., 14 N. Y. 218, 67 Am. Dec. 155.

In Jacobs *v.* New York C. & H. R. R. Co., 94 N. Y. Supp. 954, the court said: "There was no suggestion upon the part of defendant, which, of course, was possessed of ready information upon this subject, that there was any material difference in the construction, operation or fuel used by its passenger locomotives. Therefore we are entitled to assume that the conditions under which these locomotives upon other occasions in passing over the same spot and drawing the same kind of trains threw sparks and cinders were substantially the same as those which governed upon the occasion when one of them is alleged to have thrown the cinders which fired the buildings."

35. St. Louis & S. F. R. Co. *v.* Jones, 59 Ark. 105, 26 S. W. 595; Jacksonville T. & K. W. R. Co. *v.* Peninsular Land Transp. & Mfg. Co., 27 Fla. 1, 104-105, 9 So. 661, 17 L. R. A. 33; Ireland *v.* Cincinnati W. & M. R. Co., 79 Mich. 163, 44 N. W. 426; Tribette *v.* Illinois Cent. R. Co., 71 Miss. 212, 233, 13 So. 899 (the tendency of such evidence being to confuse and mislead the jury); Lester *v.* Kansas City, St. J. & C. B. R. Co., 60 Mo. 265 (although it appeared that the other engines were equipped with the same type of spark-arrester); Henderson *v.* Philadelphia & R. R. Co., 144 Pa. St. 461, 477-479, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299; Albert *v.* Northern Cent. R. Co., 98 Pa. St. 316 (where the locomotive

causing the fire in suit is unidentified, and in Iowa it seems to be wholly inadmissible.[36]

(4.) From Similar Act. — Moreover, it may be shown that another horse was frightened by the blowing of the same whistle on another occasion,[37] and the like.[38]

b. *Non-Occurrence of Accidents.* — Similarly, the fact that on other occasions no damage resulted from the action, operation or

causing the fire was identified as one of two certain engines); Erie R. Co. *v.* Decker, 78 Pa. St. 293 (the fact that a witness testifies that the spark-arresters on all its engines were in good condition does not render the evidence admissible in rebuttal); Allard *v.* Chicago & N. W. R. Co., 73 Wis. 165, 40 N. W. 685; Gibbons *v.* Wisconsin Valley R. Co., 58 Wis. 335, 17 N. W. 132.

36. Bell *v.* Chicago, B. & Q. R. Co., 64 Iowa 321, 20 N. W. 456; Babcock *v.* Chicago & N. W. R. Co., 62 Iowa 593, 13 N. W. 740, 17 N. W. 909.

37. Powell *v.* Nevada C. & O. Ry. (Nev.), 78 Pac. 978; Hill *v.* Portland & R. R. Co., 55 Me. 438, 92 Am. Dec. 601.

38. Where a colored person was assaulted pursuant to a conspiracy of certain persons to assault any colored man visiting defendant street railway's public park, to which it transported all who wished to go, evidence of other prior assaults at said park upon colored persons, and articles previously published by daily newspapers describing such occurrences, were admissible to show notice to defendant of the conditions prevailing at the park. Indianapolis St. R. Co. *v.* Dawson, 31 Ind. App. 605, 68 N. E. 909.

Where a trespasser on railroad tracks was run down, evidence of prior fatal acts caused by an engine in charge of the engineer who was in charge on the occasion in suit is not admissible, unless perhaps as supporting a claim that the defendant was negligent in employing the engineer in view of their knowledge of his negligence on previous occasions. Gregory *v.* Wabash R. Co. (Iowa), 101 N. W. 761.

Where a person was struck by a bale of cotton being loaded into a wagon in a dangerous way, a witness' testimony as to the danger in the manner in which the cotton was loaded into his wagon on a former occasion is admissible, as showing that the system of loading was dangerous, and where it appeared that the same foreman was in charge on both occasions, to show his knowledge of the danger. Northern Tex. Const. Co. *v.* Crawford (Tex. Civ. App.), 87 S. W. 223.

Where cows were run down by a train, evidence of the number killed by defendant to a witness' knowledge during each of several years, and evidence that defendant would not allow public inspection of the book required by law to be kept in which stock killed was recorded and the reasons for such refusal is erroneously admitted. Whitmore *v.* Rio Grande W. R. Co., 24 Utah 215, 66 Pac. 1066.

Use of Other Structure or Ground Admissible. — Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933 (holding such evidence admissible, in case of a fall upon another part of a sidewalk, where it appeared that the whole walk was laid at the same time in a similar manner out of similar material); Raper *v.* Wilmington & W. R. Co., 126 N. C. 563, 36 S. E. 115 (where it was shown that at a similar railroad crossing of a highway other persons had caught a foot between a rail and a guard-rail); Texas & P. R. Co. *v.* DeMilley, 60 Tex. 194 (where evidence that the same train on the same day near the same place was again thrown from the track by a broken rail).

Inadmissible. — Bauer *v.* Dubuque, 122 Iowa 500, 98 N. W. 355 (where evidence of the frosty condition of a sidewalk at other times, and its effect upon pedestrians, was excluded); Hoyt *v.* Des Moines, 76 Iowa 430, 41 N. W. 63 (accident at different

use of a similar thing[39] or the doing of a similar act[40] is admissible where there is substantial similarity of conditions.

11. Adoption or Non-Adoption of Precautions, and Practicability Thereof. — A. ADOPTION. — It is proper either for the injured[41] or the injuring[42] party to give evidence as to the precautions taken by him to avoid injury. Precautions taken after the accident to avoid a recurrence thereof, or for other reasons, cannot, however, be shown.[43] Moreover, the care taken by defendant to employ only

place on sidewalk); Johnson *v.* Walsh, 83 Minn. 74, 85 N. E. 910 (falling into another part of same trench); Fordham *v.* Gouverneur Village, 160 N. Y. 541, 549, 55 N. E. 290 (fall over other cleat on walk); Barrett *v.* Hammond, 87 Wis. 654, 58 N. W. 1053 (accident at other place on same sidewalk). *Compare,* however, Spearbracker *v.* Larrabee, 64 Wis. 573, 25 N. W. 555, where a horse stepped through a defective plank in a bridge, and evidence that a short time before an omnibus went through a similar place was admitted.

39. Atchison, T. & S. F. R. Co. *v.* Stanford, 12 Kan. 354, 374-375, 15 Am. Rep. 362 (evidence that locomotives had previously passed same place without setting fires); Ruddell *v.* Grand Rapids Cold Storage Co. (Mich.), 99 N. W. 756. *Compare,* however, Downing *v.* Chicago, R. I. & P. R. Co., 43 Iowa 96, where evidence of the sufficiency of other cattle guards was excluded. *Contra,* Houston *v.* Brush, 66 Vt. 331, 29 Atl. 380, where in case of the fall of a wheel from a tackle block at the top of a mast a witness' testimony that he had never known the pin holding such a wheel to work out was held inadmissible.

40. Where a child of five was injured by the fall upon him of a large box being handled in defendant's market, evidence of the handling of a similar box on another occasion by the same number of men and with safety is properly received, as tending to show that enough men were employed at the time of accident. Schnable *v.* Providence Public Market, 24 R. I. 477, 53 Atl. 634. *Compare,* however, Peverly *v.* Boston, 136 Mass. 366, 49 Am. Rep. 37; Atchison T. & S. F. R. Co. *v.* Stanford, 12 Kan. 354, 374-375, 15 Am. Rep. 362.

In T. & H. Pueblo Bldg. Co. *v.* Klein, 5 Colo. App. 348, 38 Pac. 608, the court held the difference between a child's and an adult's boarding an elevator too great to permit such evidence.

41. Where a person was injured by a defect in a highway while driving along on a dark night without a lantern, a witness may properly testify that before the accident the injured person applied to him for a lantern, but he could not furnish it. Chamberlin *v.* Ossipee, 60 N. H. 212.

42. Where a fire was set by an alleged defective burner of refuse matter at defendant's saw mill, defendant may show that when before the fire complaint was made to him of the defective condition of the burner he called in a competent man to repair it, and told him of the complaint, and directed him to examine it, and if anything could be done to make it safer to do it. Day *v.* H. C. Akeley Lumb. Co., 54 Minn. 522, 56 N. W. 243, 23 L. R. A. 513. See also Presby *v.* Grand Trunk Ry., 66 N. H. 615, 22 Atl. 554.

Contra, Payne *v.* Lowell, 10 Allen (Mass.) 147, where in an action for falling on an icy sidewalk evidence that defendant sent out three sand wagons at seven o'clock the morning of the accident, and that one of them reached the point of accident a few minutes after it, and sanded the walk, is properly excluded.

43. Menard *v.* Boston & M. R. Co., 150 Mass. 386, 23 N. E. 214 (where after a person was run down by a train at a crossing the railroad employed a flagman thereat); Derk *v.* Northern Cent. R. Co., 164 Pa. St. 243, 30 Atl. 231 (evidence that after an accident at a railroad crossing in the night time defendant put on a flagman in the daytime is irrelevant); Gulf C. & S. F. R. Co. *v.* Compton,

competent servants is not a fact that is competent as evidence, as a master cannot absolve himself from liability for his servant's negligence by exercising care in his selection, but is liable irrespective thereof,[44] unless where the negligence charged is the employment of an unskillful servant.[45]

B. Practicability of Removing Danger. — Evidence that a similar defect was removed from adjoining property is admissible as showing the practicability of such removal.[46]

C. Failure To Use Precautions. — Where the defectiveness of a structure or thing or the negligence of an act is in question, it is proper to show the failure to use in connection with it the precautions which common experience has shown to be necessary.[47]

75 Tex. 667, 13 S. W. 667 (where after a collision between a water train and another train the railroad put a conductor on the water train); Christensen *v.* Union Trunk Line, 6 Wash. 75, 32 Pac. 1018 (where after a street car collided with a wagon the motorman was discharged); Green *v.* Ashland Water Co., 101 Wis. 259, 73 N. W. 722, 43 L. R. A. 117. *Contra,* Martin *v.* Towle, 59 N. H. 31 (where after a stage was overturned the driver was discharged); Mulcairns *v.* Janesville, 67 Wis. 24, 36, 29 N. W. 565 (evidence that after a wall fell it was buttressed on being rebuilt).

But under the more recent rule laid down in III, 5, B, b, (1), *supra,* it is evident that these cases holding such evidence admissible can no longer be sustained.

44. Augusta & S. R. Co. *v.* Randall, 85 Ga. 297, 314, 11 S. E. 706; Pennsylvania R. Co. *v.* Brooks, 57 Pa. St. 339, 98 Am. Dec. 229.

45. Where plaintiff's team while standing near defendant's track was struck by a passing train, and plaintiff claims that the engineer of the train was employed by defendant with the knowledge that he was unskillful, and at low wages, the testimony of the president of the road that he hired the engineer as skillful and competent is properly received. Robinson *v.* Fitchburg & W. R. Co., 7 Gray (Mass.) 92.

46. Where defendant claimed that it was impossible with the utmost care, to remove from a sidewalk certain ice on which plaintiff fell, it being on the shady side of the street, evidence that the ice had been entirely removed from the walk in front of some buildings of equal height and situated similarly with that in front of which the accident occurred, and that a few days previous to the injury the ice was removed from in front of one of them with a shovel only, is properly received. If there was any unusual difficulty in removing the ice at the place of accident defendant could show it. Shea *v.* Lowell, 8 Allen (Mass.) 136.

47. *United States.* — Flynt Bldg. & Constr. Co. *v.* Brown, 14 C. C. A. 308, 67 Fed. 68.

Arkansas. — Tilley *v.* St. Louis & S. F. R. Co., 49 Ark. 535, 6 S. W. 8.

Illinois. — Illinois Cent. R. Co. *v.* Aland, 192 Ill. 37, 61 N. E. 450; Chicago, B. & Q. R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708; Weber Wagon Co. *v.* Kehl, 139 Ill. 644, 29 N. E. 714; Hodges *v.* Percival, 132 Ill. 53, 23 N. E. 423; Galena & Chicago Union R. Co. *v.* Fay, 16 Ill. 558, 569, 63 Am. Dec. 323.

Indiana. — Delphi *v.* Lowery, 74 Ind. 520, 39 Am. Rep. 98.

Massachusetts. — Poor *v.* Sears, 154 Mass. 539, 548, 28 N. E. 1046, 26 Am. St. Rep. 272.

Michigan. — Bowen *v.* Flint & P. R. Co., 110 Mich. 445, 68 N. W. 230; Woodbury *v.* Owosso, 64 Mich. 239, 31 N. W. 130.

Ohio. — Baltimore & O. R. Co. *v.* Whitacre, 35 Ohio St. 627.

Utah. — Christensen *v.* Oregon S. L. R. Co., 80 Pac. 746 (Bartch, C. J., *dissenting*).

Wisconsin. — Hoye *v.* Chicago & N. W. R. Co., 67 Wis. 1, 14-15, 29 N. W. 646 (where a person was struck by moving freight cars at a crossing,

D. Excusing Failure To Adopt Precautions. — As excusing the failure to adopt a precaution, it is questioned whether evidence of the cost of the precaution,[48] or of the impracticability of adopting another means of accomplishing the desired result,[49] is admissible.

12. Evidence Comparative of Things or Events. — Evidence of the comparative condition[50] and safety[51] of things, of the occurrence of similar damage from the performance of the same act on other like property,[52] and of the usualness or unusualness of the happening

and evidence of the absence of a flagman at the time was given).

48. Cost May Be Proved. — Rooney *v.* Randolph, 128 Mass. 580 (cost of breaking out the snow on the whole width of a highway); Tvedt *v.* Wheeler, 70 Minn. 161, 72 N. W. 1062 (cost of putting a guard around the unprotected counterweight of an elevator).

Similarly plaintiff's witness may properly testify that it would not take twenty minutes to repair a certain defect in a walk. Edwards *v.* Three Rivers, 96 Mich. 625, 55 N. W. 1003.

Cost Cannot Be Proved. — Grand Rapids & I. R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321 (cost of railroad cars, one of which overturned).

49. Can Be Shown. — Where a person fell down an elevator shaft in defendant's store, defendant may properly show that the city authorities had compelled him to close his cellar door in the sidewalk, as showing the necessity of an elevator in the store. O'Brien *v.* Tatum, 84 Ala. 186, 4 So. 158.

Cannot Be Shown. — Where a person stepped into a square opening in a plank crosswalk over a gutter, evidence that this opening was necessary to dispose of surface waters and to clean out the drain is properly excluded, because it was a matter of common knowledge that such an opening could be covered by gratings, the small openings in which would be harmless. Stone *v.* Seattle, 33 Wash. 644, 74 Pac. 808.

50. Where a train fell through six hundred feet of a bridge 1500 feet long, and defendant claimed that the portion of the bridge that fell had been repaired within a year, evidence that the timbers in such portion were in the same defective condition as in the portion that did not fall is admissible. Leonard *v.* Southern Pac. Co., 21 Or. 555, 28 Pac. 887, 15 L. R. A. 221.

51. Comparative Safety May Be Shown. — Evansville & T. H. R. Co. *v.* Keith, 8 Ind. App. 57, 35 N. E. 296 (evidence as to another spark-arrester, and that with proper handling a fire never resulted where it was used); Aldrich *v.* Concord & M R. R., 67 N. H. 250, 29 Atl. 408; Cook *v.* Champlain Transp. Co., 1 Denio (N. Y.) 91, 102 (where a fire was set by a boat on Lake Champlain, and the management of boats on the Hudson river so as to guard against sparks was shown); Raper *v.* Wilmington & W. R. Co., 126 N. C. 563, 36 S. E. 115 (where a person caught his foot between a rail and a guard-rail, it was error to exclude a question whether if the interstice between the rails had been filled up to within two inches of the surface it would have been possible for decedent to catch his foot).

Of Locomotive Spark-Arresters. Collins *v.* New York Cent. & H. R. R. Co., 109 N. Y. 243, 16 N. E. 50; Brusberg *v.* Milwaukee L. S. & W. R. Co., 55 Wis. 106, 12 N. W. 416.

Cannot Be Shown. — People's Gas Light & Coke Co. *v.* Porter, 102 Ill. App. 461 (where gas leaked, and it was held error to admit evidence of a better method of making a connection between the service and house pipes); Lucia *v.* Meech, 68 Vt. 175, 34 Atl. 695 (where evidence of how the fence through which a horse escaped compared with other fences in the locality was held irrelevant).

52. Where butter was damaged while in cold storage, evidence that other butter of like grade, belonging to another person and stored during the same time, was also damaged, is competent. Rudell *v.* Grand

of an accident in the performance of an act,[53] has been held admissible. On the other hand, the fact that defendant uses several different kinds of contrivances for the same purpose is not relevant.[54] Nor can the comparative condition of a road at other places with its condition at the place of accident be put in,[55] although it has elsewhere been held that its comparative condition at different times may be shown.[56] And the fact that other appliances than those used at the place of accident are used elsewhere is not competent as evidence,[57] especially where the conditions surrounding the use of the other appliances are different;[58] nor is the matter of the resemblance between the condition of the grounds or structure in question and those ordinarily used for similar purposes competent.[59]

13. Conduct at Other Specific Times. — A. The General Rule. a. *Previous Acts of Negligence.* — In most jurisdictions the fact that the same or another person for whom defendant is responsible did a similar negligent act or showed similar negligent management cannot be shown.[60] Such evidence is not rendered admissible by

Rapids Cold Storage Co. (Mich.), 99 N. W. 756.

53. Steele *v.* Townsend, 37 Ala. 247, 79 Am. Dec. 49; Mobile & M. R. Co. *v.* Ashcraft, 48 Ala. 15, 32.

54. Where plaintiff's dog was killed by a street car because of the alleged defective condition of the fender, evidence that defendant used several different kinds of fenders on its cars is not relevant. Moore *v.* Charlotte Elec. R. L. & P. Co., 136 N. C. 554, 48 S. E. 822.

55. Langworthy *v.* Green, 88 Mich. 207, 216-217, 50 N. W. 130, the court saying: "It is for the jury to say whether this road at this point was reasonably safe for travel, and that determination does not, under the state of facts existing here [where the defect alleged was a log partially imbedded in the highway] depend upon the condition of the road elsewhere."

56. Wooley *v.* Grand St. & N. R. Co., 83 N. Y. 121, 129-130, where a witness stated whether a switch on which a sleigh overturned was as high at the time of trial as at the time of accident.

57. Couch *v.* Watson Coal Co., 46 Iowa 17 (where a miner was injured while riding in the cage in the shaft of a mine by an object falling from above, it is error to admit a witness' testimony that where he worked in Pennsylvania the cage was covered); Schermer *v.* McMahon (Mo. App.), 82 S. W. 535 (where a digger was injured by the caving in of the ditch in which he was working, evidence that other people who dug trenches always braced them is erroneously received); McGovern *v.* Smith, 73 Vt. 52, 50 Atl. 549 (where a person was struck by a train at a highway crossing evidence that at other crossings, but not at the place of the accident, the railroad maintained electric signals, is erroneously received).

58. Sloss-Sheffield Steel & Iron Co. *v.* Mobley, 139 Ala. 425, 36 So. 181 (where evidence that the track of a furnace company was not like that of a commercial railroad was erroneously admitted); Bosqui *v.* Sutro R. Co., 131 Cal. 390, 63 Pac. 682 (where a witness was asked how the rails of a certain electric railroad compared with those of other street railroads, both electric and cable).

59. Bauer *v.* Indianapolis, 99 Ind. 56; Memphis & Ohio River Packet Co. *v.* McCool, 83 Ind. 392, 43 Am. Rep. 71.

60. *England.* — Malton *v.* Nesbit, 1 C. & P. 70 (where a ship was wrecked, and evidence of the negligent conduct of the captain and crew earlier in the day was held inadmissible).

Canada. — Edwards *v.* Ottawa River Nav. Co., 39 U. C. Q. B. 264 (where fire was set by sparks from

a steamboat, and evidence of other times when the spark-arrester was left open was held inadmissible).

United States. — Southern Bell Tel. & Tel. Co. *v.* Watts, 13 C. C. A. 579, 66 Fed. 461; Delaware L. & W. R. Co. *v.* Converse, 139 U. S. 469 (where a person was run down by a train at a highway crossing, evidence of his conduct on crossing it in the opposite direction two hours before the accident is irrelevant).

Arkansas. — Little Rock & M. R. Co. *v.* Harrell, 58 Ark. 454, 468-470, 25 S. W. 117.

Colorado. — T. & H. Pueblo Bldg. Co. *v.* Klein, 5 Colo. App. 348, 38 Pac. 608.

Illinois. — Lake Erie & W. R. Co. *v.* Morain, 140 Ill. 117, 29 N. E. 869 (where a passenger was injured while alighting from a train, evidence that at a previous station he alighted and waited till the train started and then ran alongside and jumped on is inadmissible); Chicago B. & Q. R. Co. *v.* Lee, 60 Ill. 501 (where a train approached a crossing without signals, and evidence that at other times trains had passed the crossing without signals was erroneously admitted).

Iowa. — Dalton *v.* Chicago R. I. & P. R. Co., 114 Iowa 257, 86 N. W. 272 (where a person was run down by a train, it is error to admit instances where he was found asleep in his buggy).

Kansas. — Chicago R. I. & P. R. Co. *v.* Durand, 65 Kan. 380, 69 Pac. 356 (where the train that ran down a person at a crossing was said to have approached without signals, evidence that it did not give any signals at the preceding crossing two-fifths of a mile distant is erroneously admitted). *Contra,* Atchison, T. & S. F. R. Co. *v.* Hague, 54 Kan. 284, 38 Pac. 257, 45 Am. St. Rep. 278, where facts were the same.

Kentucky. — Hutcherson *v.* Louisville & N. R. Co., 21 Ky. L. Rep. 733, 52 S. W. 955.

Maine. — Parker *v.* Portland Pub. Co., 69 Me. 173, 31 Am. Rep. 262 (where a person fell down the open gates of an elevator shaft, it is error to admit evidence that at a certain previous time the gates were not closed).

Maryland. — Baltimore Elev. Co. *v.* Neal, 65 Md. 438, 453, 5 Atl. 338.

Massachusetts. — Aiken *v.* Holyoke St. R. Co., 184 Mass. 269, 68 N. E. 238; Whitney *v.* Gross, 140 Mass. 232, 5 N. E. 619 (where two wagons collided on a hill because, as claimed, of the overloaded condition of one of them, evidence that it was overloaded at other times is not competent); Maguire *v.* Middlesex R. Co., 115 Mass. 239; Robinson *v.* Fitchburg & W. R. Co., 7 Gray 92 (where a wagon standing beside a track was struck by a train, evidence of other specific acts of negligence of the engineer is incompetent).

Michigan. — *Compare* Detroit & M. R. Co. *v.* Van Steinburg, 17 Mich. 99, and opinion of Campbell, J., therein.

Mississippi. — Southern R. Co. *v.* Kendrick, 40 Miss. 374, 382, 384, 90 Am. Dec. 332 (where a passenger was carried beyond his destination, it is error to admit evidence that on another occasion within three months the stations were not called).

Minnesota. — Newstrom *v.* St. Paul & D. R. Co., 61 Minn. 78, 63 N. W. 253.

Montana. — Kennon *v.* Gilmer, 5 Mont. 257, 267, 5 Pac. 847, 51 Am. Rep. 45.

Texas. — International & G. N. R. Co. *v.* Ives, 31 Tex. Civ. App. 772, 71 S. W. 272 (where person was struck by train at highway crossing, evidence that on other occasions he was asleep when his team crossed the crossing is properly excluded); Gulf C. & S. F. R. Co. *v.* Rowland, 82 Tex. 166, 18 S. W. 96 (where person was thrown to ground while alighting from train, evidence of similar accidents to others is properly excluded). *Contra,* Galveston H. & S. A. R. Co. *v.* Kutac, 76 Tex. 473, 13 S. W. 327; Hays *v.* Gainesville St. R. Co., 70 Tex. 602, 8 S. W. 491, 8 Am. St. Rep. 624.

Vermont. — Clark *v.* Smith, 72 Vt. 138, 47 Atl. 391 (where a person was injured by a jerk of a train as she was alighting, evidence that at previous stations on the same run it had given similar jerks is erroneously admitted).

Washington. — Christensen *v.* Union Trunk Line, 6 Wash. 75, 32 Pac. 1018 (where a collision occurred between a street car and a

the fact that the adverse party has put in evidence of the general carefulness of the person alleged to have been negligent at the time of accident (according to some courts),[61] nor to contradict evidence that the act could not be performed in the negligent manner alleged.[62] For this not only would be objectionable as raising collateral inquiries tending to mislead and confuse the jury, but would also be without logical or legal tendency to prove negligence at the time of accident, since it does not follow from a showing of a person's negligence on one or two specified occasions that he was negligent on another.[63]

b. *Subsequent Acts of Negligence.* — The same rule likewise excludes proof of subsequent specific acts of negligence.[64]

c. *Subsequent Exercise of Greater Care.* — Nor can the fact ordinarily be shown that after the accident the defendant exercised greater care in the performance of the act out of which the injury arose.[65]

B. The Exceptional Rule. — a. *Other Negligent Acts.* — In a few jurisdictions other similar negligent acts of the same person can be put in evidence as tending to render it probable that his conduct was the same at the time of the trial.[66]

wagon, evidence of the excessive speed at which the motorman had run the car on other occasions is erroneously received).

61. T. & H. Pueblo Bldg. Co. *v.* Klein, 5 Colo. App. 348, 38 Pac. 608. *Compare,* however, Detroit & M. R. Co. *v.* Van Steinburg, 17 Mich. 99.

62. T. & H. Pueblo Bldg. Co. *v.* Klein, 5 Colo. App. 348, 38 Pac. 608 *Compare,* however, Southern Bell Tel. & Tel. Co. *v.* Watts, 13 C. C. A. 570, 66 Fed. 461.

63. Chicago B. & Q. R. Co. *v.* Lee, 60 Ill. 501; Dalton *v.* Chicago R. I. & P. R. Co., 114 Iowa 257, 86 N. W. 272; Chicago R. I. & P. R. Co. *v.* Durand, 65 Kan. 380, 69 Pac. 356; Parker *v.* Portland Pub. Co., 69 Me. 173, 31 Am. Rep. 262; Maguire *v.* Middlesex R. Co., 115 Mass. 239; Robinson *v.* Fitchburg & W. R. Co., 7 Gray (Mass.) 92; Gulf C. & S. F. R. Co. *v.* Rowland, 82 Tex. 166, 18 S. W. 96.

64. Chesapeake & O. R. Co. *v.* Riddle, 24 Ky. L. Rep. 1687, 72 S. W. 22; Eskridge *v.* Cincinnati N. O. & T. P. R. Co., 89 Ky. 367, 12 S. W. 580; in each of which cases subsequent instances of failure of trains to give signals on approaching the crossing were offered in evidence.

65. Baird *v.* Daly, 68 N. Y. 547 (where after the partial swamping of a scow it was towed more slowly on the remainder of the trip); Anderson *v.* Chicago St. P. M. & O. R. Co., 87 Wis. 195, 58 S. W. 79, 23 L. R. A. 203 (where after a person was run down on a trestle the trains were run more slowly for a few days).

66. Baltimore & P. R. Co. *v.* Carrington, 3 App. D. C. 101 (where a person was struck by a train at a crossing, where, as claimed, the gateman was asleep, evidence that two and one-half hours before the accident he was asleep is admissible); Lyman *v.* Boston & M. R. R., 66 N. H. 200, 20 Atl. 976 (where a person was struck by a detached locomotive at a crossing, evidence of its speed and management at a crossing three-fourths of a mile before is admissible); Parkinson *v.* Nashua & L. R. Co., 61 N. H. 416 (where a person was struck by a train at a crossing, evidence that at other times and places in the vicinity decedent drove negligently over crossings is proper); State *v.* Manchester & L. R. R., 52 N. H. 528, 549-550 (where a person was struck by a train at a crossing, evidence that at other times during the year previous the same engineer and fireman had

b. *Other Careful Acts.* — For the same reason a specific careful act under the same circumstances may be shown.[67]

14. Habits. — Opinion and Reputation. — Ordinarily the habits of a person cannot be shown, either on a question of primary[68] or of contributory[69] negligence. Where, however, a negligent act has been done in reliance upon a known habit of the other person, the habit may, it seems, be shown.[70] In some jurisdictions also, where there is an irreconcilable conflict in the evidence as to the conduct of a party to an accident at the time thereof, his habitual mode of performing the act in question may be shown.[71] Moreover, in

run across the crossing without signals is proper); Dyer *v.* Union R. Co., 25 R. I. 221, 55 Atl. 688 (where a person was struck by a street car at a crossing, evidence that at the intersection of previous crossing the car bell was not rung is admissible); Mack *v.* South-Bound R. Co., 52 S. C. 323, 29 S. E. 905 (facts similar to previous case); Bower *v.* Chicago M. & St. P. R. Co., 61 Wis. 457, 21 N. W. 536 (same facts).

67. Stone *v.* Boston & M. R. R., 72 N. H. 206, 55 Atl. 359, where a person was struck by a train at a crossing, evidence that on a previous occasion on approaching it he remarked on its dangerous character and took precautions against it is admissible.

68. *Delaware.* — Price *v.* Charles Warner Co., 1 Pen. 462, 42 Atl. 699.

Massachusetts. — Whitney *v.* Gross, 140 Mass. 232, 5 N. E. 619; Gahagan *v.* Boston & L. R. Co., 1 Allen 187, 79 Am. Dec. 724.

Minnesota. — Fonda *v.* St. Paul City R. Co., 71 Minn. 438, 74 N. W. 166.

New Hampshire. — Wentworth *v.* Smith, 44 N. H. 419, 82 Am. Dec. 228.

Pennsylvania. — Pennsylvania R. Co. *v.* Page, 12 Atl. 662; Pennsylvania R. Co. *v.* Brooks, 57 Pa. St. 339, 98 Am. Dec. 229.

Texas. — Chicago R. I. & T. R. Co. *v.* Porterfield, 92 Tex. 442, 49 S. W. 361.

69. Louisville & N. R. Co. *v.* McClish, 115 Fed. 268; Glass *v.* Memphis & C. R. Co., 94 Ala. 581, 10 So. 215; East Tennessee V. & G. R. Co. *v.* Kane, 92 Ga. 187, 18 S. E. 18; Georgia Midland & G. R. Co. *v.* Evans, 87 Ga. 673, 13 S. E. 580; Rumpel *v.* Oregon S. L. & U. N. R. Co., 4 Idaho 13, 35 Pac. 700; Peoria & P. U. R. Co *v.* Clayberg, 107 Ill. 644; City of Junction City *v.* Blades, 1 Kan. App. 85, 41 Pac. 677; Burrows *v.* Trieber, 21 Md. 320, 83 Am. Dec. 590; McDonald *v.* Savoy, 110 Mass 49 (by a majority of the court); Langworthy *v.* Green, 88 Mich. 207, 217, 50 N. W. 130; Guggenheim *v.* Lake Shore & M. S. R. Co., 66 Mich. 150, 160, 33 N. W. 161; McCarragher *v.* Rogers, 120 N. Y. 526, 24 N. E. 812; Eppendorf *v.* Brooklyn City & N. R. Co., 69 N Y. 195, 25 Am. Rep. 171; Baker *v.* Irish, 172 Pa. St. 528, 33 Atl. 558; Propsom *v.* Leatham, 80 Wis. 608, 50 N. W. 586; Brennan *v.* Friendship, 67 Wis. 223, 29 N. W. 902.

70. Where a person went to the exit of a street car as it approached a certain corner, and the car did not stop, and plaintiff, in attempting to alight, was hurt, evidence that it was plaintiff's habit to jump from the car in front of his place of business in the middle of the next block is admissible in explanation. McDonald *v.* Montgomery St. Ry., 110 Ala 161, 20 So. 317.

71. Where the evidence was conflicting as to whether plaintiff jumped from a train before it stopped, or whether it started as he was in the act of alighting, evidence that within a year before the accident plaintiff had frequently jumped off at that place while the cars were in motion, and had been warned of the danger, is admissible, for "A sensible man, called upon, out of court, to determine whether or not a certain person had on a certain occasion carelessly jumped off a moving train of cars, and finding the direct testimony as to the matter conflicting, would naturally and properly give

Georgia the habits of a person may, it seems, be proved on the question of primary negligence,[72] and in Iowa on the question of contributory negligence,[73] though such evidence is without much weight.[74]

Witness' Opinion. — Similarly, a witness' opinion as to the general carefulness, competency or skillfulness of another is not admissible, either on the question of primary[75] or of contributory[76] negligence, except in Kentucky.[77]

Reputation. — The reputation of a person involved in an accident for carefulness or carelessness, competency or skillfulness, whether of the person whose act caused the accident,[78] or of the person

some weight to the fact that the person was in the habit of alighting from cars in that manner." Craven *v.* Central Pac. R. Co., 72 Cal. 345, 13 Pac. 878.

Where it was in dispute whether a person was injured by being struck by a backing train or by attempting to jump upon it, testimony that within a week of the accident plaintiff was in the habit of jumping on moving trains in the immediate vicinity of the accident is proper, for the reasons given in the preceding syllabus. Pittsburgh C. C. & St. L. R. Co. *v.* McNeil (Ind. App.), 66 N. E. 777. *Contra*, Louisville & N. R. Co. *v.* McClish, 115 Fed. 268.

72. Savannah, F. & W. R. Co. *v.* Flannagan, 82 Ga. 579, 589, 9 S. E. 471, 14 Am. St. Rep. 183.

73. Stafford *v.* Oskaloosa, 57 Iowa 748, 11 N. W. 668.

74. Savannah F. & W. R. Co. *v.* Flannagan, 82 Ga. 579, 589, 9 N. E. 471, 14 Am. St. Rep. 183; Stafford *v.* Oskaloosa, 64 Iowa 251, 20 N. W. 174.

75. Brown *v.* Eastern & M. R. Co., 22 Q. B. D. 391; Slade *v.* State, 2 Ind. 33; Scott *v.* Hale, 16 Me. 326; Tenney *v.* Tuttle, 1 Allen (Mass.) 185; Hays *v.* Millar, 77 Pa. St. 238, 18 Am. Rep. 445; Lucia *v.* Meech, 68 Vt. 175, 34 Atl. 695; Bryant *v.* Central Vermont R. Co., 56 Vt. 710. See also State *v.* Manchester & L. R. R., 52 N. H. 528, 550. *Compare*, however, Malton *v.* Nesbit, 1 Car. & P. (Eng.) 70, where a ship was wrecked to the injury of a passenger, the statement of the captain both before and after the wreck that the second mate was wholly incompetent to have charge of a watch was admitted.

Likewise the fact that a physician or surgeon, alleged to have been negligent, possessed or did not possess a certificate or diploma cannot be inquired into. Bute *v.* Potts, 76 Cal. 304, 18 Pac. 329.

76. Davis *v.* Kornman (Ala.), 37 So. 789; McCarragher *v.* Rogers, 120 N. Y. 526, 24 N. E. 812.

77. Louisville & N. R. Co. *v.* McEwan, 17 Ky. L. Rep. 406, 31 S. W. 465, where it was held error to exclude evidence that the conductor of a train on which a disturbance occurred was a faithful, efficient and courageous officer.

78. *Alabama.* — Southern & Northern Alabama R. Co. *v.* Chappell, 61 Ala. 527. *Contra*, Cook *v.* Parham, 24 Ala. 21, 33-34.

Colorado. — T. & H. Pueblo Bldg. Co. *v.* Klein, 5 Colo. 348, 38 Pac. 608.

Illinois. — Holtzman *v.* Hoy, 118 Ill. 534, 8 N. E. 832, 59 Am. Rep. 390, *affirming* 19 Ill. App. 459.

Indiana. — Smith *v.* Stump, 12 Ind. App. 359, 40 N. E. 279.

Iowa. — Hall *v.* Rankin, 87 Iowa 261, 54 N. W. 217.

Kansas. — Ottowa *v.* McCreery, 10 Kan. App. 443, 61 Pac. 986.

Maine. — Dunham *v.* Rackliff, 71 Me. 345.

Massachusetts. — Baldwin *v.* Western R. Corp., 4 Gray 333. *Contra*, Adams *v.* Carlisle, 21 Pick. 146.

Michigan. — Boick *v.* Bissell, 80 Mich. 260, 45 N. W. 55; Williams *v.* Edmunds, 75 Mich. 92, 42 N. W. 534.

Montana. — Stevenson *v.* Gelsthorpe, 10 Mont. 563, 27 Pac. 404.

damnified thereby,[79] is not ordinarily admissible on the question of his negligence, it being too remote and uncertain to warrant any fair inference on such question.[80] In Alabama and Iowa, however, such evidence is said to be admissible in rebuttal of similar evidence of opinion or reputation.[81] And in a few jurisdictions evidence of reputation is generally admissible on the question of the negligence of the person whose reputation is shown.[82]

In Absence of Direct Evidence. — Where no direct evidence of the conduct of a person at the time an accident befell him is available, in a few jurisdictions the classes of evidence discussed in this subdivision become admissible.[83]

15. Direct Evidence of Knowledge of Danger. — A. By Defendant. — The fact that defendant's servant, charged with a duty with respect to the dangerous thing, directly participated in a dangerous act before the occurrence of an accident therefrom,[84] or that defendant warned others of the existence of a dangerous place in certain premises from which an injury arose,[85] is competent to show knowledge thereof. For this purpose a complaint made or warning given to defendant or his authorized agent of the danger is also admissible.[86]

Pennsylvania. — Mertz *v.* Detweiler, 8 Watts & S. 376.

Vermont. — Houston *v.* Brush, 66 Vt. 331, 29 Atl. 380.

79. Atlanta & W. P. R. Co. *v.* Smith, 94 Ga. 107, 20 S. E. 763; Atlanta & W. P. R. Co. *v.* Newton, 85 Ga. 517, 525-526, 11 S. E. 776; Adams *v.* Chicago M. & St. P. R. Co., 93 Iowa 565, 61 N. W. 1059; Chase *v.* Maine Cent. R. Co., 77 Me. 62, 52 Am. Rep. 744.

80. Atlanta & W. P. R. Co. *v.* Smith, 94 Ga. 107, 20 S. E. 763; Holtzman *v.* Hoy, 118 Ill. 534, 8 N. E. 832, 59 Am. Rep. 390; Adams *v.* Chicago M. & St. P. R. Co., 93 Iowa 565, 61 N. W. 1059; Chase *v.* Maine Cent. R. Co., 77 Me. 62, 52 Am. Rep. 744.

81. Montgomery & W. P. R. Co. *v.* Edmonds, 41 Ala. 667, 677; Stafford *v.* Oskaloosa, 64 Iowa 251, 20 N. W. 174.

82. Hasie *v.* Alabama & V. R. Co., 78 Miss. 413, 28 So. 491; Vicksburg & J. R. Co. *v.* Patton, 31 Miss. 156, 194; Patton *v.* St. Louis & S. F. R. Co., 87 Mo. 117, 56 Am. Rep. 446; Smith *v.* Hannibal & St. J. R. Co., 37 Mo. 287.

83. Salem *v.* Webster, 192 Ill. 369, 61 N. E. 323; Chicago R. I. & P. R. Co. *v.* Clark, 108 Ill. 113; Minot *v.* Boston & M. R. R. (N. H.), 61 Atl. 509; Smith *v.* Boston & M. R. R., 70 N. H. 53, 47 Atl. 290.

84. Chicago B. & Q. R. Co. *v.* Krayenbuhl, 65 Neb. 889, 91 N. W. 880, 59 L. R. A. 920, where shortly before a child was injured while playing by a railroad turn-table, the defendant's agent whose duty it was to see that the table was locked, rode on a push-car that the child in question with others was pushing five hundred yards distant therefrom.

85. Franklin *v.* Engel, 34 Wash. 480, 76 Pac. 84, where plaintiff showed that defendant had previously warned others against falling down a trap door in the floor of his store down which plaintiff fell.

86. Alexandria Min. & Exploring Co. *v.* Irish, 16 Ind. App. 534, 44 N. E. 680; Bast *v.* Leonard, 15 Minn. 304; Auld *v.* Manhattan L. Ins. Co., 34 App. Div. 491, 54 N. Y. Supp. 222, *affirmed* without opinion, 165 N. Y. 610, 58 N. E. 1085. *Contra*, Potter *v.* Cave, 123 Iowa 98, 98 N. W. 569; Tribette *v.* Illinois Cent. R. Co., 71 Miss. 212, 232, 13 So. 899.

Warning of Existence of Other Danger Not Admissible. — Dundas *v.* Lansing, 75 Mich. 499, 507, 42 N. W. 1011, 13 Am. St. Rep. 457, 5 L. R. A. 143, where a city had been given

B. By Person Injured. — As showing knowledge of the person injured of the danger to be apprehended, his familiarity with the place of accident,[87] or with a custom of performing an act causing the injury,[88] may be shown. A warning to the injured person of the existence of the danger is also admissible.[89] In rebuttal, plaintiff may show that the injured person did not know of the possibility of the performance of the act from which the injury arose,[90] or that his view of a defect in certain grounds was cut off,[91] or that he had no knowledge of other accidents from such defect.[92] He may also show statements made to the injured person tending to remove any apprehension of danger.[93]

C. By Third Persons. — Proof that a person residing in the

notice of the defective condition of other cross-walks in the vicinity six months before the accident.

87. Georgia Midland & G. R. Co. *v.* Evans, 87 Ga. 673, 13 S. E. 580; Benson *v.* Hamilton, 34 Wash. 201, 75 Pac. 805.

88. Where a person was struck by a rock from a blast, evidence that she knew that the blasting was not safeguarded as required by city ordinance is admissible on the question of her care. Brannock *v.* Elmore, 114 Mo. 55, 64-65, 21 S. W. 451.

Where an engineer was killed in a collision of his train with another that by the rules of the road should have cleared the track, evidence that decedent knew that it was customary for the other train to switch on the main line after his train was past due is admissible. Pierson *v.* Chicago G. W. R. Co. (Minn.), 88 N. W. 363.

89. Central R. & Bkg. Co. *v.* Sears, 59 Ga. 436 (where a brakeman had been warned of the danger of uncoupling cars in a certain way); Fitzpatrick *v.* Fitchburg R. Co., 128 Mass. 13 (warnings to a child of nine against getting on the track and jumping on moving cars); Yazoo & M. V. R. Co. *v.* Humphrey, 83 Miss. 721, 36 So. 154 (warning against walking about a passenger car attached to a mixed train).

In rebuttal it may be shown that the warning was misunderstood. Tyler *v.* Concord & M. R. R., 68 N. H. 331, 44 Atl. 524.

90. Helbig *v.* Michigan Cent. R. Co., 85 Mich. 359, 48 N. W. 589, where the freight car that ran plaintiff down was being moved by a locomotive on the adjoining track by staking it, and the plaintiff put in evidence that he did not know of that method of moving cars.

91. Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 414, 61 N. E. 936, where a passenger in a dense crowd on a railroad platform stepped into a hole therein, and evidence that the crowd prevented him from seeing it was received.

92. Potter *v.* Natural Gas Co., 183 Pa. St. 575, 591, 39 Atl. 7.

93. Where plaintiff had fallen over the same obstacles in a dark cellar two weeks before, evidence that the employe responsible for putting them there then said he was very sorry tended to show that plaintiff had reason to expect that the obstacles would be removed and was admissible as bearing on plaintiff's contributory negligence. Mount *v.* Brooklyn Union Gas Co., 72 App. Div. 440, 76 N. Y. Supp. 533.

Where plaintiff while crossing a track at a railroad station to a train on a further track was struck by an incoming train on a near track, evidence that plaintiff was informed that the incoming train was fifteen minutes late, whereas it came in on time, is admissible as tending to excuse him for crossing the track in front of it. Lake Shore & M. S. R. Co. *v.* Herrick, 49 Ohio St. 25, 29 N. E. 1052.

immediate vicinity of a defect in a street did not know of its existence is irrelevant.[94]

16. Notoriety of Dangerous Nature or Condition. — General notoriety of the dangerous nature or condition of a thing or structure,[95] or of the occurrence of former accidents at the same place,[96] is admissible on the question of knowledge of the danger.

17. Mental Capacity of Children. — The intelligence of a child and his capacity to know and understand danger may be shown,[97] but whether or not in any particular case he sufficiently apprehended the danger is a question for the jury.[98]

18. Vision and Hearing of Person Damnified. — The poor eyesight of the person injured may be shown,[99] and so also his deafness.[1]

19. Intoxication. — Relevancy in General. — The fact that a person whose act caused an injury[2] or one who was injured by the

94. Grand Rapids *v.* Wyman, 46 Mich. 516, 9 N. W. 833.

And so is the fact that an undesignated person knew of the danger to certain colts from habitually trespassing on a railroad track. Western Maryland R. Co. *v.* Carter, 59 Md. 306.

95. Reed *v.* Northfield, 13 Pick. (Mass.) 94 (where the notoriety of a defect in a highway appeared); Crane *v.* Missouri Pac. R. Co., 87 Mo. 588 (where it was shown that because of its dangerousness a certain type of draw-head for freight cars had generally been withdrawn from use); Gulf C. & S. F. R. Co. *v.* Evansich, 63 Tex. 54 (where defendant's employes generally knew the dangerousness of a certain turntable to children). See, however, Missouri Pac. R. Co. *v.* Johnson, 72 Tex. 95, 10 S. W. 325, where it was held doubtful whether or not evidence of a general reputation that a certain railroad track was in bad condition was admissible). *Contra,* Savannah F. & W. R. Co. *v.* Evans (Ga.), 49 S. E. 308, where evidence that the public at large knew of the dangers of being on defendant's track at a certain place, because of the customary movement of trains thereat, was excluded.

96. Louisville & N. R. Co. *v.* Hall, 91 Ala. 112, 120, 8 So. 371, 24 Am. St. Rep. 863, where a brakeman on a moving train was struck by an overhead bridge, and the general notoriety of previous injuries thereat was admitted to show notice to the defendant of the previous injuries.

97. Atchison T. & S. F. R. Co. *v.* Potter, 60 Kan. 808, 58 Pac. 471; Bridger *v.* Asheville & S. R. Co., 27 S. C. 456, 3 S. E. 860, 13 Am. St. Rep. 653; Over *v.* Missouri K. & T. R. Co. (Tex. Civ. App.), 73 S. W. 535. *Compare* Lynch *v.* Smith, 104 Mass. 52, 6 Am. Rep. 188, where the opinion of the school teacher as to the capacity of a child of four was excluded.

98. Bridger *v.* Asheville & S. R. Co., 27 S. C. 456, 3 S. E. 860, 13 Am. St. Rep. 653; Over *v.* Missouri K. & T. R. Co. (Tex. Civ. App.), 73 S. W. 535; St. Louis S. W. R. Co. *v.* Shiflet (Tex. Civ. App.), 84 S. W. 247 (it is error to admit evidence that a child of eleven did not have sufficient intelligence to appreciate and realize that if he sat upon the track while weary and tired, at night, he might go to sleep); St. Louis S. W. R. Co. *v.* Shiflet (Tex. Civ. App.), 58 S. W. 945.

99. Austin *v.* Ritz, 72 Tex. 391, 9 S. W. 884, the same being admissible on plaintiff's behalf on the issue of contributory negligence.

1. Cleveland C. & C. R. Co. *v.* Terry, 8 Ohio St. 570, 579-580, the same being admissible on the issue of contributory negligence, but where it does not appear that defendant knew of it is not admissible on the issue of primary negligence.

2. Hobson *v.* New Mexico & A. R. Co., 2 Ariz. 171, 11 Pac. 545, 553; Merrill *v.* Pepperdine, 9 Ind. App. 416, 36 N. E. 921; Philadelphia City Pass. R. Co. *v.* Henrice, 92 Pa. St. 431.

negligence of another,[3] was intoxicated at the time of injury, is ordinarily admissible on the question of negligence. In some jurisdictions, however, it seems that in order to be relevant such evidence must be coupled with further proof that the intoxication contributed to the injury.[4] Disconnected instances of intoxication cannot however be shown.[5] Neither can a habit of becoming intoxicated or of remaining sober be shown,[6] unless where the specific negligence charged was intoxication.[7] Nor can a reputation for habitual intoxication or sobriety be shown.[8]

20. Acts, Habits, Disposition and Reputation of Animals. — Specific acts of a horse before the time of the accident in suit, illustrating

3. Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177; Kingston *v.* Ft. Wayne & E. R. Co., 112 Mich. 40, 70 N. W. 315; Link *v.* Brooklyn Heights R. Co., 64 App. Div. 406, 72 N. Y. Supp. 75; Sharpton *v.* Augusta & A. R. Co., 72 S. C. 162, 51 S. E. 553; Houston & Texas Cent. R. Co. *v.* Waller, 56 Tex. 331, 340; Rhyner *v.* Menasha, 97 Wis. 523, 73 N. W. 41; Seymer *v.* Lake, 66 Wis. 651, 29 N. W. 554 (but intoxication is not conclusive of contributory negligence).

4. Texas & St. L. R. Co. *v.* Orr, 46 Ark. 182, 194; Sylvester *v.* Casey, 110 Iowa 256, 81 N. W. 455. See also Shelly *v.* Brunswick Trac. Co., 65 N. J. L. 639, 48 Atl. 562. *Contra,* Cramer *v.* Burlington, 42 Iowa 315 (*compare* opinion of Beck, J., *dissenting*).

5. Warner *v.* New York C. & H. R. R. Co., 44 N. Y. 465 (intoxication on several previous occasions); Crowder *v.* St. Louis S. W. R. Co. (Tex. Civ. App.), 87 S. W. 166 (the fact that the person injured drank after the accident cannot be shown; so it is error to allow a question, whether plaintiff drank any whisky on the day of the accident, the same being too broad).

Admissible on Question of Capacity to Earn Money. — Herrick *v.* Wixom, 121 Mich. 384, 81 N. W. 333, 80 N. W. 117.

6. *Massachusetts.* — Carr *v.* West End St. R. Co., 163 Mass. 360, 40 N. E. 185 (nor does the admission of immaterial evidence that a witness had seen plaintiff intoxicated several times render evidence of his habits, either as being sober or industrious, admissible).

Michigan. — Kingston *v.* Ft. Wayne & E. R. Co., 112 Mich. 40, 70 N. W. 315; Langworthy *v.* Green, 88 Mich. 207, 217, 50 N. W. 130; Williams *v.* Edmunds, 75 Mich. 92, 45 N. W. 534; Hill *v.* Snyder, 44 Mich. 318, 6 N. W. 674; Lane *v.* Missouri Pac. R. Co., 132 Mo. 4, 33 S. W. 645, 1128 (Sherwood, J., *dissenting*); Warner *v.* New York C. & H. R. R. Co., 44 N. Y. 465; Browne *v.* Bachman, 31 Tex. Civ. App. 430, 72 S. W. 622; Carter *v.* Seattle, 19 Wash. 597, 53 Pac. 1102. *Compare,* however, Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401, 28 N. E. 860, where evidence that the engineer of a train that was derailed was in the habit of drinking — that he frequently drank at a saloon the train passed en route — and had taken a drink within thirty minutes of the accident, was held admissible. *Contra,* Hobson *v.* New Mexico & A. R. Co., 2 Ariz. 171, 11 Pac. 545, 553.

7. Gahagan *v.* Boston & L. R. Co., 1 Allen (Mass.) 187, 79 Am. Dec. 724, where it was claimed that defendant negligently employed an intemperate flagman at a crossing, and evidence that he was careful, attentive and temperate was admitted.

8. Hobson *v.* New Mexico & A. R. Co., 2 Ariz. 171, 11 Pac. 545, 553; Kingston *v.* Ft. Wayne & E. R. Co., 112 Mich. 40, 70 N. W. 315; Williams *v.* Edmunds, 75 Mich. 92, 42 N. W. 534; Carter *v.* Seattle, 19 Wash. 597, 53 Pac. 1102; Chesapeake & O. R. Co. *v.* Riddle, 24 Ky. L. Rep. 1687, 72 S. W. 22 (where evidence was offered that the person killed was sober). See, however, Missouri Pac. R. Co. *v.* Moffatt, 60 Kan. 113, 55 Pac. 837.

the safety or dangerousness of using it, may be shown.[9] In connection with such evidence, proof of its acts after the accident are also admissible,[10] and in some jurisdictions, at least, evidence of specific acts after the accident are admissible,[11] although this has elsewhere been denied.[12] Specific acts of a dog may likewise be shown to illustrate the safety or dangerousness of keeping it or permitting it to run at large.[13] Similarly the habits and disposition of a horse before an accident may be shown,[14] and its habits thereafter as well,[15] at least when coupled with evidence as to their condition before.[16] The habits and disposition of a dog may likewise be shown.[17] Also the general reputation of a horse,[18] a dog[19] or a

9. Indianapolis U. R. Co. *v.* Boettcher, 131 Ind. 82, 28 N. E. 551; Whittier *v.* Franklin, 46 N. H. 23, 88 Am. Dec. 185.

10. Kennon *v.* Gilmer, 131 U. S. 22; Indianapolis U. R. Co. *v.* Boettcher, 131 Ind. 82, 28 N. E. 551; Todd *v.* Rowley, 8 Allen (Mass.) 51 (such testimony being admissible to show that the horse's previous conduct was not accidental or unusual, but frequent and the result of fixed habit at the time of accident).

11. Kennon *v.* Gilmer, 5 Mont. 257, 5 Pac. 847, 51 Am. Rep. 45; Chamberlain *v.* Enfield, 43 N. H. 356 (where evidence of acts of skittishness six or eight months after the accident were received, the court saying: "It may be safely laid down as a general rule [having its exceptions no doubt], that neither horses nor men entirely change their characters, their habits, and their manners, in that space of time").

12. Illinois Cent. R. Co. *v.* Griffin, 184 Ill. 9, 56 N. E. 337, the court saying: "The fact that the mare may have run off some time after the accident did not show that she was unsafe when the accident occurred. It is a matter of common observation that a horse rarely, if ever, recovers from a runaway accident so that it becomes gentle or safe."

13. Murray *v.* Young, 12 Bush (Ky.) 337 (specific attacks by a dog upon stock); Robinson *v.* Marino, 3 Wash. 434, 28 Pac. 752, 28 Am. St. Rep. 50 (a previous bite or attempt of the dog to bite another person).

14. Burkett *v.* Bond, 12 Ill. 87; Kennon *v.* Gilmer, 5 Mont. 257, 5 Pac. 847, 51 Am. Rep. 45; Folsom *v.* Concord & M. R. R., 68 N. H. 454, 38 Atl. 209; Whittier *v.* Franklin, 46 N. H. 23, 88 Am. Dec. 185; Kalbus *v.* Abbot, 77 Wis. 621, 46 N. W. 810.

15. Lebanon & S. Tpke. Co. *v.* Hearn, 87 Tenn. 291, 10 S. W. 510, the court holding that the habit of an animal is a continuous fact, and that its condition after the accident being due to the fright of the accident was a thing to be proved as a defense and not assumed.

16. Schaefer *v.* Osterbrink, 67 Wis. 495, 30 N. W. 922, 58 Am. Rep. 875.

17. Knowles *v.* Mulder, 74 Mich. 202, 41 N. W. 896, 16 Am. St. Rep. 627 (where the habit of running out into the street, giving chase to and barking at passers-by in vehicles was held proper); Chenev *v.* Russell, 44 Mich. 620, 7 N. W. 234 (where vicious character and roving propensities of dog proved).

In Buckley *v.* Leonard 4 Denio (N. Y.) 500, where defendant had notice that a dog was accustomed to bite people, it was error to permit defendant to give evidence of the mild character and deportment of the dog.

18. Wormsdorf *v.* Detroit City R. Co., 75 Mich. 472, 42 N. W. 1000, 13 Am. St. Rep. 453, where the reputation of a street car horse for being unsafe and unreliable and liable to run away was shown.

Reason for Non-Use of Horse. Where defendant introduces evidence that the person who reared a horse never used it, in rebuttal it may be shown that that was because such person had more horses than he had use for. Potter *v.* Natural Gas Co., 183 Pa. St. 575, 591-592, 39 Atl. 7.

19. Cameron *v.* Bryan, 89 Iowa 214, 56 N. W. 434, where a bad repu-

bull[20] may be considered in determining whether or not due care was exercised in its management.

21. Customs and Usages. — A. General Customs. — a. *As to Act by Defendant.* — Where other persons in the ordinary course of their business perform acts similar to that from which the injury in suit arose, such custom is, in some jurisdictions, admissible in determining whether or not defendant exercised due care,[21] except where the ordinary manner of performance of such act is a matter of common knowledge.[22] In other jurisdictions, however, such a custom can never be shown.[23] Similarly the fact that similar defects

tation was shown on the question of notice to defendant. Murray *v.* Young, 12 Bush (Ky.) 337.

20. Meier *v.* Shrunk, 79 Iowa 17, 44 N. W. 209, where before plaintiff was attacked by a bull he struck him with his cane, evidence of the general reputation of the bull as being vicious was admitted on plaintiff's behalf as tending to show whether his act was negligent or reasonably calculated to ward off danger.

21. *Alabama.* — Maxwell *v.* Eason, 1 Stew. 514.

Massachusetts. — Lane *v.* Boston & A. R. Co., 112 Mass. 455, 463. (See also Myers *v.* Hudson Iron Co., 150 Mass. 125, 137-138, 22 N. E. 631, 15 Am. St. Rep. 176, where a miner was precipitated to the bottom of a shaft by failure of brakes on the reel holding the cable attached to the bucket, and evidence of the kind of appliances used elsewhere to control the speed of the bucket in descending was given). *Contra*, Hill Mfg. Co. *v.* Providence & N. Y. S. S. Co., 125 Mass. 292, 303; Kidder *v.* Dunstable, 11 Gray 342; Bacon *v.* Boston, 3 Cush. 174.

Minnesota. — Tvedt *v.* Wheeler, 70 Minn. 161, 72 N. W. 1062 (holding custom admissible on question of contributory negligence). See Kelly *v.* Southern M. R. Co., 28 Minn. 98, 9 N. W. 588.

South Carolina. — Bridger *v.* Asheville & S. R. Co., 27 S. C. 456, 3 S. E. 860, 13 Am. St. Rep. 653.

Tennessee. — Standard Oil Co. *v.* Swan, 89 Tenn. 434, 14 S. W. 1068.

Texas. — Houston & T. C. R. Co. *v.* Cowser, 57 Tex. 293, 303.

Wisconsin. — Feldschneider *v.* Chicago M. & St. P. R. Co., 99 N. W. 1034; Jochem *v.* Robinson, 72 Wis. 199, 39 N. W. 383; Nadau *v.* White River Lumb. Co., 76 Wis. 120, 134, 43 N. W. 1135.

22. Maxwell *v.* Eason, 1 Stew. (Ala.) 514; Simonds *v.* Baraboo, 93 Wis. 40, 67 N. W. 40, 57 Am. St. Rep. 895. See also Raymond *v.* Lowell, 6 Cush. (Mass.) 524.

Similarly where negligence of act is apparent proof of custom is inadmissible. Larson *v.* Ring, 43 Minn. 88, 44 N. W. 1078, where a person was brushed from a wagon by a guy rope that defendant had stretched across a street.

23. *Georgia.* — East Tennessee V. & G. R. Co. *v.* Kane, 92 Ga. 187, 18 S. E. 18.

Illinois. — Hansell-Elcock Foundry Co. *v.* Clark, 214 Ill. 399, 73 N. E. 787; Chicago R. I. & P. R. Co. *v.* Clark, 108 Ill. 113.

Iowa. — McCartney *v.* Washington, 124 Iowa 382, 100 N. W. 80; Slossen *v.* Burlington C. R. & N. R. Co., 60 Iowa 214, 14 N. W. 244; Ormond *v.* Central Iowa R. Co., 58 Iowa 742, 13 N. W. 54; Koester *v.* Ottumwa, 34 Iowa 41. See also Metzgar *v.* Chicago M. & St. P. R. Co., 76 Iowa 387, 41 N. W. 49, 14 Am. St. Rep. 224; Payne *v.* Kansas City St. J. & C. B. R. Co., 72 Iowa 214, 33 N. W. 633; McPherrin *v.* Jennings, 66 Iowa 622, 24 N. W. 242. *Compare*, however, Moore *v.* Burlington, 49 Iowa 136, where a person fell over a pile of lumber in a street, and evidence that other lumbermen had been accustomed to pile lumber at the same place was held admissible as tending to show knowledge of the fact on defendant's part and consequent negligence.

are customary in streets or highways generally is not admissible on the question of defendant's negligence,[24] or the damnified person's contributory negligence.[25]

b. *As to Act by Plaintiff.* — The custom of persons to do the act that the damnified person was doing at the time he sustained injury, is, in some jurisdictions, admissible to show notice to the defendant of the probability that such act would be done;[26] but in other jurisdictions such custom cannot be shown.[27]

c. *By Third Person as Notice.* — Where a customary act of a third person is dangerous, and an injury results therefrom, the custom may be shown to charge defendant with notice of the danger.[28]

The usage of one other concern, small when compared with defendant, in the performance of acts like that from which the injury arose, is not competent as evidence on the question of defendant's due care.[29]

B. USAGES OF DEFENDANT. — a. *To Show Performance of Act.* Although it is questioned whether or not defendant did the alleged

Maine. — Pulsifer *v.* Berry, 87 Me. 405, 32 Atl. 986; Hill *v.* Portland & R. R. Co., 55 Me. 438, 92 Am. Dec. 601.

Missouri. — Kelley *v.* Parker-Washington Co., 107 Mo. App. 490, 81 S. W. 631.

New Hampshire. — See Hubbard *v.* Concord, 35 N. H. 52, 61, 69 Am. Dec. 520.

New Jersey. — See Temperance Hall Ass'n *v.* Giles, 33 N. J. L. 260.

Utah. — Jenkins *v.* Hooper Irr. Co., 13 Utah 100, 44 Pac. 829.

Washington. — See Stone *v.* Seattle, 34 Wash. 644, 74 Pac. 808.

24. Marvin *v.* New Bedford, 158 Mass. 464, 33 N. E. 605; Schoonmaker *v.* Wilbraham, 110 Mass. 134. Other cases illustrating this proposition are quoted in note 23 *supra*.

25. George *v.* Haverhill, 110 Mass. 506. *Contra*, Packard *v.* New Bedford, 9 Allen (Mass.) 200.

26. *United States.* — Illinois Cent. R. Co. *v.* Davidson, 22 C. C. A. 306, 76 Fed. 517.

Illinois. — North Chicago St. R. Co. *v.* Kaspers, 186 Ill. 246, 57 N. E. 849.

Iowa. — Donaldson *v.* Mississippi & M. R. Co., 18 Iowa 280, 289.

Michigan. — Rascher *v.* East Detroit & G. P. R. Co., 90 Mich. 413, 51 N. W. 463, 30 Am. St. Rep. 447; Engel *v.* Smith, 82 Mich. 1, 46 N. W. 21, 21 Am. St. Rep. 549; Boick *v.* Bissell, 80 Mich. 260, 45 N. W. 55.

Nebraska. — Chicago B. & Q. R. Co. *v.* Russell, 100 N. W. 156.

Texas. — Gulf C. & S. F. R. Co. *v.* Grisom (Tex. Civ. App.), 82 S. W. 671.

Utah. — Christensen *v.* Oregon S. L. R. Co., 80 Pac. 746.

Vermont. — Benedict *v.* Union Agricultural Soc., 74 Vt. 91, 52 Atl. 110.

27. Glass *v.* Memphis & C. R. Co., 94 Ala. 581, 10 So. 215; Metropolitan St. R. Co. *v.* Johnson, 91 Ga. 466, 18 S. E. 816; Monehan *v.* South Covington & C. St. R. Co., 25 Ky. L. Rep. 1920, 78 S. W. 1106; Williams *v.* Southern R. Co., 68 S. C. 369, 47 S. E. 706; Colf *v.* Chicago St. P. M. & O. R. Co., 87 Wis. 273, 58 N. W. 408.

28. Shaw *v.* Chicago & G. T. R. Co., 123 Mich. 629, 82 N. W. 618, 49 L. R. A. 308, where a passenger in a station was hurt by flying glass from the breakage of a window against which a mail bag from a passing train was hurled by the mail clerk, the fact that the clerk had thrown it so that it occasionally struck the station house for a considerable period before was admitted.

29. Standard Oil Co. *v.* Swan, 89 Tenn. 434, 14 S. W. 1068, where fire was communicated from the burning buildings and oil of the Standard Oil company, and the care with which a small competitive concern handled its oil was held incom-

negligent act on the occasion of the accident in suit, defendant's customary manner of performing such act cannot ordinarily be shown in evidence.[30] Such evidence is, however, sometimes received where no direct evidence is available.[31]

b. *On Question of Defendant's Care.* — The ordinary usage of the defendant in the performance of acts similar to that from which the injury arose may also, in some jurisdictions, be shown on the question of the defendant's exercise of due care on the occasion in suit.[32] Other jurisdictions hold it is only admissible where the

petent on the question of due care.

30. Texas & P. R. Co. *v.* Frank (Tex. Civ. App.), 88 S. W. 383; Stewart *v.* Galveston H. & S. A. R. Co. (Tex. Civ. App.), 78 S. W. 979; Atherton *v.* Tacoma R. & P. Co., 30 Wash. 395, 71 Pac. 39. *Contra*, McKerley *v.* Red River T. & S. R. Co. (Tex. Civ. App.), 85 S. W. 499.

Admissible To Strengthen Witness' Testimony as to Manner in Which Act Done. — Atlanta & W. P. R. Co. *v.* Holcombe, 88 Ga. 9, 13 S. E. 751, where plaintiff claimed he fell over a stool left on the passage way between two passenger cars while the train was standing at a station, the custom to put the stool on the ground for the use of passengers cannot be proved; yet the servant whose duty it is to put the stool down, in connection with his testimony that he put it down at the time in question, may add that it was his invariable custom to do so.

Admissible When Manner in Which Act Done in Dispute. — Alexandria & F. R. Co. *v.* Herndon, 87 Va. 193, 12 S. E. 289, where the place where a train stopped was in dispute, and the customary place for it to stop was shown.

31. Galvin *v.* New York, 112 N. Y. 223, 19 N. E. 675 (where there were no eye-witnesses of accident).

St. Joseph & D. C. R. Co. *v.* Chase, 11 Kan. 47, 55-56 (where fire was said to have been caused by negligently burning wood in coal-burning locomotive, and evidence that all defendant's locomotives were coal-burners was given); Kentucky Cent. R. Co. *v.* Barrow, 89 Ky. 638, 20 S. W. 165, 5 Ky. L. Rep. 518 (where a fire was said to have been caused by the negligent leaving of a locomotive spark-arrester open, and evidence that at the point in question the spark-arrester was usually open was received).

32. *Connecticut.* — Fuller *v.* Naugatuck R. Co., 21 Conn. 557, 575 (where usual length of time train stopped at certain station was received).

Massachusetts. — Floytrup *v.* Boston & M. R. Co., 163 Mass. 152, 39 N. E. 797 (custom that one train should not enter station while another was unloading passengers). *Compare*, Holly *v.* Boston Gaslight Co., 8 Gray (Mass.) 123, 133-135, 69 Am. Dec. 233, where the system followed by defendant in dealing with complaints of leaks in its gas pipes was shown, as evidence of the promptness of the remedy provided by defendant for the accidents that might be expected, but not as showing that defendant used the same promptness in this case as in others.

Contra, Peverly *v.* Boston, 136 Mass. 366, 49 Am. Rep. 37 (where custom of boat to have deck-hand at bow on making landing was excluded); Lane *v.* Boston & A. R. Co., 112 Mass. 455 (custom of handling freight awaiting delivery excluded). See also Gahagan *v.* Boston & L. R. Co., 1 Allen (Mass.) 187, 79 Am. Dec. 724.

New Hampshire. — Bullard *v.* Boston & M. R. R., 64 N. H. 27, 5 Atl. 838, 10 Am. St. Rep. 367 (custom to direct passengers for a certain point to take certain car of train).

New York. — Casey *v.* New York C. & H. R. R. Co., 78 N. Y. 518 (custom to keep flagman at certain railroad crossing); *Per* Earl & Rapallo, JJ., in McGrath *v.* New York C. & H. R. R. Co., 63 N. Y. 522.

Pennsylvania. — See Heiss *v.* Lancaster, 203 Pa. St. 260, 52 Atl. 201, where similar condition of other

individual custom of the defendant conforms to a general usage.[33]

c. *Damnified Person's Care.* — A usage observed by defendant before the accident in the performance of the act from which it arose may be shown on the question of contributory negligence, as notice to the injured person of the probability that such usage would be observed, whether it appears that the usage was observed[34] or violated[35] at the time of the accident in suit. The usage of defendant

cross walks and adjacent gutters was received.

Tennessee. — Poole *v.* Mayor, 93 Tenn. 62, 23 S. W. 57.

Admissible Where Custom Discontinued Shortly Before Accident. Stewart *v.* Chester & D. Telford Road Co., 3 Pa. Super. Ct. 86 (where custom to keep light on projecting end of open gate shown).

The usual performance of an act which co-operated with another to produce injury may be shown. Southern Pac. Co. *v.* Hall, 41 C. C. A. 50, 100 Fed. 760, where an alighting passenger stepped into an open water box in the station grounds, and evidence that the train usually stopped beside this box was admitted.

Stone *v.* Lewiston B. & B. St. R. Co., 99 Me. 243, 59 Atl. 56, where the custom of defendant street railroad to permit passengers to ride on the running boards of cars on their line was received.

Customary Operation of Machine. Presby *v.* Grand Trunk R. R., 66 N. H. 615, 22 Atl. 554, where evidence that locomotives standing at a certain station frequently blew off steam, frightening horses, was admitted to show defendant's knowledge of the danger.

33. Maxwell *v.* Eason, 1 Stew (Ala.) 514 (custom of carrying lighted open oil lamp into cotton-ginning house in which cotton was stored); Chicago City R. Co. *v.* Taylor, 170 Ill. 49, 48 N. E. 831; Baltimore & O. R. Co. *v.* Shipley, 39 Md. 251; Bannon *v.* Baltimore & O. R. Co., 24 Md. 108, 118-119 (custom to back trains onto "Y" without guard on rear of train); Gulf C. & S. F. R. Co. *v.* Rowland, 82 Tex. 166, 18 S. W. 96; Hinton *v.* Cream City R. Co., 65 Wis. 323, 27 N. W. 147. See Radichel *v.* Kendall, 121 Wis. 560, 99 N. W. 348, where a person fell over buggy shafts lying across a sidewalk at night, and the custom of leaving vehicles in the street at night with defendant's permission was excluded.

Inadmissible Where Custom Discontinued Shortly Before Accident. Gardner *v.* Detroit St. R. Co., 99 Mich. 182, 58 N. W. 49, where custom of running a street car without a conductor, discontinued shortly before accident, was excluded.

"The general conduct of the defendants was not in issue. . . . The acts and omissions of their servants and agents at other times, furnished no legitimate evidence of their conduct upon the particular occasion referred to; and if they did, the safe conduct of the cars, for a long time before without injury, would rather tend to mitigate than to inflame the jury, showing there was no danger to the community in that mode of managing the cars. The evidence was collateral, and incapable of affording any reasonable presumption or inference as to the matter in issue." Bannon *v.* Baltimore & O. R. Co., 24 Md. 108, 118-119.

34. Floytrup *v.* Boston & M. R. R. 163 Mass. 152, 39 N. E. 797, where custom of incoming train to stop outside station grounds until previous train had discharged passengers, was held admissible on the question of contributory negligence, if plaintiff knew of it.

35. *United States.* — Southern R. Co. *v.* Simpson, 131 Fed. 705.

Delaware. — Foulk *v.* Wilmington City R. Co., 60 Atl. 973.

District of Columbia. — Baltimore & P. R. Co. *v.* Carrington, 3 App. D. C. 101.

Illinois. — North Chicago St. R. C. *v.* Irwin, 202 Ill. 345, 66 N. E. 1077.

Indiana. — Cleveland, C. C. & St.

at a time subsequent to the injury is held irrelevant to this issue.[36]

22. Ordinances, Rules and Contracts. — Ordinances. — Where evidence is given of the failure of defendant to take precautions enjoined on him by ordinance, such ordinance is admissible in evidence on the question of defendant's negligence.[37] Where it appears that the conduct of the injured person was in violation of ordinance in any relevant respect such ordinance is admissible.[38] An ordinance adopted after the occurrence in suit is not admissible.[39]

L. R. Co. *v.* Coffman (Ind. App.), 64 N. E. 233; Pittsburgh, C. & St. L. R. Co. *v.* Yundt, 78 Ind. 373, 41 Am. Rep. 580.

Kentucky. — Berberich *v.* Louisville Bridge Co., 20 Ky. L. Rep. 467, 46 S. W. 691.

Pennsylvania. — See Heiss *v.* Lancaster, 203 Pa. St. 260, 52 Atl. 201. *Compare* McNerney *v.* Reading City, 150 Pa. St. 611, 25 Atl. 57.

Washington. — See Smith *v.* Seattle, 33 Wash. 481, 74 Pac. 674.

Contra, McGrath *v.* New York C. & H. R. R. Co., 59 N. Y. 468; Muller *v.* Hale, 138 Cal. 163, 71 Pac. 81.

36. Luria *v.* Cusick, 93 N. Y. Supp. 507.

37. Shumway *v.* Burlington, 108 Iowa 424, 79 N. W. 123 (where a sidewalk has a slope of ten inches from house line to curb, an ordinance prohibiting a slope of more than three inches is admissible); Knupfle *v.* Knickerbocker Ice Co., 84 N. Y. 488, (where a child was killed by the starting of an untied team, an ordinance prohibiting the leaving of teams untied is admissible); McNerney *v.* Reading City, 150 Pa. St. 611, 25 Atl. 57 (where a person fell into a basement stairway beside a sidewalk, an ordinance requiring such openings to be sufficiently guarded is admissible); Browne *v.* Bachman, 31 Tex. Civ. App. 430, 72 S. W. 622 (where a person fell into an unguarded trench in a street, an ordinance making it an offense to leave an unguarded trench in a street is admissible).

Limiting Speed of Vehicles. *Illinois.* — United States Brew. Co. *v.* Stoltenberg, 211 Ill. 531, 71 N. E. 1081; Brinks City Exp. Co. *v.* Kinnare, 168 Ill. 643, 48 N. E. 446; Lake Erie & W. R. Co. *v.* Middlecoff, 150 Ill. 27, 35, 37 N. E. 660.

Indiana. — St. Louis & S. E. R. Co. *v.* Mathias, 50 Ind. 65; Madison & I. R. Co. *v.* Taffe, 37 Ind. 361, 375-376.

Massachusetts. — Hanlon *v.* South Boston Horse R. Co., 129 Mass. 310.

Nebraska. — Mathiesen *v.* Omaha St. R. Co., 97 N. W. 243; Chicago B. & Q. R. Co. *v.* Richardson, 28 Neb. 118, 44 N. W. 103; Union Pacific R. Co. *v.* Rassmussen, 25 Neb. 810, 41 N. W. 778, 13 Am. St. Rep. 527.

Ohio. — Meek *v.* Pennsylvania Co., 38 Ohio St. 632.

Pennsylvania. — Lederman *v.* Pennsylvania R. R., 165 Pa. St. 118, 30 Atl. 725, 44 Am. St. Rep. 644.

Signal of Approaching Cars. Reed *v.* St. Louis I. M. & S. R. Co., 107 Mo. App. 238, 80 S. W. 919; Kelly *v.* Union R. & Transit Co., 93 Mo. 279, 8 S. W. 420.

Presence of Flagman. — McGrath *v.* New York C. & H. R. R. Co., 62 N. Y. 522, 530.

38. Chicago B. & Q. R. Co. *v.* Richardson, 28 Neb. 118, 44 N. W. 103 (where cow was run down, an ordinance forbidding cows to run at large is admissible); Quinn *v.* New York City R. Co., 94 N. Y. Supp. 560 (where a vehicle was struck by a street car, an ordinance giving the cars the right of way was erroneously excluded).

Where, however, a man in the street with a hand-cart was compelled to push it on a sidewalk to avoid being struck by defendant's team, an ordinance forbidding the running of such hand-carts on sidewalks is not admissible. Dennison *v.* Miner (Pa.), 2 Atl. 561.

39. McCartney *v.* Washington, 124 Iowa 382, 100 N. W. 80.

Rules. — Where evidence tends to show that defendant's servant failed to observe the cautionary rules prescribed by defendant for his government in the performance of the act from which the injury arose, such rules are admissible in evidence,[40] except in Minnesota,[41] on the question of primary negligence. Where an action for negligence is defended on the ground of the negligence of a fellow servant, and it appears that such fellow servant was not disciplined for such alleged negligence, defendant's rule requiring the discharge, reprimand or suspension of a negligent employe is admissible.[42]

Contracts. — A contract between a railroad and a municipality limiting the rate of speed of trains is admissible where it appears the train that struck a person was moving at an excessive speed.[43]

23. Opinion. — A. CONDITION OF PLACE OF ACCIDENT. — A witness' opinion as to the safety of the grounds or place where the accident in suit occurred is inadmissible,[44] except in a few

40. Georgia R. R. *v.* Williams, 74 Ga. 723, 734; Chicago M. & St. P. R. Co. *v.* O'Sullivan, 143 Ill. 48, 58, 32 N. E. 398; Chicago R. I. & P. R. Co. *v.* Krayenbuhl, 65 Neb. 889, 91 N. W. 880, 59 L. R. A. 920; Lyman *v.* Boston & M. R. R., 66 N. H. 200, 20 Atl. 976.

Where the disobedience of a rule "injuriously affects a third person, it is not to be assumed in favor of the master that the negligence was immaterial to the injured person, and that his rights were not affected by it. Rather ought it to be held an implication that there was a breach of duty toward him, as well as toward the master who prescribed the conduct that he thought necessary or desirable for protection in such cases. Against the proprietor of the business, the methods which he adopts for the protection of others are some evidence of what he thinks necessary or proper to insure their safety." Stevens *v.* Boston Elev. R. Co., 184 Mass. 476, 69 N. E. 338.

41. Fonda *v.* St. Paul City R. Co. (Minn.), 74 N. W. 166, where the court said that the doctrine that the rules are admissible is unfair and erroneous, because "the effect of it is that the more careful and cautious a man is in the adoption of rules in the management of his business in order to protect others, the worse he is off, and the higher degree of care he is bound to exercise. A person may, out of abundant caution, adopt rules requiring of his employes a much higher degree of caution than the law imposes. This is a practice that ought to be encouraged and not discouraged. But, if the adoption of such a course is to be used against him as an admission, he would naturally find it to his interest not to adopt any rules at all."

42. Atchison T. & S. F. R. Co. *v.* Parker, 5 C. C. A. 220, 55 Fed. 595.

43. Duval *v.* Atlantic Coast Line R. Co., 134 N. C. 331, 46 S. E. 750, 65 L. R. A. 722.

44. *Iowa.* — Langhammer *v.* Manchester, 99 Iowa 295, 68 N. W. 688.

Kansas. — Junction City *v.* Blades, 1 Kan. App. 85, 41 Pac. 677; Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933.

Michigan. — Lindley *v.* Detroit, 131 Mich. 8, 90 N. W. 665; Brown *v.* Owosso, 130 Mich. 107, 89 N. W. 568; Girard *v.* Kalamazoo, 52 N. W. 1021, 92 Mich. 610; Langworthy *v.* Green Twp., 88 Mich. 207, 216, 50 N. W. 130. *Contra,* Cross *v.* Lake Shore & M. S. R. Co., 69 Mich. 363, 37 N. W. 361; Laughlin *v.* Street R. Co., 62 Mich. 220, 28 N. W. 873 (Morse, J., *dissenting*).

Montana. — Metz *v.* Butte, 27 Mont. 506, 71 Pac. 761.

Texas. — Southern Kansas R. Co. *v.* Cooper, 32 Tex. Civ. App. 595, 75 S. W. 328.

Vermont. — Bovee *v.* Danville, 53 Vt. 183.

jurisdictions, where the witness has the requisite knowledge.[45]

B. Appliances. — A witness' opinion as to the safety or suitableness of the appliances used in an act in the performance of which an injury arose is inadmissible in some jurisdictions,[46] but in others it may be received.[47]

C. Conduct. — Moreover, an opinion of the care or negligence of a person causing an injury,[48] or of the person injured thereby,[49] in the performance of the act causing or contributing to the injury, is inadmissible. Similarly an opinion as to the practicability of performing such act without injury is inadmissible, either on the issue of primary[50] or of contributory negligence,[51] and so is an opinion as to the sufficiency of the precautions taken to avoid an injury.[52] In Alabama, however, an opinion as to the sufficiency of the care manifested in the performance of the act,[53] or of the completeness of the means taken to avoid an impending injury,[54] is admissible.

Wisconsin. — Hallum *v.* Omro, 99 N. W. 1051; Gordon *v.* Sullivan, 116 Mo. 543, 93 N. W. 457.

45. Martin *v.* Baltimore & P. R. Co., 2 Marv. (Del.) 123, 42 Atl. 442; McNerney *v.* Reading City, 150 Pa. St. 611, 25 Atl. 57; Beatty *v.* Gilmore, 16 Pa. St. 463, 55 Am. Dec. 514.

Opinion as to apparent dangerousness of sidewalk admissible to show notice to defendant from its condition. Poole *v.* Jackson, 93 Tenn. 62, 23 S. W. 57.

46. Motey *v.* Pickle Marble & Granite Co., 20 C. C. A. 366, 74 Fed. 155; Sappenfield *v.* Main St. & A. P. R. Co., 91 Cal. 48, 59-61, 27 Pac. 590; Houston *v.* Brush, 66 Vt. 331, 29 Atl. 380.

47. Davis *v.* Kornman (Ala.), 37 So. 789; Chicago B. & Q. R. Co. *v.* Gregory, 58 Ill. 272, 279-280; Standard Oil Co. *v.* Tierney, 92 Ky. 367, 17 S. W. 1025, 36 Am. St. Rep. 595, 14 L. R. A. 677; Haley *v.* St. Louis K. C. & N. R. Co., 69 Mo. 614 (Napton & Norton, JJ., *dissenting*).

48. Hill *v.* Portland & R. R. Co., 55 Me. 438, 92 Am. Dec. 601; Chicago R. I. & P. R. Co. *v.* Cain (Tex. Civ. App.), 84 S. W. 682.

49. Wood *v.* Danbury, 72 Conn. 69, 43 Atl. 554; Langworthy *v.* Green Twp., 88 Mich. 207, 50 N. W. 130; Roanoke *v.* Shull, 97 Va. 419, 34 S. E. 34.

50. Fitch *v.* Mason City & C. L. Trac. Co., 116 Iowa 716, 89 N. W. 33 (street car rounding curve without lurch sufficient to move person).

51. Baltimore & Y. Tpke. Road *v.* Leonhardt, 66 Md. 70, 5 Atl. 346 (ability to descend from upper to lower deck of street car without being struck by post near track).

52. Where it was claimed that an accident was caused by the absence of a railing beside the road, a question asked a witness whether had the railing been up it would have furnished reasonable protection, is properly excluded. Waterbury *v.* Waterbury Trac. Co., 74 Conn. 152, 166, 50 Atl. 3.

Where it was alleged to be negligent not to have fire extinguishers in a boiler room where a fire started, it is error to allow a witness to be asked whether it was safe not to have such appliances. McNally *v.* Colwell, 91 Mich. 527, 536, 52 N. W. 70, 30 Am. St. Rep. 494.

53. Sloss-Sheffield Steel & Iron Co. *v.* Mobley, 139 Ala. 425, 36 So. 181, where it was held error to refuse to allow a witness to testify to the dangerousness of attempting to couple a locomotive to a car loaded with hot slag on an inclined track.

54. Choate *v.* Southern R. Co., 119 Ala. 611, 24 So. 373, where the conductor and an engineer of a train that ran down a cow were permitted to say that they did all that could be done to stop the train.

Contra, Montgomery & W. P. R.

At Admiralty. — A witness' opinion as to the exercise of due care in navigation, where a collision or other disaster occurs, is properly received.[55]

Co. *v.* Edmonds, 41 Ala. 667, 677, where it was held not error to refuse to permit a witness to say whether everything was done that could be done to save certain cotton that was burned from being burned.

55. Fenwick *v.* Bell, 1 C. & K. (Eng.) 312 (where sailing vessels collided on a river); Malton *v.* Nesbit, 1 Car. & P. (Eng.) 70 (where a sailing vessel was wrecked); Cook *v.* Parham, 24 Ala. 24, 31 (where two ships collided); Baltimore Elev. Co. *v.* Neal, 65 Md. 438, 451-452, 5 Atl. 338 (where vessel ran into a building on land).

NEWLY DISCOVERED EVIDENCE.—See New Trial.

NEW PROMISE.

By E. S. Page.

I. SCOPE OF ARTICLE.

In general, the cases in which a new promise, without any additional consideration, may be enforced may be divided into three classes: (1.) Where the promise is made by a party to a bill or note after he has been discharged through the laches of the holder. (2.) Where the promise is made by one whose obligation has been rendered unenforceable by a discharge in bankruptcy or insolvency. (3.) Where the promise is made by a debtor after the statute of limitations has barred the remedy. This last class is discussed in the article "Limitation of Actions." The first two are discussed in this article.

II. NEW PROMISE AS WAIVER OF LACHES BY HOLDER OF BILL OR NOTE.

1. Effect of New Promise. — By the weight of authority the new promise acts as a waiver of demand, protest and notice of dishonor. In a number of jurisdictions, however, it is held that it raises merely a rebuttable presumption that these requisites have been complied with.[1]

1. Lundie *v.* Robertson, 7 East (Eng.) 231; Sherman *v.* Clark, 3 McLean 91, 21 Fed. Cas. No. 12,763, Gazzo *v.* Baudoin, 10 La. Ann. 157; Lewis *v.* Brehme, 33 Md. 412, 3 Am. Rep. 190.

2. Burden of Proof. — It is held in some jurisdictions that the plaintiff has the burden of proving that the promise was made by the defendant with knowledge of the facts releasing him from liability.[2] On the other hand, it is held elsewhere that the promise or acknowledgment itself raises a presumption that the drawer of the bill or the indorser of the note was acquainted with the laches of the holder.[3]

3. Evidence of Knowledge. — In some jurisdictions knowledge of the facts releasing the promisor may be inferred as a fact from the promise under the attending circumstances, without clear and affirmative proof.[4]

4. Evidence Admissible. — In general parol evidence is admissible to prove the promise.[5] The rules as to relevancy of evidence do not differ from those applicable to other matters.[6]

III. NEW PROMISE AFTER DISCHARGE IN BANKRUPTCY OR INSOLVENCY.

1. Parol Evidence. — A new promise to pay a debt barred by a discharge in bankruptcy or in insolvency need not be in writing;[7]

2. Good *v.* Sprigg, 2 Cranch C. C. 172, 10 Fed. Cas. No. 5532; Hunt *v.* Wadleigh, 26 Me. 271, 45 Am. Dec. 108; Davis *v.* Gowen, 17 Me. 387; Leonard *v.* Gary, 10 Wend. (N. Y.) 504 ("The reason given is, an indorser may believe due notice given inasmuch as notice need not be personally served, and under a misapprehension of the fact consider himself liable"); Murphy *v.* Levy, 23 Misc. 147, 50 N. Y. Supp. 682.

3. Alabama Nat. Bank *v.* Rivers, 116 Ala. 1, 22 So. 580; Loose *v.* Loose, 36 Pa. St. 538; Oxnard *v.* Varnim, 111 Pa. St. 193, 2 Atl. 224, 56 Am. Rep. 255.

4. Tebbetts *v.* Dowd, 23 Wend. (N. Y.) 379; Linthicum *v.* Caswell, 19 App. Div. 541, 46 N. Y. Supp. 610.

Some cases, however, have required the clearest evidence of knowledge. Trimble *v.* Thorne, 16 Johns. (N. Y.) 152; Jones *v.* Savage, 6 Wend. (N. Y.) 658.

5. See cases cited in previous notes. The assent will not be inferred, however, from doubtful or equivocal language. Ross *v.* Hurd, 71 N. Y. 14, 27 Am. Rep. 1.

6. The following cases are illustrations of what evidence is sufficient to prove the promise. Walker *v.* Walker, 7 Ark. 542 (the indorser sent word to the plaintiff "that the bill had been protested for non-payment and sent back, that he did not wish suit to be brought on it, but that he would be up at Little Rock and make arrangements to pay it"); Ross *v.* Hurd, 71 N. Y. 14, 27 Am. Rep. 1; Blodgett *v.* Durgin, 32 Vt. 361.

Evidence that the indorser, when requested to pay, remained silent, is not sufficient. Wyckoff *v.* Wilson, 36 N. Y. St. 35, 13 N. Y. Supp. 270.

"Evidence of circumstances or of conversations which are equivocal in their character, and which do not import a clear admission of liability, or amount to a distinct promise to pay, and which are consistent with the view that the indorser was merely seeking to avoid or postpone a suit against himself, are not satisfactory evidence either to prove actual notice or to re-establish the indorser's liability after it has ceased for want of demand or notice." Glidden *v.* Chamberlin, 167 Mass. 486, 46 N. E. 103.

7. *United States.* — Mutual Reserve Fund L. Ass'n *v.* Beatty, 93 Fed. 747, 35 C. C. A. 573.

Arkansas. — Worthington *v.* De Bardlekin, 33 Ark. 651.

and accordingly, parol evidence is admissible to prove it.[8] In some jurisdictions, however, a writing is necessary.[9] When the promise is in writing, the ordinary rules as to evidence of the contents of writings apply.

2. Evidence Admissible. — The promise may be proved in the same manner as any other parol promise.[10]

California. — Lambert *v.* Schmalz, 118 Cal. 33, 50 Pac. 13.

Georgia. — Ross *v.* Jordan, 62 Ga. 298.

Massachusetts. — Way *v.* Sperry, 6 Cush. 238, 52 Am. Dec. 779. But the rule in this state has been changed by statute. Pub. Stat. ch. 78, § 3.

Michigan. — Craig *v.* Seitz, 63 Mich. 727, 30 N. W. 347.

Minnesota. — Smith *v.* Stanchfield, 84 Minn. 343, 87 N. W. 917; International Harvester Co. *v.* Lyman, 90 Minn. 275, 96 N. W. 87.

North Carolina. — Henly *v.* Lanier, 75 N. C. 172; Kull *v.* Farmer, 78 N. C. 339.

South Carolina. — Lanier *v.* Tolleson, 20 S. C. 57.

Vermont. — Farmers & Mechanics Bank *v.* Flint, 17 Vt. 508, 44 Am. Dec. 351; Barron *v.* Benedict, 44 Vt. 518.

8. This follows necessarily from the fact that the promise may be parol. For express statements to the effect that parol evidence is admissible, see Farmers & Mechanics Bank *v.* Flint, 17 Vt. 508, 44 Am. Dec. 351; Barron *v.* Benedict, 44 Vt. 518.

9. *Maine.* — Rev. Stat. ch. 111, § 1.

Massachusetts. — Pub. Stat. ch. 78, § 3.

New York. — Laws 1897, p. 510, ch. 417, § 21, art. 2; Scheper *v.* Briggs, 28 App. Div. 115, 50 N. Y. Supp. 869; Gruenberg *v.* Treanor, 40 Misc. 232, 81 N. Y. Supp. 675 (writing sufficient); Bair *v.* Hilbert, 84 App. Div. 621, 82 N. Y. Supp. 1010; Mandell *v.* Levy, 93 N. Y. Supp. 545 (oral promise not sufficient).

10. The evidence must show a promise before suit. Thornton *v.* Nichols, 119 Ga. 50, 45 S. E. 785.

Evidence showing a promise made between the time of adjudication and discharge is admissible. Griel *v.* Solomon, 82 Ala. 85, 2 So. 322, 60 Am. Rep. 733. But evidence of a promise made before the proceedings were instituted is inadmissible. Reed *v.* Frederick, 8 Gray (Mass.) 230.

Where a promise to pay "when able" is sufficient, the right may be sustained by evidence showing the promise, and that defendant had property sufficient to satisfy the claim. Eckler *v.* Galbraith, 12 Bush (Ky.) 71. See also Tolle *v.* Smith, 98 Ky. 464, 33 S. W. 410. *Compare* Blanc *v.* Banks, 10 Rob. (La.) 115, 43 Am. Dec. 175.

Where the promise is conditional, the evidence must show that the condition was accepted or acted upon by the plaintiff. Smith *v.* Stanchfield, 84 Minn. 343, 87 N. W. 917.

Where the creditor refuses to accept the conditional promise, the debt is not revived. International Harvester Co. *v.* Lyman, 90 Minn. 275, 96 N. W. 87.

In Sundling *v.* Willey (S. D.), 103 N. W. 38, a promise contained in a letter stating that the creditor "should be paid in full as soon as possible," was held not conditional.

The jury may infer a promise from what was said. United Society *v.* Winkley, 7 Gray (Mass.) 460. But it has been held that where an express promise is not shown it cannot be inferred from circumstances. Baltimore & O. R. Co. *v.* Clark, 19 Md. 509.

Parol evidence that a written promise was made merely to facilitate proof in bankruptcy is admissible. Atwood *v.* Gillett, 2 Doug. (Mich.) 206.

Conversations with third persons may be admissible to furnish some grounds for an inference that a promise had been made to the creditor; but of themselves they do not amount to a promise. Prewett *v.* Caruthers, 12 Smed. & M. (Miss.)

491. See also Brooks *v.* Paine, 25 Ky. L. Rep. 1125, 77 S. W. 190 (evidence of statement to third person admitted).

Evidence that the maker, in a suit against another party on the note, when called upon to testify said that he intended to pay, is admissible. Badger *v.* Gilmore, 33 N. H. 361, 66 Am. Dec. 729.

Evidence that the defendant declared that "he would pay Major Haines, who had been his friend, and he would not let him stick," is admissible. Haines *v.* Stauffer, 13 Pa. St. 541, 53 Am. Dec. 493.

Letters expressing an intention to pay are admissible. Cook *v.* Shearman, 103 Mass. 21; Sundling *v.* Willey (S. D.), 103 N. W. 38. But letters recognizing only a moral duty are not sufficient. Mandell *v.* Levy, 93 N. Y. Supp. 545.

Parol evidence is admissible to show that a writing was not intended to operate as a new promise. Bank of Gilby *v.* Farnsworth, 7 N. D. 6, 72 N. W. 901.

In the following cases the evidence was held insufficient to warrant relief: Kiernan *v.* Fox, 43 App. Div. 58, 59 N. Y. Supp. 330 (letter stating that "when I am in a position to pay, there is no one I would more cheerfully pay"); Carnegie Steel Co. *v.* Chattanooga C. Co. (Tenn. Ch.), 38 S. W. 102.

NEW TRIAL.

By E. S. Page.

I. INTRODUCTION.

1. Definition. — The grounds upon which a new trial is granted, in general, are: (1.) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial. (2.) Misconduct of the jury. (3.) Accident or surprise which ordinary prudence could not have guarded against. (4.) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial. (5.) Excessive damages appearing to have been given under the influence of passion or prejudice. (6.) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law. (7.) Error of law occurring at the trial and excepted to by the party making the application. In the first four cases the motion is based upon affidavits, and sometimes upon oral testimony as well; in the last three it is based upon the minutes of the court, or a bill of exceptions, or a statement of the case.[1] In this article we are concerned with the first four grounds.[2]

1. Cal. Code Civ. Proc., § 657. This enumeration is taken from the section of the California code cited. It covers, in general, the grounds recognized in most of the states.

2. Cal. Code Civ. Proc., § 658. As to the necessity for affidavits see Perry *v.* Miller, 61 Minn. 412, 63 N. W. 1040; Cochrane *v.* Knowles, 3 Greene (Iowa) 115; Atchison, T. & S. F. R. Co. *v.* Rowan, 55 Kan. 270, 39 Pac. 1010; Paquetel *v.* Gauche, 17 La. Ann. 63; Stubblefield *v.* Stubblefield (Tex. Civ. App.), 45 S. W. 965.

Irregularities in the proceedings of the court not appearing in the record may be shown by affidavit. Woods *v.* Jensen, 130 Cal. 200, 62 Pac. 473; Gay *v.* Torrance, 145 Cal. 144, 78 Pac. 540. The admission of oral testimony is within the discretion of the court. Schoolfield *v.* Brunton, 20 Colo. 139, 36 Pac. 1103.

The court in its discretion may refuse to hear oral testimony in support of a motion for a new trial in a criminal case. People *v.* Tucker, 117 Cal. 229, 49 Pac. 134; State *v.*

2. Counter-Affidavits. — When a motion for a new trial is based upon affidavits the other party may reply by counter-affidavits.[3]

3. Averment of Merits. — An affidavit for a new trial should in general contain a positive averment of merits.[4] Where, however, an affidavit is not necessary, as where the motion is based upon error of law or upon insufficiency of evidence, no showing of merits other than such error or insufficiency is required.[5]

II. MOTIONS BASED UPON MISCONDUCT, MISTAKE, ETC., OF OTHERS.

1. When Affidavits of Jurors Are Not Admissible. — A. Not to Impeach Verdict. — In general the affidavit of a juror is not admissible to impeach the verdict;[6] nor can he give oral testimony which

Mortensen, 26 Utah 312, 73 Pac. 562, 633.

3. Newcastle & R. R. Co. *v.* Chambers, 6 Ind. 346; Bingham *v.* Walk, 128 Ind. 164, 27 N. E. 483; Bratton *v.* Bryan, 1 A. K. Marsh. (Ky.) 212; Gautier *v.* Douglass Mfg. Co., 52 How. Pr. (N. Y.) 325 (a new trial denied); Burlingame *v.* Cowee, 16 R. I. 40, 12 Atl. 234 ("the court will always use such affidavits circumspectly, when received, to enlighten, not control, its discretion"); McGavock *v.* Brown, 4 Humph. (Tenn.) 251 (practice of receiving counter-affidavits in civil cases should not be encouraged).

Criminal Cases. — State *v.* Madigan, 66 Minn. 10, 68 N. W. 179 (when defendant sets up fraud of his attorney the affidavit of the latter is admissible to rebut the charges); Marion *v.* State, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825 (defendant's showing overcome by counter-affidavits); Dignowitty *v.* State, 17 Tex. 521, 67 Am. Dec. 670; Sargent *v.* State, 35 Tex. Crim. 325, 33 S. W. 364; Ramos *v.* State (Tex. Crim.), 35 S. W. 378 (defendant's showing overcome by counter-affidavit).

4. Elliott *v.* Leak, 4 Mo. 540; Culbertson *v.* Hill, 87 Mo. 553; Gillespie *v.* Davis, 5 Yerg. (Tenn.) 319; Burnham *v.* Smith, 11 Wis. 258.

5. Vose *v.* Mayo, 3 Cliff. 484, 28 Fed. Cas. No. 17,009. It has been said, however, that it cannot be maintained that the court erred in refusing time to make a showing, "unless the complaining party shall support his motion for a new trial with proof, by affidavit or otherwise, that if allowed time, he could have made a good showing in support of his motion." Davis *v.* Hardy, 76 Ind. 272.

6. *England.* — Vain *v.* Delaval, 1 T. R. 11; Owen *v.* Warburton, 1 N. R. 326.

Alabama. — Clay *v.* Montgomery, 102 Ala. 297, 14 So. 646.

Arkansas. — St. Louis, I. M. & S. R. Co. *v.* Cantrell, 37 Ark. 519, 40 Am. Rep. 105; Griffith *v.* Mosley, 70 Ark. 244, 67 S. W. 309.

California. — Castro *v.* Gill, 5 Cal. 40. (In this state an exception is made when the verdict is reached by a resort to the determination of chance. Code Civ. Proc. § 657.)

Georgia. — Augusta *v.* Hudson, 94 Ga. 135, 21 S. E. 289; Coleman *v.* State, 28 Ga. 78; Rutland *v.* Hathorn, 36 Ga. 380; O'Barr *v.* Alexander, 37 Ga. 195; Estes *v.* Carter, 105 Ga. 495, 30 S. E. 882; Southern R. Co. *v.* Sommer, 112 Ga. 512, 37 S. E. 735; Bowdoin *v.* State, 113 Ga. 1150, 39 S. E. 478.

Idaho. — Jacobs *v.* Dooley, 1 Idaho 41. (The rule in this state is the same as that in California. Rev. Stat., § 4439.)

Illinois. — Reed *v.* Thompson, 88 Ill. 245; Niccolls *v.* Foster, 89 Ill. 386; Phillips *v.* Scales Mound, 195 Ill. 353, 63 N. E. 180; Illinois Cent. R. Co. *v.* Souders, 79 Ill. App. 41.

Indiana. — Barlow *v.* State, 2 Blackf. 114; Dunn *v.* Hall, 8 Blackf. 32; Bennett *v.* State, 3 Ind. 167; Conner *v.* Winton, 8 Ind. 315, 65 Am. Dec. 761; McCray *v.* Stewart, 16 Ind.

will have that effect.[7] The general rule in criminal cases is the same as that in civil cases.[8]

377; Stanley *v.* Sutherland, 54 Ind. 339.

Iowa. — Abel *v.* Kennedy, 3 Greene 47; Butt *v.* Tuthill, 10 Iowa 585.

Kentucky. — Heath *v.* Conway, 1 Bibb 398; Doran *v.* Shaw, 3 T. B. Mon. 411.

Louisiana. — State *v.* Millican, 15 La. Ann. 557.

Michigan. — Appeal of Merriman, 108 Mich. 454, 66 N. W. 372.

Minnesota. — Bradt *v.* Rommel, 26 Minn. 505, 5 N. W. 680.

Mississippi. — French *v.* Carson, 6 So. 613.

Missouri. — Pratte *v.* Coffman, 33 Mo. 71; McCormick *v.* Monroe, 2 Mo. App. Rep. 1062, 64 Mo. App. 197; *In re* North Terrace Park, 48 S. W. 860; Meisch *v.* Sippy, 102 Mo. App. 559, 77 S. W. 141.

New Hampshire. — Dodge *v.* Carroll, 59 N. H. 237.

New Jersey. — Lindauer *v.* Teeter, 41 N. J. L. 255; Randall *v.* Grover, 1 N. J. L. 151.

New York. — Dana *v.* Tucker, 4 Johns. 487; Messenger *v.* Fourth Nat. Bank, 48 How. Pr. 542, 6 Daly 190; Moore *v.* New York Elev. R. Co., 24 Abb. N. C. 77, 18 Civ. Proc. 146, 15 Daly 506, 8 N. Y. Supp. 329; Dean *v.* New York, 29 App. Div. 350, 51 N. Y. Supp. 586; *In re* Francis, 1 City H. Rec. 121.

North Carolina. — Lafoon *v.* Shearin, 95 N. C. 391.

Pennsylvania. — Seltzer Klahr Hdw. Co. *v.* Dunlap, 17 Lanc. Law Rev. 106.

South Dakota. — Murphy *v.* Murphy, 1 S. D. 316, 47 N. W. 142, 9 L. R. A. 820; Gaines *v.* White, 1 S. D. 434, 47 N. W. 524; Edward Thompson Co. *v.* Gunderson, 10 S. D. 42, 71 N. W. 764 (not admissible to show that two jurors separated from others. The rule in this state is the same as that in California).

Tennessee. — Fish *v.* Cantrell, 2 Heisk. 578. But see Whitmore *v.* Ball, 9 Lea 35.

Texas. — Gurley *v.* Clarkson (Tex. Civ. App.), 30 S. W. 360; Haley *v.* Cusenbary (Tex. Civ. App.), 30 S. W. 587; Little *v.* Birdwell, 21 Tex. 597, 73 Am. Dec. 242; Moore *v.* Missouri, K. & T. R. Co., 30 Tex. Civ. App. 266, 69 S. W. 997; Newcomb *v.* Babb, 2 Wills. Civ. Cas., § 760.

Vermont. — Downer *v.* Baxter, 30 Vt. 467.

Virginia. — Bull *v.* Com., 14 Gratt. 613; Howard *v.* McCall, 21 Gratt. 205; Moses *v.* Cromwell, 78 Va. 671; Elam *v.* Commercial Bank, 86 Va. 92, 9 S. E. 498 (evidence of jurors inadmissible); Read *v.* Com., 22 Gratt. 924; Steptoe *v.* Flood, 31 Gratt. 323.

Washington. — Marvin *v.* Yates, 26 Wash. 50, 66 Pac. 131.

West Virginia. — Reynolds *v.* Tompkins, 23 W. Va. 229; Probst *v.* Braeunlich, 24 W. Va. 356.

Wyoming. — Bunce *v.* McMahon, 6 Wyo. 24, 42 Pac. 23.

"To permit members of the jury, after the return of a verdict, thus to impeach it would present to the unsuccessful party a strong temptation to tamper with jurors and open a wide door to corruption." Haun *v.* Wilson, 28 Ind. 296.

Ohio Rule. — In Ohio it has been said that an affidavit of a juror is not admissible to impeach a verdict unless evidence *aliunde* is first offered; and an affidavit as to his own statements is not a sufficient primary showing. Parker *v.* Blackwelder, 7 Ohio Cir. Ct. 140.

7. Amsby *v.* Dickhouse, 4 Cal. 102; Duhon *v.* Landry, 15 La. Ann. 591; Folsom *v.* Manchester, 11 Cush. (Mass.) 334; Pratte *v.* Coffman, 33 Mo. 71. See also State *v.* King, 88 Minn. 175, 92 N. W. 965.

8. *United States.* — Mattox *v.* United States, 146 U. S. 140; United States *v.* Daubner, 17 Fed. 793.

California. — People *v.* Wyman, 15 Cal. 70; People *v.* Pratt, 78 Cal. 345, 20 Pac. 731; People *v.* Hughes, 29 Cal. 257; People *v.* Doyell, 48 Cal. 85; People *v.* Azoff, 105 Cal. 632, 39 Pac. 59; People *v.* Soap, 127 Cal. 408, 59 Pac. 771; People *v.* Murphy, 80 Pac. 709.

Colorado. — Johnson *v.* People, 80 Pac. 133.

Dakota. — Territory *v.* King, 6 Dak. 131, 50 N. W. 623.

Florida. — Kelly *v.* State, 39 Fla. 122, 22 So. 303.

Georgia. — Bishop *v.* State, 9 Ga. 121; Coleman *v.* State, 28 Ga. 78; Brown *v.* State, 28 Ga. 199; Hoye *v.* State, 39 Ga. 718; Hale *v.* State, 91 Ga. 19, 16 S. E. 105; Cornwall *v.* State, 91 Ga. 277, 18 S. E. 154; Carr *v.* State, 96 Ga. 284, 22 S. E. 570.

Idaho. — State *v.* Marquardsen, 62 Pac. 1034.

Illinois. — Marzen *v.* People, 190 Ill. 81, 60 N. E. 102 (not to show that jurors were allowed to separate).

Indiana. — Bennett *v.* State, 3 Ind. 167; Long *v.* State, 95 Ind. 481.

Indian Territory. — Langford *v.* United States, 76 S. W. 111 (not admissible to prove that a witness was not sworn).

Iowa. — State *v.* Accola, 11 Iowa 246; State *v.* McConkey, 49 Iowa 499. For present rule in Iowa, however, see *infra.*

Louisiana. — State *v.* Nelson, 32 La. Ann. 842; State *v.* Price, 37 La. Ann. 215 ("Both decency and public policy alike demand the rejection of such testimony"); State *v.* Bird, 38 La. Ann. 497; State *v.* Richmond, 42 La. Ann. 299, 7 So. 459; State *v.* Fruge, 28 La. Ann. 657; State *v.* Corcoran, 50 La. Ann. 453, 23 So. 511; State *v.* Ferguson, 38 So. 23.

Maine. — State *v.* Pike, 65 Me. 111.

Michigan. — People *v.* Stimer, 82 Mich. 17, 46 N. W. 28.

Minnesota. — State *v.* Mims, 26 Minn. 183, 2 N. W. 683; State *v.* Stokely, 16 Minn. 282.

Mississippi. — McGuire *v.* State, 25 So. 495; Brister *v.* State, 38 So. 678.

Missouri. — State *v.* Fox, 79 Mo. 109 (rope with hangman's noose was thrown into jury room while jury was deliberating); State *v.* McNamara, 100 Mo. 100, 13 S. W. 938; State *v.* Schaefer, 116 Mo. 96, 22 S. W. 477; State *v.* Branstetter, 65 Mo. 149; State *v.* Palmer, 161 Mo. 152, 61 S. W. 651.

Nevada. — State *v.* Stewart, 9 Nev. 120; State *v.* Crutchley, 19 Nev. 368, 12 Pac. 113.

New York. — People *v.* Hartung, 17 How. Pr. 85, 4 Park. Crim. 256.

North Carolina. — State *v.* Brittain, 89 N. C. 481; State *v.* Royal, 90 N. C. 755; State *v.* Best, 111 N. C. 638, 15 S. E. 930.

Oregon. — State *v.* Smith, 43 Or. 109, 71 Pac. 973.

South Carolina. — State *v.* Senn, 32 S. C. 392, 11 S. E. 292; State *v* Robertson, 54 S. C. 147, 31 S. E. 868.

South Dakota. — State *v.* Andre, 14 S. D. 215, 84 N. W. 783 (not to show that some of the jurors were intoxicated); State *v.* Kiefer, 16 S. D. 180, 91 N. W. 1117.

Texas. — Johnson *v.* State, 27 Tex. 758; Brennan *v.* State, 33 Tex. 266; Rockhold *v.* State, 16 Tex. App. 577.

Utah. — People *v.* Flynn, 7 Utah 378, 26 Pac. 1114.

Virginia. — Read *v.* Com., 22 Gratt. 924.

West Virginia. — State *v.* Cobbs, 40 W. Va. 718, 22 S. E. 310.

Contra. — Crawford *v.* State, 2 Yerg. (Tenn.) 60, 24 Am. Dec. 467; Booby *v.* State, 4 Yerg. (Tenn.) 111; Nile *v.* State, 11 Lea (Tenn.) 694 (affidavits should be examined with caution). But the right to use such affidavits is narrowly confined. Hudson *v.* State, 9 Yerg. (Tenn.) 408; Norris *v.* State, 3 Humph. (Tenn.) 333, 39 Am. Dec. 175 (not admissible to show that charge of judge was misunderstood, when the charge was clear); Scruggs *v.* State, 90 Tenn. 81, 15 S. W. 1074. The affidavit must state facts, not conclusions. Fletcher *v.* State, 6 Humph. (Tenn.) 249. Jurors cannot be heard to impeach a verdict, even in answer to those who have testified in its vindication. Hill *v.* State, 91 Ga. 153, 16 S. E. 976.

Texas Rule. — In Texas affidavits of jurors are occasionally received to impeach the verdict in criminal cases. Mitchell *v.* State, 36 Tex. Crim. 278, 33 S. W. 367, 36 S. W. 456 (matters outside the testimony were considered by the jury); Ysaguirre *v.* State (Tex. Crim.), 58 S. W. 1005; Brogden *v.* State (Tex. Crim.), 80 S. W. 378. This is based upon a statutory provision. "When, from the misconduct of the jury, the court is of opinion that the defendant has not received a fair and impartial trial, it shall be competent to prove such misconduct by the voluntary affidavit of a juror; and the verdict may in like manner be sustained by such affidavit." *Quoted* in Hodges *v.* State, 6 Tex. App. 615, where it is said that "such affidavits ought not to be permitted except as a last resort, and then only to pro-

B. Not To Show What Transpired in Jury Room. — The affidavits of jurors as to what transpired in the jury room are inadmissible to impeach their verdict.[9]

C. Not To Prove Misconduct of Jurors. — Affidavits and testimony of jurors are inadmissible to prove their own misconduct or that of other members of the jury.[10]

cure a fair and impartial verdict."

Where affidavits are received and clearly show that injustice has been done, the verdict should be set aside. McCane *v.* State, 33 Tex. Crim. 476, 26 S. W. 1087. See also Wilson *v.* State, 39 Tex. Crim. 365, 46 S. W. 251.

Affidavits of jurors are not admissible to show that they discussed the case before it was given to them for decision (Scott *v.* State, 43 Tex. Crim. 591, 68 S. W. 177); nor to show the ground upon which the verdict was reached (Blackwell *v.* State [Tex. Crim.], 73 S. W. 960); nor to show a compromise verdict (Bearden *v.* State [Tex. Crim.], 83 S. W. 808).

Where a charge is clear a new trial should not be granted upon the affidavits of jurors stating that they misunderstood it. McCulloch *v.* State, 35 Tex. Crim. 268, 33 S. W. 230; Tolston *v.* State (Tex. Crim.), 42 S. W. 988; Ramon *v.* State (Tex. Crim.), 87 S. W. 1043.

The fact that the court would discipline the jury for misconduct does not authorize the court to exclude their testimony going to show such misconduct. Dixon *v.* State (Tex. Crim.), 79 S. W. 310.

Sufficiency of Evidence. — McDade *v.* State, 27 Tex. App. 641, 11 S. W. 672, 11 Am. St. Rep. 216 (insufficient); Ulrich *v.* State, 30 Tex. App. 61, 16 S. W. 769; Snodgrass *v.* State, 36 Tex. Crim. 207, 36 S. W. 477; Dancy *v.* State (Tex. Crim.), 53 S. W. 635, 886; Keith *v.* State (Tex. Crim.), 56 S. W. 628; Henry *v.* State (Tex. Crim.), 43 S. W. 340 (juror induced to agree by promise that there would be a recommendation to mercy).

9. *Alabama.* — Clay *v.* Montgomery, 102 Ala. 297, 14 So. 646.

Georgia. — Spann *v.* Fox, Ga. Dec. 1.

Kentucky. — Steele *v.* Logan, 3 A. K. Marsh. 394; Illinois Cent. R. Co. *v.* West, 22 Ky. L. Rep. 1387, 60 S. W. 290.

New Hampshire. — Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323.

Rhode Island. — Luft *v.* Linganic, 17 R. I. 420, 22 Atl. 942.

Vermont. — Robbins *v.* Windover, 2 Tyl. 11.

Misconduct. — Affidavit of juror that the jury sent word to the judge that they could not agree, "and that many of the jury understood from the reply of the officer having charge of them that they would be kept there one or two weeks without food unless they agreed; that when they first went out most of them were for finding for plaintiff, and before they agreed a quart of whisky was furnished to them and they drank most of it," not admissible. O'Barr *v.* Alexander, 37 Ga. 195.

Criminal Cases. — Affidavits of jurors are not admissible to show what took place in the jury room. Moughon *v.* State, 59 Ga. 308; Com. *v.* Meserve, 156 Mass. 61, 30 N. E. 166; State *v.* Lentz, 45 Minn. 177, 47 N. W. 720.

10. *Illinois.* — Martin *v.* Ehrenfels, 24 Ill. 187; Allison *v.* People, 45 Ill. 37; Palmer *v.* People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146; Sanitary Dist. of Chicago *v.* Cullerton, 147 Ill. 385, 35 N. E. 723.

Kentucky. — Alexander *v.* Humber, 86 Ky. 565, 6 S. W. 453.

Louisiana. — State *v.* Millican, 15 La. Ann. 557; Godfrey *v.* Soniat, 33 La. Ann. 915.

Maine. — Shepherd *v.* Camden, 82 Me. 535, 20 Atl. 91.

Massachusetts. — Hannum *v.* Belchertown, 19 Pick. 311; Cook *v.* Castner, 9 Cush. 266; Boston & W. R. Corp. *v.* Dana, 1 Gray 83; Chadbourn *v.* Franklin, 5 Gray 312; Rowe *v.* Canney, 139 Mass. 41, 29 N. E. 219.

Michigan. — Battle Creek *v.* Haak, 102 N. W. 1005.

D. Not To Show Quotient or Chance Verdicts. — A juror's affidavit that the verdict was reached by setting down the amount which each juror thought should be allowed, adding these amounts and dividing by twelve, is not admissible;[11] and in the absence of

Missouri. — Pratte *v.* Coffman, 33 Mo. 71; Sawyer *v.* Hannibal & St. J. R. Co., 37 Mo. 240, 90 Am. Dec. 382.

New Jersey. — Brewster *v.* Thompson, 1 N. J. L. 32.

New York. — Dana *v.* Tucker, 4 Johns. 487; Clum *v.* Smith, 5 Hill 560; Taylor *v.* Everett, 2 How. Pr. 23.

Pennsylvania. — Cluggage *v.* Swan, 4 Binn. 150, 5 Am. Dec. 400; White *v.* White, 5 Rawle 61; Stull *v.* Stull, 197 Pa. St. 243, 47 Atl. 240; Willing *v.* Swasey, 1 Brown 123.

South Carolina. — Smith *v.* Culbertson, 9 Rich. L. 106.

Texas. — Mason *v.* Russel, 1 Tex. 721; Burns *v.* Paine, 8 Tex. 159.

Vermont. — Cheney *v.* Holgate, Brayt. 171.

In California nine jurors may render a verdict in a civil case. In Saltzman *v.* Sunset Tel. & Tel. Co., 125 Cal. 501, 58 Pac. 169, it was contended that the rule is that a juror cannot impeach his own verdict, but that a dissenting juror may impeach the majority verdict. It was held, however, that even a dissenting juror cannot impeach the verdict by testimony as to the misconduct of his fellows.

Criminal Cases.

Arkansas. — Hampton *v.* State, 67 Ark. 266, 54 S. W. 746.

California. — People *v.* Findley, 132 Cal. 301, 64 Pac. 472 (except when there has been resort to the determination of chance).

Colorado. — Heller *v.* People, 22 Colo. 11, 43 Pac. 124.

Illinois. — Reins *v.* People, 30 Ill. 256.

Missouri. — State *v.* Cooper, 85 Mo. 256; State *v.* Coupenhaver, 39 Mo. 430 (agreement to decide in accordance with vote of majority); State *v.* Swinney, 25 Mo. App. 347.

New Jersey. — Titus *v.* State, 49 N. J. L. 36, 7 Atl. 621.

New York. — People *v.* Carnal, 1 Park. Crim. 256.

North Carolina. — State *v.* Smallwood, 78 N. C. 560; State *v.* McLeod, 8 N. C. 344; State *v.* Harper, 101 N. C. 761, 7 S. E. 730, 9 Am. St. Rep. 46.

South Carolina. — State *v.* Tindall, 10 Rich. L. 212.

Texas. — Davis *v.* State, 43 Tex. 189.

Virginia. — Bull *v.* Com., 14 Gratt. 613; Taylor *v.* Com., 90 Va. 109, 17 S. E. 812.

Affidavits of jurors that they agreed to the verdict only in order to prevent a hung jury are not admissible. State *v.* Plum, 49 Kan. 679, 31 Pac. 308.

An affidavit of a juror is not admissible to show that "certain of them suggested that accused should be convicted because B. Bagley had been found guilty; it having been shown that Bagley and the defendant both ravished the prosecutrix." Welsh *v.* State, 60 Neb. 101, 82 N. W. 368.

Jurors cannot impeach a verdict by affidavits to the effect that they agreed because they were anxious to be discharged. Scott *v.* State, 7 Lea (Tenn.) 232; State *v.* Morris, 41 La. Ann. 785, 6 So. 639.

11. *Alabama.* — Eufaula *v.* Speight, 121 Ala. 613, 25 So. 1009; Montgomery St. Ry. *v.* Mason, 133 Ala. 508, 32 So. 261.

Arkansas. — Pleasants *v.* Hurd, 15 Ark. 403.

Delaware. — Croasdale *v.* Tantum, 6 Houst. 218.

Illinois. — Reed *v.* Thompson, 88 Ill. 245.

Minnesota. — St. Martin *v.* Desnoyer, 1 Minn. 156, 61 Am. Dec. 494.

Missouri. — Sawyer *v.* Hannibal & St. J. R. Co., 37 Mo. 240, 90 Am. Dec. 382; St. Clair *v.* Missouri Pac. R. Co., 29 Mo. App. 76; Philips *v.* Stewart, 69 Mo. 149 (a paper was found in the jury room immediately after the verdict was returned, containing a series of figures, the aggregate of which divided by twelve made the exact sum found by the jury. *Held,* "testimony of a juror

statute such an affidavit cannot be used to show that the verdict was determined by lot.[12] Nor can any method used by the jury in arriving at a verdict be shown by the affidavit of a juror.[13]

E. Not To Show That Facts Not in Evidence Were Considered. — An affidavit showing that the jurors considered facts not legally in evidence is not admissible.[14] Accordingly, that a juror

that these figures were made by a member of the jury is not admissible"); Jobe *v.* Weaver, 77 Mo. App. 665.

New Hampshire. — Clark *v.* Manchester, 64 N. H. 471, 13 Atl. 867. *Contra,* Knight *v.* Epsom, 62 N. H. 356.

New York. — Moses *v.* Central Park, N. & E. R. Co., 3 Misc. 322, 23 N. Y. Supp. 23 (quotient verdict involves misconduct, and therefore the affidavits of jurors are not admissible).

Ohio. — Janes *v.* Hoehn, 2 Ohio Cir. Dec. 245.

Oregon. — Cline *v.* Broy, 1 Or. 89.

Pennsylvania. — Kunkel *v.* Hughes, 6 Pa. Dist. 356.

Texas. — International & G. N. R. Co. *v.* Gordon, 72 Tex. 44, 11 S. W. 1033.

West Virginia. — Chesapeake & O. R. Co. *v.* Patton, 9 W. Va. 648.

See the following Iowa cases *contra.* — Manix *v.* Malony, 7 Iowa 81; Schanler *v.* Porter, 7 Iowa 482; Hendrickson *v.* Kingsbury, 21 Iowa 379; Darland *v.* Wade, 48 Iowa 547. See also Grinnell *v.* Phillips, 1 Mass. 530; Elledge *v.* Todd, 1 Humph. (Tenn.) 43, 34 Am. Dec. 616.

12. Ward *v.* Blackwood, 48 Ark. 396, 3 S. W. 624. See, however, St. Louis, I. M. & S. R. Co. *v.* Cantrell, 37 Ark. 519, 40 Am. Rep. 105; Cluggage *v.* Swan, 4 Binn. (Pa.) 150, 5 Am. Dec. 400; Swope *v.* Crawford, 17 Lanc. Law Rev. (Pa.) 196.

Quotient Verdict in Criminal Cases. — In some states the jury is allowed to fix the term of imprisonment. In such cases the affidavit of a juror is not admissible to show that the term agreed upon was in reality a quotient verdict. State *v.* Wood, 124 Mo. 412, 27 S. W. 1114. *Contra,* Joyce *v.* State, 7 Baxt. (Tenn.) 273. See, however, Sargent *v.* ——, 5 Cow. (N. Y.) 106 (in seduction case jury gave part of the damages for the expense of bringing up the child).

13. Montgomery St. Ry. *v.* Mason, 133 Ala. 508, 32 So. 261; State *v.* Dusenberry, 112 Mo. 277, 20 S. W. 461; Carpenter *v.* Willey, 65 Vt. 168, 26 Atl. 488.

The mode of computation cannot be shown by the affidavit of a juror. Hovey *v.* Luce, 31 Me. 346.

Affidavits of jurors showing that the verdict was the result of a compromise of conflicting opinions are not admissible. Bryson *v.* Chicago, B. & Q. R. Co., 89 Iowa 677, 57 N. W. 430.

An affidavit of one of the jury to prove that the verdict was the result of an agreement that such a verdict should be rendered as was favored by a majority of the jury is not admissible. Lucas *v.* Cannon, 13 Bush (Ky.) 650.

Chance Verdict in Criminal Cases. Affidavits of jurors are not admissible. People *v.* Barker, 2 Wheel. Crim. (N. Y.) 19.

14. *Arkansas.* — Fain *v.* Goodwin, 35 Ark. 109.

California. — Fredericks *v.* Judah, 73 Cal. 604, 15 Pac. 305.

Connecticut. — Haight *v.* Turner, 21 Conn. 593 (jury were instructed to disregard certain evidence; affidavit to effect that they considered it is inadmissible).

Tennessee. — Wade *v.* Ordway, 1 Baxt. 229 (misconstruction of charge); Dunnaway *v.* State, 3 Baxt. 206.

Utah. — Homer *v.* Inter-Mountain Abstract Co., 9 Utah 193, 33 Pac. 700 (jurors examined pages of account book other than those in evidence).

West Virginia. — Graham *v.* Citizens Nat. Bank, 45 W. Va. 701, 32 S. E. 245.

Contra, Stewart *v.* Burlington & M. R. Co., 11 Iowa 62; Kruidenier *v.* Shields, 70 Iowa 428, 30 N. W.

stated to the jury matters purporting to be within his personal knowledge cannot be proved by the affidavit or testimony of other jurors.[15]

F. Not To Show Improper Visit to Premises. — An affidavit of a juror showing that the jury improperly visited the premises and had the facts explained to them is not admissible.[16]

G. Not To Show Ground or Motive for Verdict. — Affidavits of jurors stating the theory or ground upon which they rendered their verdict will not be received for the purpose of impeaching the same;[17] nor will those affidavits containing statements as to their

681; Griffin *v.* Harriman, 74 Iowa 436, 38 N. W. 139.

Criminal Cases. — Not admissible to show that the jury received evidence after they had retired to consider their verdict (Smith *v.* State, 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20); nor to show that they considered facts not legally in evidence (Taylor *v.* Com., 90 Va. 109, 17 S. E. 812).

15. *Connecticut.* — State *v.* Freeman, 5 Conn. 348.

Indiana. — Taylor *v.* Garnett, 110 Ind. 287, 11 N. E. 309 (affidavit that juror stated that he knew one of the witnesses and believed him to be an honest man not admissible).

Iowa. — Dunlavey *v.* Watson, 38 Iowa 398 (juror stated that he knew that certain liquor was intoxicating); Bingham *v.* Foster, 37 Iowa 339 (witness was of bad character).

Massachusetts. — Folsom *v.* Manchester, 11 Cush. 334 (oral testimony not admitted).

New Jersey. — Popino *v.* McAllister, 7 N. J. L. 46.

Pennsylvania. — Megargel *v.* Waltz, 4 Lack. Leg. N. 343, 21 Pa. Co. Ct. 633.

Texas. — St. Louis S. R. Co. *v.* Ricketts, 96 Tex. 68, 70 S. W. 315.

Virginia. — Price *v.* Warren, 1 Hen. & M. 385.

West Virginia. — Bartlett *v.* Patton, 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523.

An affidavit by a juror that, being in the neighborhood of the disputed land, he gave information to the other jurors, which in his opinion was considered by them in forming the verdict, is not admissible. Lafoon *v.* Shearin, 95 N. C. 391.

Criminal Cases. — The moving party cannot show by affidavits of jurors that certain members narrated facts to the jury purporting to be within their own personal knowledge. United States *v.* Daubner, 17 Fed. 793; Mitchell *v.* Com., 23 Ky. L. Rep. 1084, 64 S. W. 751; People *v.* Ritchie, 12 Utah 180, 42 Pac. 209 (juror made measurements and told result to others).

16. Griffiths *v.* Montandon, 4 Idaho 377, 39 Pac. 548; Herring *v.* Wabash R. Co., 80 Mo. App. 562, 2 Mo. App. Rep. 707; Deacon *v.* Shreve, 22 N. J. L. 176; Haight *v.* Elmira, 42 App. Div. 391, 59 N. Y. Supp. 193.

Contra, Harrington *v.* Worcester, L. & S. St. R. Co., 157 Mass. 579, 32 N. E. 955 (but the juror cannot testify as to the effect upon his mind). Rush *v.* St. Paul City R. Co., 70 Minn. 5, 72 N. W. 733; Peppercorn *v.* Black River Falls, 89 Wis. 38, 61 N. W. 79, 46 Am. St. Rep. 818 (the rule of public policy which excludes the testimony of jurors to impeach their verdict extends only to matters taking place during their retirement).

17. *United States.* — Chandler *v.* Thompson, 30 Fed. 38.

Colorado. — Wray *v.* Carpenter, 16 Colo. 271, 27 Pac. 248, 25 Am. St. Rep. 265.

Illinois. — Frank *v.* Taubman, 31 Ill. App. 592.

Kentucky. — Taylor *v.* Giger, Hard. 586.

Massachusetts. — Hannum *v.* Belchertown, 19 Pick. 311.

New Jersey. — Schenck *v.* Stevenson, 2 N. J. L. 365.

New York. — Brownell *v.* McEwen, 5 Denio 367.

North Carolina. — Bellamy *v.* Pippin, 74 N. C. 46 (cannot be shown that they overlooked certain facts);

motives;[18] nor those stating facts showing that they proceeded upon corrupt or improper grounds.[19]

H. Not To Show Misunderstanding of Instructions of Court. — An affidavit of a juror is not admissible to show that the

Purcell *v.* Southern R. Co., 119 N. C. 728, 26 S. E. 161 (cannot show how damage was assessed).

Rhode Island. — Tucker *v.* South Kingstown, 5 R. I. 558.

Tennessee. — Dunnaway *v.* State, 3 Baxt. 206; Lewis *v.* Moses, 6 Cold. 193.

Texas. — Wills Point Bank *v.* Bates, 72 Tex. 137, 10 S. W. 348 (not admissible to show what their understanding of the facts was, and upon what ground they rendered a verdict).

Vermont. — Sheldon *v.* Perkins, 37 Vt. 550.

Accordingly it has been held that affidavits of jurors showing their mode of calculation are not admissible to show that the verdict was not warranted. Rumford Chemical Works *v.* Finnie, 2 Flip. 459, 20 Fed. Cas. No. 12,130.

Nor are affidavits of jurors admissible to show that they disregarded evidence which was called to their attention. Castle *v.* Greenwich F. Ins. Co., 45 N. Y. Supp. 901. See also Wood *v.* Gulf, C. & S. F. R. Co., 15 Tex. Civ. App. 322, 40 S. W. 24 (not admissible to show that issue of limitation was not considered).

Criminal Cases. — An affidavit of jurors touching the construction they put upon, or the weight they attach to, the testimony of any witness in the cause, or the grounds upon which they base their verdict, is not admissible. Ward *v.* State, 8 Blackf. (Ind.) 101; State *v.* Schaefer, 116 Mo. 96, 22 S. W. 447; Blackwell *v.* State (Tex. Crim.), 73 S. W. 960.

18. Ford *v.* State, 12 Md. 514; Bridge *v.* Eggleston, 14 Mass. 245, 7 Am. Dec. 209; Folsom *v.* Brawn, 25 N. H. 114; Walker *v.* Kennison, 34 N. H. 257.

The reasons in these cases are the same. "Men of strong minds and sound judgments, who are very sure to come to wise and just conclusions, would, if called upon to state the grounds of their opinions, often give very insufficient and unsatisfactory reasons for their decisions. The secrecy of the deliberations and discussions of the jury and the exemption of jurors from the liability of being questioned as to their motives and grounds of action are highly important to the freedom and independence of their decisions." Hannum *v.* Belchertown, 19 Pick. (Mass.) 311.

Affidavits of jurors to the effect that they were induced to agree to the verdict upon the understanding that the prisoner was to be recommended to the mercy of the court are not admissible. Gordon *v.* Com., 100 Va. 825, 41 S. E. 746, 57 L. R. A. 744.

19. *Indiana.* — Hughes *v.* Listner, 23 Ind. 396 (affidavit "that the bailiff having the jury in charge had informed them that, unless they agreed upon a verdict before the adjournment of the court on that day [Saturday], they would be compelled to remain together until the meeting of the court on the following Thursday; and that upon said information, and to avoid such confinement, and not upon the merits of the controversy, he agreed to find for the plaintiff").

Iowa. — Brown *v.* Cole, 45 Iowa 601 (one juror agreed to verdict because he was sick; and another because of the sickness of the first and the apprehended injury to him by longer confinement); Fox *v.* Wunderlich, 64 Iowa 187, 20 N. W. 7 (juror reluctantly agreed to verdict because he felt he could not longer remain away from his sick father).

Maryland. — Browne *v.* Browne, 22 Md. 103 (one juror agreed because he was sick; several others agreed in order to relieve him).

Montana. — Fitzgerald *v.* Clark, 17 Mont. 100, 42 Pac. 273, 52 Am.

jury erred in the formation of the verdict, either by disregarding or misconstruing the charge of the judge.[20]

I. Not To Show Misunderstanding as to Effect of Verdict. An affidavit of a juror is not admissible to show that the verdict was rendered under a misunderstanding as to its effect.[21]

St. Rep. 665, 30 L. R. A. 803 (juror agreed because he was sick).

Wisconsin. — Edmister *v.* Garrison, 18 Wis. 594 (verdict rendered so as not to be kept together over night).

An affidavit of jurors stating that they considered a point of law and decided for defendant because they thought another party should be jointly sued with him is not admissible. Reiss *v.* Pelham, 30 Misc. 545, 62 N. Y. Supp. 607.

For other cases where affidavits were offered to show that the jurors acted upon corrupt or improper grounds, see *supra,* IV, 1, C.

20. *United States.* — Mirick *v.* Hemphill, Hempst. 179, 17 Fed. Cas. No. 9647*a*.

Iowa. — Ward *v.* Thompson, 48 Iowa 588 (affidavit by jurors "to the effect that they understood from the instructions given that the exemplary damages given would go to the school fund, and that the general verdict included all the damages to which they considered the plaintiff entitled"); Davenport *v.* Cummings, 15 Iowa 219; Christ *v.* Webster City, 105 Iowa 119, 74 N. W. 743.

Louisiana. — State *v.* Millican, 15 La. Ann. 557 (cannot show that charge was misunderstood).

Massachusetts. — Bridgewater *v.* Plymouth, 97 Mass. 382.

Missouri. — Hanlon *v.* O'Keeffe, 38 Mo. App. 273.

New York. — Paige *v.* Chedsey, 1 Misc. 396, 20 N. Y. Supp. 899; Perkins *v.* Brainard Quarry Co., 11 Misc. 328, 32 N. Y. Supp. 230 (not that jury disregarded issue as presented, and found the verdict upon another and different issue).

Ohio. — Holman *v.* Riddle, 8 Ohio St. 384.

Rhode Island. — Handy *v.* Providence Mut. F. Ins. Co., 1 R. I. 400.

Tennessee. — Wade *v.* Ordway, 1 Baxt. 229; Norris *v.* State, 3 Humph. 333, 39 Am. Dec. 175; Saunders *v.* Fuller, 4 Humph. 516.

Utah. — People *v.* Flynn, 7 Utah 378, 26 Pac. 1114.

Vermont. — Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57.

Virginia. — Harnsbarger *v.* Kinney, 6 Gratt. 287; Danville Bank *v.* Waddill, 31 Gratt. 469.

West Virginia. — Reynolds *v.* Tompkins, 23 W. Va. 229.

Wisconsin. — Schultz *v.* Catlin, 78 Wis. 611, 47 N. W. 946.

See, however, Packard *v.* United States, 1 Greene (Iowa) 225, 48 Am. Dec. 375, where affidavits of jurors were admitted to show that they had entirely misconstrued the instructions of the court.

21. *California.* — Hatch *v.* Galvin, 50 Cal. 441; Polhemus *v.* Heiman, 50 Cal. 438.

Indiana. — Sinclair *v.* Roush, 14 Ind. 450 (jury thought verdict for one cent would carry costs).

Louisiana. — Jeter *v.* Heard, 12 La. Ann. 3.

Massachusetts. — Hannum *v.* Belchertown, 19 Pick. 311 (testimony of jurors that if they had known their verdict was to be doubled by the court they would not have agreed to it, is not admissible).

Mississippi. — Jones *v.* Edwards, 57 Miss. 28 (jury thought verdict would carry costs).

New Hampshire. — Folsom *v.* Brawn, 25 N. H. 114.

New York. — People *v.* Columbia Common Pleas, 1 Wend. 297.

Criminal Cases. — *Georgia.* — Bishop *v.* State, 9 Ga. 121 (juror made affidavit that other jurors misrepresented the effect of the verdict); Echols *v.* State, 109 Ga. 508, 34 S. E. 1038 (jury thought recommendation to mercy would secure a misdemeanor sentence).

Minnesota. — State *v.* Lentz, 45 Minn. 177, 47 N. W. 720 (juror told his fellows the judge had told him the death penalty could not be in-

J. Not To Show That no Agreement Was Reached. — The fact that the verdict was not unanimous cannot be shown by the affidavit of a juror;[22] nor can a juror make affidavit that he did not agree to the verdict,[23] or that he was coerced into agreeing by the other jurors.[24]

flicted when there was a recommendation to mercy).

Mississippi. — Penn *v.* State, 62 Miss. 450 (intention of jury to return a verdict which would result in life imprisonment, not death).

Missouri. — State *v.* Shock, 68 Mo. 552 (juror would not have agreed to verdict if he had known the punishment was death).

South Carolina. — State *v.* Bennett, 40 S. C. 308, 18 S. E. 886 (juror thought recommendation to mercy would secure a pardon or commutation of sentence); State *v.* Aughtry, 49 S. C. 285, 26 S. E. 619 (jurors did not know their verdict would result in life imprisonment).

Texas. — Montgomery *v.* State, 13 Tex. App. 74 (expected a pardon).

But see *contra*, Crawford *v.* State, 2 Yerg. (Tenn.) 60, 24 Am. Dec. 467; Cochran *v.* State, 7 Humph. (Tenn.) 544.

Did Not Understand the Meaning of the Verdict. — People *v.* Kloss, 115 Cal. 567, 47 Pac. 459; State *v.* Burwell, 34 Kan. 312, 8 Pac. 470. In Wisconsin affidavits of jurors are admissible to show that, in response to a query from them, the judge promised clemency in case a verdict of guilty were found. McBean *v.* State, 83 Wis. 206, 53 N. W. 497.

22. Rutland *v.* Hathorn, 36 Ga. 380; Letcher *v.* Morrison, 79 Tex. 240, 14 S. W. 1010 (affidavit that verdict was assented to by majority of jury only).

23. *Arizona.* — Torque *v.* Carrillo, 1 Ariz. 336, 25 Pac. 526.

Connecticut. — Meade *v.* Smith, 16 Conn. 346.

Delaware. — McCombs *v.* Chandler, 5 Har. 423 (it was the duty of the juror to express his dissent at the time).

Florida. — Coker *v.* Hayes, 16 Fla. 368.

Georgia. — Sims *v.* Sims, 113 Ga. 1083, 39 S. E. 435.

Iowa. — Cook *v.* Sypher, 3 Iowa 484 (affidavit that verdict was not voluntary on his part, and that he did not consent to it); Hallenbeck *v.* Garst, 96 Iowa 509, 65 N. W. 417.

Kentucky. — Johnson *v.* Davenport, 3 J. J. Marsh. 390 (juror did not assent to verdict, and when jury announced its verdict he "did not think himself required to make any objection, unless he had been called on, which was not done").

New Hampshire. — Breck *v.* Blanchard, 27 N. H. 100 ("A verdict of a jury ought to be set aside where the decision of any juror is misrepresented or misunderstood by the foreman or his fellows, or where a juror has been forced into acquiescence by improper means, but it is obvious that there must be a limit fixed, beyond and after which no such inquiry can be made; and we think that time is well settled to be the time when the verdict is recorded").

New Jersey. — Clark *v.* Read, 5 N. J. L. 560.

North Carolina. — Suttrel *v.* Dry, 5 N. C. 94.

South Carolina. — Reaves *v.* Moody, 15 Rich. L. 312 (affidavit of four jurymen made three weeks after trial).

Texas. — Boetge *v.* Landa, 22 Tex. 105.

See, however, Smith *v.* Eames, 4 Ill. 76, 36 Am. Dec. 515; West Chicago St. R. Co. *v.* Huhnke, 82 Ill. App. 404.

24. An affidavit of a juror stating that he was continually subjected by a portion of the jurors to unjust and unwarranted treatment, "by way of harsh criticisms and strictures upon his judgment, and upon the fact of his casting his vote for defendants as aforesaid, and was during all of said time taunted with being in league with said defendants," and that such conduct influenced his judgment, is inadmissible. Wester *v.* Hedberg, 68 Minn. 434, 71 N. W. 616.

An affidavit of a juror that he

K. In Cases of Mistake. — It is frequently said that an affidavit of a juror is not admissible to show that the verdict was rendered by mistake.[25] Accordingly it cannot be shown by a juror that he misunderstood any part of the evidence.[26] It has been held, however, that where the mistake is in the nature of a clerical error, and consists, not in making up the verdict on wrong principles or on a misunderstanding of facts, but in an omission to state correctly, in writing, the verdict at which the jury had, by a due and regular course of proceeding, honestly and fairly arrived, the affidavit of the juror may be received.[27] There is strong authority, neverthe-

signed because the others told him the law compelled him to do so is not admissible. Artz *v.* Robertson, 50 Ill. App. 27.

An affidavit of a juror that he was under duress by the other jurors in making up his verdict is not admissible. Jacobs *v.* Dooley, 1 Idaho 41. See also Com. *v.* White, 147 Mass. 76, 16 N. E. 707.

25. *United States.* — Hurst *v.* Coley, 15 Fed. 645; Ladd *v.* Wilson, 1 Cranch C. C. 305, 14 Fed. Cas. No. 7977.

Connecticut. — Haight *v.* Turner, 21 Conn. 593.

Illinois. — Suver *v.* O'Riley, 80 Ill. 104.

Missouri. — State *v.* Gage, 52 Mo. App. 464.

New York. — Taylor *v.* Everett, 2 How. Pr. 73; *Ex parte* Caykendoll, 6 Cow. 53. But see Noah *v.* Dickenson, 15 Johns. 309.

South Dakota. — Murphy *v.* Murphy, 1 S. D. 316, 47 N. W. 142, 9 L. R. A. 820.

Contra. — Hague *v.* Stratton, 4 Call (Va.) 84.

A mere mistake of law cannot be shown by the affidavit of a juror. Murdock *v.* Sumner, 22 Pick. (Mass.) 156 (jurors thought they were bound by opinion of witness as to value); State *v.* Cobbs, 40 W. Va. 718, 22 S. E. 310 (not admissible to show ignorance or mistake of law); People *v.* Holmes, 118 Cal. 444, 50 Pac. 675 (jury brought in a verdict of guilty of involuntary manslaughter, "not a felony;" last words disregarded by court). An affidavit of a juror is not admissible to explain what the jury meant by the verdict. Conner *v.* Winton, 8 Ind. 315, 65 Am. Dec. 761; Lindauer *v.* Teeter, 41 N. J. L. 255. And a party against whom a verdict is rendered cannot interrogate the members of the jury as to what they intended, especially when the verdict is clear. Anderson *v.* Green, 46 Ga. 361. In general, to the effect that evidence of jurors as to what they intended is not admissible, see Cire *v.* Righton, 11 La. 140; Stevens *v.* Montgomery, 27 Minn. 108, 6 N. W. 456; Smalley *v.* Morris, 157 Pa. St. 349, 27 Atl. 734.

26. Clark *v.* Carter, 12 Ga. 500, 58 Am. Dec. 485; Coleman *v.* Slade, 75 Ga. 61; Com. *v.* Zuern, 24 Pa. Co. Ct. 26. If such testimony ever is admissible it is only where there is reasonable ground for the misapprehension. Jack *v.* Naber, 15 Iowa 450; Moffit *v.* Rogers, 15 Iowa 453.

27. *United States.* — Pelzer Mfg. Co. *v.* Hamburg-Bremen F. Ins. Co., 71 Fed. 826.

Illinois. — Schwamb Lumb. Co. *v.* Schaar, 94 Ill. App. 544 (jury intended to find for S. L. Co.; they thought the company was defendant instead of plaintiff, and accordingly found for defendant).

Maine. — Little *v.* Larrabee, 2 Me. 37, 11 Am. Dec. 43.

New York. — Dalrymple *v.* Williams, 63 N. Y. 361. *Compare* Webber *v.* Reynolds, 32 App. Div. 248, 52 N. Y. Supp. 1007 (admitted to show that answer to specific question was made under misapprehension of its meaning).

Ohio. — Wertz *v.* Cincinnati H. & D. R. Co., 11 Ohio Dec. 804.

Virginia. — Moffett *v.* Bowman, 6 Gratt. 219.

Wisconsin. — Wolfgram *v.* Schoepke, 100 N. W. 1054.

The reasons for admitting such affidavit are well stated by Bigelow, C. J., in Capen *v.* Stoughton, 16

less, holding that affidavits of jurors are not admissible even to show a clerical error.[28]

2. When Affidavits of Jurors Are Admissible. — A. To Support the Verdict. — Where evidence has been introduced *aliunde* to impeach the verdict by showing improper conduct of the jury, or attempts upon them by a party, the affidavits of jurors are admissible in exculpation of themselves, and in support of the verdict.[29]

Gray (Mass.) 364, 368: "Its admission does not in any degree infringe on the sanctity with which the law surrounds the deliberations of juries, or expose their verdicts to be set aside through improper influences, or upon grounds which might prove dangerous to the purity and steadiness of the administration of public justice. On the contrary, it is a case of manifest mistake of a merely formal and clerical character, which the court ought to interfere to correct, in order to prevent the rights of parties from being sacrificed by a blind adherence to a rule of evidence, in itself highly salutary and reasonable, but which upon principle has no application to the present case."

See Alexander *v.* Humber, 86 Ky. 565, 6 S. W. 453, where the court says that if such affidavits ever are received, "it should be with the greatest caution, and only in case of mistake clearly made out, and free from all misconduct upon the part of the jurors."

28. Withers *v.* Fiscus, 40 Ind. 131 (jurors agreed upon a basis upon which the calculation of the amount to be recovered should be made, and there was a mistake in the calculation); McKinley *v.* First Nat. Bank, 118 Ind. 375, 21 N. E. 36 (jury intended to answer an issue "No;" by mistake it was answered "Yes"); Wilkins *v.* Bent, 66 Iowa 531, 24 N. W. 29 (not admissible to prove miscalculation or error in judgment). An affidavit to the effect that the foreman made a miscalculation in figuring the verdict is not admissible. Ladd *v.* Wilson, 1 Cranch C. C. 305, 14 Fed. Cas. No. 7977.

29. *United States.* — Fuller *v.* Fletcher, 44 Fed. 34 ("admissible to disprove that a certain paper was before the jury or was read by them").

California. — Wilson *v.* Berryman, 5 Cal. 44, 63 Am. Dec. 78; Saltzman *v.* Sunset Tel. & Tel. Co., 125 Cal. 501, 58 Pac. 169.

Georgia. — Columbus *v.* Goetchius, 7 Ga. 139.

Illinois. — Smith *v.* Eames, 4 Ill. 76, 36 Am. Dec. 515.

Indiana. — Barlow *v.* State, 2 Blackf. 114; Haun *v.* Wilson, 28 Ind. 296 (affidavits that the jury did not arrive at their verdict by lot); Conwell *v.* Anderson, 2 Ind. 122 (affidavit admitted no discussion).

Iowa. — Butt *v.* Tuthill, 10 Iowa 585 (affidavits admissible to show the basis upon which a verdict was founded).

Kansas. — Perry *v.* Bailey, 12 Kan. 539.

Maine. — Haskell *v.* Becket, 3 Me. 92; Taylor *v.* Greely, 3 Me. 204; Sawyer *v.* Hopkins, 22 Me. 268 ("juror who has been implicated in reference to a verdict which he may have given is admissible to remove the ground of implication").

Massachusetts. — Woodward *v.* Leavitt, 107 Mass. 453, 9 Am. Rep. 49.

Missouri. — McCormick *v.* Monroe, 2 Mo. App. Rep. 1062, 64 Mo. App. 197.

New Hampshire. — Dodge *v.* Carroll, 59 N. H. 237; Tenney *v.* Evans, 13 N. H. 462 (a good statement of the rule).

New Jersey. — Kennedy *v.* Kennedy, 18 N. J. L. 450 (admissible to show that verdict was not a quotient verdict).

New York. — Dana *v.* Tucker, 4 Johns. 487; Moore *v.* New York Elev. R. Co., 24 Abb. N. C. 77, 18 Civ. Proc. 146, 15 Daly 506, 8 N. Y. Supp. 329 (evidence that a visit to the premises had no effect upon the verdict); Elliott *v.* Luengene, 17 Misc. 78, 39 N. Y. Supp. 850 (affidavits of jurors that they did not read an improper communication are admissible); Haight *v.* Elmira,

B. LIMITATIONS. — Such an affidavit cannot be admitted, however, to show that they were not influenced in reaching their verdict by evidence improperly admitted;[30] nor to show that they were not influenced by incorrect instructions or directions of the court,[31] or by improper conduct of counsel;[32] nor to show that reading news-

42 App. Div. 391, 59 N. Y. Supp. 193.

Ohio. — Farrer *v.* State, 2 Ohio St. 54.

South Dakota. — Edward Thompson Co. *v.* Gunderson, 10 S. D. 42, 71 N. W. 764.

Vermont. — Downer *v.* Baxter, 30 Vt. 467.

An affidavit that a juror was not influenced by an attempt to bribe him is admissible. Clay *v.* Montgomery, 102 Ala. 297, 14 So. 646.

The refusal of the court to have a verdict, rendered at a previous trial, and which had been set aside, covered or in some way concealed from the jury, is not ground for a new trial when it appears by the affidavits of nine of the jurors that the jury did not know what the former verdict was. Fulton Co. *v.* Phillips, 91 Ga. 65, 16 S. E. 260.

When it is alleged, in support of a motion for a new trial, that an agent of one of the parties discussed the merits of the case in the hearing of some of the jury, affidavits of jurors are admissible to show that they did not hear such remarks. Smith *v.* Powers, 15 N. H. 546.

Criminal Cases.

Arkansas. — Stanton *v.* State, 13 Ark. 317.

California. — People *v.* Hunt, 59 Cal. 430.

Georgia. — Carr *v.* State, 96 Ga. 284, 22 S. E. 570.

Indiana. — Bradford *v.* State, 15 Ind. 347.

Kentucky. — Howard *v.* Com., 24 Ky. L. Rep. 612, 69 S. W. 721.

Louisiana. — State *v.* Favre, 51 La. Ann. 434, 25 So. 93; State *v.* Procella, 105 La. 518, 29 So. 967.

Missouri. — State *v.* Underwood, 57 Mo. 40 ("may testify in support of their verdict that no disturbing influence was brought to bear upon them, and that they were not interfered or tampered with"); State *v.* Rush, 95 Mo. 199, 8 S. W. 221 (admissible to rebut statements of eavesdropper).

Montana. — State *v.* Gay, 18 Mont. 51, 44 Pac. 411.

New Hampshire. — State *v.* Ayer, 23 N. H. 301; Palmer *v.* State, 65 N. H. 221, 19 Atl. 1003; State *v.* Hascall, 6 N. H. 352 (admitted to support verdict by showing that there was not misconduct of outside parties).

Ohio. — Farrer *v.* State, 2 Ohio St. 54.

Texas. — Cannon *v.* State, 3 Tex. 31.

Washington. — State *v.* Webb, 20 Wash. 500, 55 Pac. 935.

Where it is contended that jurors read articles in newspapers in violation of the admonition of the judge, affidavits of jurors denying the allegations are allowable. People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161.

In Mississippi it is held that if the separation was such that the juror might have been improperly influenced by others it is sufficient grounds for setting aside the verdict, and his affidavit is inadmissible to justify his conduct during the separation. Organ *v.* State, 4 Cushm. (Miss.) 78. But see, to the effect that affidavits of jurors are admissible to explain such separation. State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224.

In State *v.* West (Idaho), 81 Pac. 107, it was held that an uncorroborated affidavit of a juror is not sufficient to explain a separation.

30. Abel *v.* Kennedy, 3 Greene (Iowa) 47. *Contra,* McCormick *v.* Monroe, 2 Mo. App. Rep. 1062, 64 Mo. App. 197.

In Ferrill *v.* Simpson, 8 Pick. (Mass.) 358, a juror was allowed to testify that a misapprehension at the trial in regard to a certain line had no influence upon the verdict.

31. Glaspell *v.* Northern Pac. R. Co., 43 Fed. 900.

32. Jordon *v.* Wallace, 67 N. H. 175, 32 Atl. 174 (improper remarks of counsel in address to jury).

paper articles by the jurors had no effect upon the verdict;[33] nor to explain the verdict.[34]

C. A CHANCE VERDICT. — In a few jurisdictions, by statute, an affidavit of a juror is admissible to impeach a verdict determined by lot, or by a resort to the determination of chance.[35]

33. United States *v.* Ogden, 105 Fed. 371; People *v.* Stokes, 103 Cal. 193, 37 Pac. 207, 42 Am. St. Rep. 102; People *v.* Azoff, 105 Cal. 632, 39 Pac. 59; People *v.* Chin Non (Cal.), 80 Pac. 681; State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224. See, however, People *v.* Murray, 94 Cal. 212, 29 Pac. 494, 28 Am. St. Rep. 113 (jurors allowed to show that reading of newspapers did not influence verdict).

34. Lloyd *v.* McClure, 2 Greene (Iowa) 139.

35. *Arkansas.* — Gantt's Dig., § 1971; St. Louis, I. M. & S. R. Co *v.* Cantrell, 37 Ark. 519, 40 Am. Rep. 105. See, however, Ward *v.* Blackwood, 48 Ark. 396, 3 S. W. 624.

California. — "Whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors." Code Civ. Proc., § 657. This does not make the affidavit of jurors essential, however. Donner *v.* Palmer, 23 Cal. 40.

Colorado. — Pawnee Ditch & Imp. Co. *v.* Adams, 1 Colo. App. 250, 28 Pac. 662.

Idaho. — Rev. Stat., § 4439; Griffiths *v.* Montandon, 4 Idaho 377, 39 Pac. 548; Giffen *v.* Lewiston, 6 Idaho 231, 55 Pac. 545.

Kentucky. — Gartland *v.* Conner, 22 Ky. L. Rep. 920, 59 S. W. 29.

South Dakota. — Comp. Laws, § 5088; Murphy *v.* Murphy, 1 S. D. 316, 47 N. W. 142, 9 L. R. A. 820; Gaines *v.* White, 1 S. D. 434, 47 N. W. 524.

Utah. — Archibald *v.* Kolitz, 26 Utah 226, 72 Pac. 935 (in this case affidavits were received, but were overcome by counter-affidavits); Pence *v.* California Min. Co., 27 Utah 378, 75 Pac. 934 (same burden of proof is upon party alleging misconduct); Black *v.* Rocky Mt. Bell Tel. Co., 26 Utah 451, 73 Pac. 514 (quoting statutes; effect is that no verdict can be impeached by affidavits of jurors except when there has been a resort to chance).

It has been held that a so-called quotient verdict is a chance verdict within the meaning of these statutes.

California. — Dixon *v.* Pluns, 98 Cal. 384, 33 Pac. 268, 35 Am. St. Rep. 180, 20 L. R. A. 698 ("No person even knew the figures upon which the computation would be made. If the estimate of each juror is before the eyes of the others when the agreement is made, then no element of chance will be found in the result, for it would be a mere matter of mathematical computation; but without a knowledge of these estimates, the character of the verdict will be as entirely unknown to the jurors as though the whole matter were decided by the casting of a die, or the tossing of a coin." This case overrules the earlier case of Turner *v.* Tuolumne Co. W. Co., 25 Cal. 397, and in effect overrules Boyce *v.* California Stage Co., 25 Cal. 460); Weinburg *v.* Somps, 33 Pac. 341.

Colorado. — Pawnee Ditch & Imp. Co. *v.* Adams, 1 Colo. App. 250, 28 Pac. 662.

Idaho. — Flood *v.* McClure, 3 Idaho 587, 32 Pac. 254 (a good case).

Montana. — Gordon *v.* Trevarthan, 13 Mont. 387, 34 Pac. 185, 40 Am. St. Rep. 452.

South Dakota. — Long *v.* Collins, 12 S. D. 621, 82 N. W. 95, *overruling* Ulrick *v.* Dakota Loan & Trust Co., 2 S. D. 285, 49 N. W. 1054, which followed the early California cases.

In Goodman *v.* Cody, 1 Wash. Ter. 329, 34 Am. Rep. 808, the court, *per* Greene, J., said: "The statute allowing proof by affidavits of jurors is truly in derogation of the common law, but it is at the same time a remedial statute. It is designed to relieve suitors from a very sore evil of illegal verdicts, the illegality of

D. To Show Misconduct of Third Parties. — In some jurisdictions affidavits of jurors have been admitted to prove the misconduct of third parties;[36] but in others it has been expressly held that such evidence is not admissible.[37]

E. To Show an Extraneous Influence. — In a few jurisdictions a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind.[38] And it has been held, accordingly, that affidavits of jurors are admissible to prove their own misconduct outside the jury room.[39]

which can seldom be proved unless by affidavits of the very men who have conspired to render them. The statute is to be liberally construed to effect the intent of legislation. The degree of liberality of construction is to be measured by the reason for it. According to the bulk and ramifications of the mischief to be cured, the words of the statute are to be expanded until, if necessary, their utmost stretch and distribution of meaning and application is reached."

36. In General. — Reynolds *v.* Champlain Transp. Co., 9 How. Pr. (N. Y.) 7; Thomas *v.* Chapman, 45 Barb. (N. Y.) 98.

Misconduct of Party. — Hawkins *v.* New Orleans P. & P. Co., 29 La. Ann. 134; Heffron *v.* Gallupe, 55 Me. 563; Chews *v.* Driver, 1 N. J. L. 166; Ritchie *v.* Holbrooke, 7 Serg. & R. (Pa.) 458.

Misconduct of Officer. — Thomas *v.* Chapman, 45 Barb. (N. Y.) 98 (officer said to jury "that the case was clear for plaintiff, and that the jury had better agree and go home; that if they did not, soon, he should lock the jury up for the night").

Misconduct of Some Other Party. Johnson *v.* Witt, 138 Mass. 79 (improperly approached by witness; juror may testify as to what was said, but not as to effect on his mind).

Criminal Cases. — Affidavits of jurors may be received for the purpose of showing misconduct on the part of bailiffs and other third parties. Heller *v.* People, 22 Colo. 11, 43 Pac. 124; Nelms *v.* State, 13 Smed. & M. (Miss.) 500, 53 Am. Dec. 94; Shaw *v.* State, 79 Miss. 577, 31 So. 209 (sheriff called to bailiff, so that jury could hear, that the judge was going home and that the jury would have to remain until Monday); People *v.* Carnal, 1 Park. Crim. (N. Y.) 256.

37. Griffith *v.* Mosley, 70 Ark. 244, 67 S. W. 309; Sanitary Dist. of Chicago *v.* Cullerton, 147 Ill. 385, 35 N. E. 723 (conduct of bailiff); Allison *v.* People, 45 Ill. 37 (constable took part in the discussion); Knowlton *v.* McMahon, 13 Minn. 386, 97 Am. Dec. 236; Gardner *v.* Minea, 47 Minn. 295, 50 N. W. 199; Hulet *v.* Barnett, 10 Ohio 459; Pickens *v.* Coal River Boom & Timber Co. (W. Va.), 50 S. E. 872.

38. Woodward *v.* Leavitt, 107 Mass. 453, 9 Am. Rep. 49, *per* Gray, J.; Morse *v.* Montana Ore-Purch. Co., 105 Fed. 337 (may testify as to whether they have read articles in newspapers, but not as to effect upon their action).

Criminal Cases. — Mattox *v.* United States, 146 U. S. 140; United States *v.* Ogden, 105 Fed. 371 (may testify that they have read newspaper articles, but not as to the effect upon their minds); State *v.* Riggs, 110 La. 509, 34 So. 655 (overt acts may be shown.) See also Com. *v.* Johnson, 5 Pa. Co. Ct. 236.

39. "The rule of public policy which excludes the testimony of jurors to impeach their verdict extends only to matters taking place during their retirement, and it is competent to impeach the verdict as to matters occurring outside the jury room during the progress of the trial." Rush *v.* St. Paul City R. Co., 70 Minn. 5, 72 N. W. 733. See also Heffron *v.* Gallupe, 55 Me. 563.

In the following cases affidavits of jurors were admitted to prove that they had visited the premises in

F. To Show Matters Not Inhering in Verdict. — In some states it is said that "affidavits of jurors may be received, for the purpose of avoiding a verdict, to show any matter occurring during the trial, or in the jury room, which does not essentially inhere in the verdict itself."[40]

question during the trial. Rush *v.* St. Paul City R. Co., 70 Minn. 5, 72 N. W. 733; Pierce *v.* Brennan, 83 Minn. 422, 86 N. W. 417; Hempton *v.* State, 111 Wis. 127, 86 N. W. 596; Peppercorn *v.* Black River Falls, 89 Wis. 38, 61 N. W. 79, 46 Am. St. Rep. 818.

40. *Iowa.* — Wright *v.* Illinois & M. Tel. Co., 20 Iowa 195; Cowles *v.* Chicago, R. I. & P. R. Co., 32 Iowa 515. See also Hall *v.* Robison, 25 Iowa 91; Stewart *v.* Burlington & M. R. R. Co., 11 Iowa 62; Kruidenier *v.* Shields, 70 Iowa 428, 30 N. W. 681 (using evidence not legally admitted); Griffin *v.* Harriman, 74 Iowa 436, 38 N. W. 139.

But affidavits showing that the jurors were unduly influenced by statements of fellow jurors are not admissible. Purcell *v.* Tibbles, 101 Iowa 24, 69 N. W. 1120. Nor are affidavits showing that an instruction of the court was misunderstood. Cooper *v.* Mills Co., 69 Iowa 350, 28 N. W. 633.

Kansas. — Perry *v.* Bailey, 12 Kan. 539 (affidavit that juror was drunk during deliberations admitted); Gottleib *v.* Jasper, 27 Kan. 770 ("juror may testify to facts which transpired within his own personal observation, and which transpired in such a manner that others, as well as himself, could be cognizant of them, and could testify to them;" affidavit that one of the jurors stated in the jury room that he personally knew certain facts admitted); Leroy & W. R. Co. *v.* Anderson, 41 Kan. 528, 21 Pac. 588 (juror was asked the following question: "I will ask you if it was not a matter of fact that you agreed on the general verdict first, and then answered the special interrogatories with a view of agreeing with your general verdict, without reference to any particular damage to any particular part of the farm." *Held,* first part of question as to what was done is admissible; latter part is not).

Nebraska. — Harris *v.* State, 24 Neb. 803, 40 N. W. 317. But affidavits of jurors as to their motives are not admissible. Johnson *v.* Parrotte, 34 Neb. 26, 51 N. W. 290.

The illustrations given in the opinion quoted from in the text, as to what matters inhere in the verdict, and accordingly cannot be proved by the juror, are "that the juror did not assent to the verdict; that he misunderstood the instructions of the court, the statements of the witnesses, or the pleadings in the case; that he was unduly influenced by the statements (or otherwise) of his fellow jurors, or mistaken in his calculations or judgment, or other matter resting alone in a juror's breast." Wright *v.* Illinois & M. Tel. Co., 20 Iowa 195.

Criminal Cases. — Matters Not Inhering in Verdict. — *Iowa.* — State *v.* Beste, 91 Iowa 565, 60 N. W. 112 (arguments used by jurors and deductions to be drawn therefrom are matters clearly inhering in the verdict).

Kansas. — State *v.* Rambo, 69 Kan. 777, 77 Pac. 563.

Washington. — State *v.* Parker, 25 Wash. 405, 65 Pac. 776 (affidavits of jurors that other jurors narrated facts to the jury admissible; affidavits as to effect not admissible).

Affidavits of jurors are admissible to show overt acts which can be seen or heard. Harris *v.* State, 24 Neb. 803, 40 N. W. 317 (juror improperly took law book into jury room and read from it). Jurors are competent to testify whether certain affidavits were before them, but not as to their effect upon the verdict. State *v.* Clark, 34 Kan. 289, 8 Pac. 528.

Matters Inhering in Verdict. Coil *v.* State, 62 Neb. 15, 86 N. W. 925 (misunderstanding of evidence or of effect of verdict); Savary *v.* State, 62 Neb. 166, 87 N. W. 34

G. Affidavits May Be Considered if Admitted Without Objection. — In some jurisdictions it is held that while affidavits of jurors are not admissible to impeach a verdict, yet if they are admitted without objection they may be considered by the court.[41]

H. Jurors Cannot Be Compelled To Make Affidavit. — In some jurisdictions, where affidavits of jurors are admitted for certain purposes, it is held that jurors cannot be *compelled* to answer under oath as to the manner in which they made up their verdict.[42]

3. Evidence of Third Parties. — A. In General. — An affidavit of a person other than a juror is admissible to prove misconduct of the jury.[43]

B. Affidavit Upon Information and Belief Not Sufficient. An affidavit based upon information and belief, and alleging misconduct on the part of the jury, is not sufficient.[44]

(showing that juror reasoned from false premises, or adopted an illegitimate method in reaching a conclusion).

In State *v.* Lauderbeck, 96 Iowa 258, 65 N. W. 158, it was held that the following matters were inherent in the verdict and could not therefore be shown by affidavit; "that the jury did not, in their deliberations, pay any attention to the testimony of the medical experts; that one of the jurors said that if they did find a verdict of guilty, and it was not right, the judge would set it aside; and that another juror, who was an unmarried man, consented to the verdict because he relied upon the judgment of the other jurors who were married."

See also the following cases, where affidavits of jurors were not allowed: State *v.* La Grange, 99 Iowa 10, 68 N. W. 557 (statements of jurors); State *v.* Whalen, 98 Iowa 662, 68 N. W. 554.

41. Winn *v.* Reed, 61 Mo. App. 621, 1 Mo. App. Rep. 456.

Where the jurors, under their official oath, answer certain questions of the court, without objection by either party, neither can subsequently object. Dorr *v.* Fenno, 12 Pick. (Mass.) 521. For a contrary holding in a criminal case, see Com. *v.* Meserve, 156 Mass. 61, 30 N. E. 166.

Where affidavits of jurors are offered by the prosecution for the purpose of sustaining the verdict, the facts therein stated may be sufficient to warrant the court in granting a new trial. People *v.* Chin Non (Cal.), 80 Pac. 681.

42. "To allow such a practice would be to invade and interfere with the rights of jurors and the discharge of their duties in the jury room to an extent never contemplated by our code. If there has been fraud or unfair dealing on their part, of course, they are not beyond reach of judicial inquiry; but upon a mere allegation of their having acted improperly they should not be compelled to disclose how they made up their verdict." Forshee *v.* Abrams, 2 Iowa 571. See also State *v.* Grady, 4 Iowa 461; Howard *v.* Cobb, Brunner Col. Cas. 75, 3 Day 309, 12 Fed. Cas. No. 6755.

43. Cain *v.* Cain, 1 B. Mon. (Ky.) 213; Bradt *v.* Rommel, 26 Minn. 505, 5 N. W. 680.

An affidavit by a constable, who had the jury in charge and was with them in the room during the whole of their deliberations, stating that the result was reached by adding the sum of the amounts assessed by each juror and dividing by twelve, is admissible. Dunn *v.* Hall, 8 Blackf. (Ind.) 32. See also Wright *v.* Abbott, 160 Mass. 395, 36 N. E. 62, 39 Am. St. Rep. 499 (verdict reached by lot).

An affidavit of the bailiff who had the jurors in charge that they read certain inflammatory newspaper articles is admissible. People *v.* Murray, 85 Cal. 350, 24 Pac. 666.

44. *California.* — Hoare *v.* Hindley, 49 Cal. 274 (affidavit of defendant that verdict was determined by

C. Requisites. — The affidavit must set forth the nature and the circumstances of the misconduct, and must specify the particular juror who has been guilty of misconduct,[45] and should show that the party had no knowledge of the alleged misconduct during the trial.[46]

D. Affidavits as to Statements of Jurors Not Admissible. Affidavits by others as to the statements, conversations or admissions

dividing the sum of the several amounts assessed by the jurors by twelve disregarded, in absence of proof that he was in the jury room or had any personal knowledge of the facts).

Illinois. — Cummins *v.* Crawford, 88 Ill. 312, 30 Am. Rep. 558 (alleged that jury arrived at verdict by each juror marking down the amount he desired assessed, and dividing the aggregate of the several sums by twelve).

Indiana. — Stanley *v.* Sutherland, 54 Ind. 339; Toliver *v.* Moody, 39 Ind. 148.

Pennsylvania. — Com. *v.* Harrold, 204 Pa. St. 154, 53 Atl. 760.

Where the affidavit is positive in its allegation of facts it is not essential that the affiant state how he learned the facts. Chicago & I. C. R. Co. *v.* McDaniel, 134 Ind. 166, 32 N. E. 728; Houk *v.* Allen, 126 Ind. 568, 25 N. E. 897, 11 L. R. A. 706.

See, however, Eaken *v.* Thompson, 4 Ind. App. 393, 30 N. E. 1114; Treschman *v.* Treschman, 28 Ind. App. 206, 61 N. E. 961; Phillips *v.* Scales Mound, 195 Ill. 353, 63 N. E. 180; Eufaula *v.* Speight, 121 Ala. 613, 25 So. 1009; People *v.* Dobbins, 138 Cal. 694, 72 Pac. 339. In these cases affidavits as to what occurred in the jury room were such that reasonably the information could have been obtained only from a juror.

While an affidavit expressing a general opinion that the jury was prejudiced is not of itself entitled to much weight, it may strengthen the claim to a new trial founded on the evidence on which the jury decided. Withers *v.* Butts, 7 Dana (Ky.) 329.

An affidavit that one of the jurors discussed the case before submission is insufficient when the name of the juror is not given. Brant *v.* Lyons, 60 Iowa 172, 14 N. W. 227.

Criminal Cases. — Affidavit on Information and Belief Not Sufficient. *California.* — People *v.* Williams, 24 Cal. 31; People *v.* Findley, 132 Cal. 301, 64 Pac. 472; People *v.* Chin Non, 80 Pac. 681.

Illinois. — Bonardo *v.* People, 182 Ill. 411, 55 N. E. 519 (not to show chance verdict); Marzen *v.* People, 190 Ill. 81, 60 N. E. 102 (not to show that jurors were allowed to separate).

Indiana. — Hutchins *v.* State, 151 Ind. 667, 52 N. E. 403.

Missouri. — State *v.* Stubblefield, 157 Mo. 360, 58 S. W. 337.

Tennessee. — Stone *v.* State, 4 Humph. 27.

Washington. — State *v.* Murphy, 13 Wash. 229, 43 Pac. 44.

45. Cornelius *v.* State, 12 Ark. 782; Achey *v.* State, 64 Ind. 56; Brant *v.* Lyons, 60 Iowa 172, 14 N. W. 227; McCash *v.* Burlington, 72 Iowa 26, 33 N. W. 346; State *v.* Jones, 112 La. 980, 36 So. 825; Lennox *v.* Knox & L. R. Co., 62 Me. 322.

Affidavits of a vague and inconclusive character are not sufficient. Jack *v.* State, 26 Tex. 1. The affidavits should be explicit in giving the juror's name and the time and place of the act. State *v.* McLaughlin, 44 Iowa 82.

It is said in some jurisdictions that a copy of the affidavit should be served on the juror so as to give him an opportunity to reply. State *v.* Duestoe, 1 Bay (S. C.) 377; State *v.* Harding, 2 Bay (S. C.) 267.

46. Knowledge of Misconduct. It has been said in Ohio that "the party filing the motion must show that he had no knowledge of the alleged misconduct during the continuance of the trial, for the reason that this is a matter peculiarly known to himself, and not generally within the knowledge of the opposite party." Thomas *v.* Board of

of jurors made after trial are not admissible to show what the jury thought and did in their retirement.[47] But in certain states where

County Com'rs, 5 Ohio N. P. 453. Affidavits setting forth that a juror was asleep during the trial should set forth that the defendant was ignorant of the fact at the time. Cogswell *v.* State, 49 Ga. 103.

47. *United States.* — Kelley *v.* Pennsylvania R. Co., 33 Fed. 856 (statements of jurors as to what influenced them in making up their verdict); Walton *v.* Wild Goose Min. & Trading Co., 123 Fed. 209.

Arkansas. — Pleasants *v.* Heard, 15 Ark. 403.

California. — Siemsen *v.* Oakland, S. L. & H. Elec. R. Co., 134 Cal. 494, 66 Pac. 672.

Colorado. — Richards *v.* Richards, 20 Colo. 303, 38 Pac. 323 (affidavit of counsel that juror admitted that counter-claim was not considered).

Connecticut. — Godwin *v.* Bryan, 16 Fla. 396 (not admissible to prove juror's motives).

Florida. — Coker *v.* Hayes, 16 Fla. 368 (stand on same footing as affidavits of jurors).

Georgia. — Smith *v.* Banks, 65 Ga. 26.

Illinois. — Niccolls *v.* Foster, 89 Ill. 386; Palmer *v.* People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146; Forester *v.* Guard, 1 Ill. 74, 12 Am. Dec. 141 (affidavit of plaintiff founded on confession of juror); Allison *v.* People, 45 Ill. 37 (affidavit of outsider); Smith *v.* Smith, 169 Ill. 623, 48 N. E. 306, *affirming* 69 Ill. App. 314; Heldmaier *v.* Rehor, 188 Ill. 458, 59 N. E. 9, *affirming* 90 Ill. App. 96; Phillips *v.* Scales Mound, 195 Ill. 353, 63 N. E. 180; Virginia *v.* Plummer, 65 Ill. App. 419; Barker *v.* Livingston Co. Nat. Bank, 30 Ill. App. 591.

Indiana. — McCray *v.* Stewart, 16 Ind. 377; Elliott *v.* Mills, 10 Ind. 368; Drummond *v.* Leslie, 5 Blackf. 453 (affidavit of third party showing admissions of jurors that verdict was a quotient verdict); Dunn *v.* Hall, 8 Blackf. 32.

Iowa. — State *v.* Grady, 4 Iowa 461; State *v.* Quinton, 59 Iowa 362, 13 N. W. 328.

Kansas. — Gottleib *v.* Jasper, 27 Kan. 770; Cain Bros. Co. *v.* Wallace, 46 Kan. 138, 26 Pac. 445 (hearsay).

Kentucky. — Grundy *v.* Jackson, 1 Litt. 11.

Louisiana. — Irish *v.* Wright, 8 Rob. 428 (affidavit of counsel that juror voluntarily made statement to him that he consented to the verdict because he believed that otherwise the jury would not agree, inadmissible); Digard *v.* Michaud, 9 Rob. 387.

Maine. — Shepherd *v.* Camden, 82 Me. 535, 20 Atl. 91. See also Trafton *v.* Pitts, 73 Me. 408 (evidence of what jurors said during deliberations inadmissible).

Massachusetts. — Warren *v.* Spencer Water Co., 143 Mass. 155, 9 N. E. 527 (one of the jurors stated after the verdict that he believed the verdict to be excessive, but that his reason for arriving at said verdict was that defendant was a rich corporation, while the petitioner was a poor man).

Michigan. — Stevenson *v.* Detroit & M. R. Co., 118 Mich. 651, 77 N. W. 247.

Missouri. — Easley *v.* Missouri Pac. R. Co., 113 Mo. 236, 20 S. W. 1073; Proffer *v.* Miller, 69 Mo. App. 501; Herring *v.* Wabash R. Co., 80 Mo. App. 562, 2 Mo. App. Rep. 707; Meisch *v.* Sippy, 102 Mo. App. 559, 77 S. W. 141.

Nebraska. — Johnson *v.* Parrotte, 34 Neb. 26, 51 N. W. 290. In this state, however, affidavits of jurors are admitted in certain cases. The case cited here is authority for the view that testimony as to admissions cannot be received when the affidavit of the juror is inadmissible.

New Hampshire. — Griffin *v.* Auburn, 59 N. H. 286 (hearsay evidence of their declarations as to the manner of their reaching a verdict inadmissible).

New York. — Clum *v.* Smith, 5 Hill 560; Taylor *v.* Everett, 2 How. Pr. 73; Smith *v.* Cheetham, 3 Caines 57 (confessions of jurors that they had cast lots); Mais *v.* Ruh, 57 App. Div. 15, 67 N. Y. Supp. 1051; Gans *v.* Metropolitan St. R. Co., 84 N. Y. Supp. 914.

the affidavits of jurors are admissible, affidavits by others are admissible to contradict the juror.[48]

E. Tampering With Jury. — An affidavit stating that the prevailing party has tampered with the jury is sufficient to warrant the granting of a new trial;[49] and the court will not inquire as to what effect the misconduct had upon the verdict.[50]

F. Burden of Proof. — The burden of proving misconduct is upon the party moving for a new trial.[51] When misconduct is

North Carolina. — Johnson *v.* Allen, 100 N. C. 131, 5 S. E. 666 ("to allow the motion, founded on such evidence, would be virtually to allow jurors to impeach their own verdict"); Purcell *v.* Southern R. Co., 119 N. C. 728, 26 S. E. 161.

Rhode Island. — Tucker *v.* South Kingstown, 5 R. I. 558 (hearsay rule excludes such declarations).

South Carolina. — Price *v.* McIlvain, 3 Brev. 419.

Criminal Cases. — The rule is the same in criminal cases.

California. — People *v.* Azoff, 105 Cal. 632, 39 Pac. 59; People *v.* Findley, 132 Cal. 301, 64 Pac. 472.

Delaware. — State *v.* Harmon, 4 Pen. 580, 60 Atl. 866.

Florida. — Kelly *v.* State, 39 Fla. 122, 22 So. 303.

Georgia. — Mercer *v.* State, 17 Ga. 146 (statement of juror that he did not agree to verdict).

Idaho. — State *v.* Murphy, 7 Idaho 183, 61 Pac. 462.

Indiana. — Reed *v.* State, 147 Ind. 41, 46 N. E. 135.

Louisiana. — State *v.* Wallman, 31 La. Ann. 146 (juror agreed to verdict on condition that all should unite in petition for pardon); State *v.* Beatty, 30 La. Ann. 1266; State *v.* Corcoran, 50 La. Ann. 453; 23 So. 511; State *v.* Morris, 41 La. Ann. 785, 6 So. 639.

Massachusetts. — Com. *v.* Meserve, 156 Mass. 61, 30 N. E. 166.

Michigan. — People *v.* Martin, 116 Mich. 446, 74 N. W. 653 (hearsay).

Missouri. — State *v.* Cooper, 85 Mo. 256; State *v.* Schaefer, 116 Mo. 96, 22 S. W. 447; State *v.* Dieckman, 11 Mo. App. 538; State *v.* Palmer, 161 Mo. 152, 61 S. W. 651. See also State *v.* Rush, 95 Mo. 199, 8 S. W. 221.

Nebraska. — Savary *v.* State, 62 Neb. 166, 87 N. W. 34 (hearsay).

New York. — People *v.* Hartung, 17 How. Pr. 85, 4 Park. Crim. 256; Wilson *v.* People, 4 Park. Crim. 619.

Tennessee. — Stone *v.* State, 4 Humph. 27.

Wisconsin. — Hughes *v.* State, 109 Wis. 397, 85 N. W. 333.

Wyoming. — Gustavenson *v.* State, 10 Wyo. 300, 68 Pac. 1006.

48. Rule in Jurisdictions Where Juror's Affidavits Are Admissible. Although under the rule in certain states affidavits of jurors themselves are admissible, affidavits of others as to subsequent statements are inadmissible to prove misconduct because hearsay. Gottleib *v.* Jasper, 27 Kan. 770. See also Kansas cases cited *supra.*

It would seem, however, that such affidavits might be used to contradict the juror who made the statement. See Sharpe *v.* Williams, 41 Kan. 56, 20 Pac. 497; Cain Bros. Co. *v.* Wallace, 46 Kan. 138, 26 Pac. 145.

In Eufaula *v.* Speight, 121 Ala. 613, 25 So. 1009, a positive affidavit was made by an attorney to the effect that the verdict was a quotient verdict, but the means of obtaining knowledge was not stated. It was held that the court was authorized to infer that knowledge was obtained from the jurors themselves, that being the most probable means, and therefore that it was proper to disregard the affidavit. See cases cited *infra.*

49. Huston *v.* Vail, 51 Ind. 299.

50. Huston *v.* Vail, 51 Ind. 299.

51. United States *v.* Swett, 2 Hask. 310, 28 Fed. Cas. No. 16,427; People *v.* Williams, 24 Cal. 31 (presumption is that actions were regular); State *v.* Boggan, 133 N. C. 761, 46 S. E. 711.

The burden is on the moving party to prove misconduct. Clay *v.* Montgomery, 102 Ala. 297, 14 So. 646.

proved in a criminal case the *onus* is on the state to show that the accused suffered no injury thereby.[52]

G. Sufficiency of Evidence. — When a verdict is attacked by affidavit the prevailing party may reply in like manner. It is for the court to determine, from all the evidence presented, whether the allegations of misconduct or disqualification are sustained.[53]

52. Silvey *v.* State, 71 Ga. 553.

When it is doubtful whether misconduct has been shown, a new trial should be refused. Parshall *v.* Minneapolis & St. L. R. Co., 35 Fed. 649. See also Mullins *v.* Cottrell, 41 Miss. 291 (clearest proof required); McCausland *v.* McCausland, 1 Yeates (Pa.) 372 (clear and full proof); Morse *v.* Montana Ore-Purch. Co., 105 Fed. 337.

The evidence of misconduct must be clear, certain and convincing. Walton *v.* Wild Goose Min. & Trading Co., 123 Fed. 209.

The decision of the trial court upon conflicting evidence will not generally be interfered with on appeal. Wightman *v.* Butler Co., 83 Iowa 691, 49 N. W. 1041; Light *v.* Chicago, M. & St. P. R. Co., 93 Iowa 83, 61 N. W. 380.

53. In the following cases the courts considered the weight and sufficiency of the evidence:

California. — Hunt *v.* Elliott, 77 Cal. 588, 20 Pac. 132 (juror's affidavit overcome by counter-affidavits of two other jurors).

Georgia. — Columbus *v.* Goetchius, 7 Ga. 139; Henderson *v.* Fox, 83 Ga. 233, 9 S. E. 839 ("improper language or conduct attributed to a juror, proved by one witness only, and which he denies on oath, is not cause for a new trial").

Indiana. — Conwell *v.* Anderson, 2 Ind. 122 (affidavit of juror denying that he had used improper expressions during the trial); Harding *v.* Whitney, 40 Ind. 379.

Minnesota. — Gurney *v.* Minneapolis & St. C. R. Co., 41 Minn. 223, 43 N. W. 2 (officer furnished jury with cigars, but winning party did not know of it until after the trial; relief refused).

Missouri. — Jobe *v.* Weaver, 77 Mo. App. 665 (affidavit that paper was found in jury room containing twelve separate amounts, divided by twelve, and that the quotient was the amount of the verdict, is insufficient).

Nebraska. — Hair *v.* State, 16 Neb. 601, 21 N. W. 464; Everton *v.* Esgate, 24 Neb. 235, 38 N. W. 794; Cortelyou *v.* McCarthy, 37 Neb. 742, 56 N. W. 620.

New York. — Hager *v.* Hager, 38 Barb. 92; Haight *v.* Elmira, 42 App. Div. 391, 59 N. Y. Supp. 193.

North Carolina. — State *v.* Scott, 8 N. C. 24.

Rhode Island. — Darling *v.* New York, P. & B. R. Co., 17 R. I. 708, 24 Atl. 462 (evidence of intermeddling by an officer is not sufficient unless it shows that "the communication from the officer to the jury had a manifest tendency to influence the jury improperly against the unsuccessful party, or was such that prejudice has resulted to such party").

Texas. — Texas Cent. R. Co. *v.* Stuart, 1 Tex. Civ. App. 642, 20 S. W. 962; Moore *v.* Missouri, K. & T. R. Co., 30 Tex. Civ. App. 266, 69 S. W. 997; Gulf, C. & S. F. R. Co. *v.* Blanchard (Tex Civ. App.), 73 S. W. 88.

West Virginia. — Probst *v.* Braeunlich, 24 W. Va. 356.

Wisconsin. — Gans *v.* Harmison, 44 Wis. 323.

Sufficiency of Evidence in Criminal Cases. — *Arkansas.* — Hooker *v.* State, 86 S. W. 846 (separation not shown to have been wrongful).

California. — People *v.* Yut Ling, 74 Cal. 569, 16 Pac. 489 (affidavit of misconduct overcome by affidavit of officer who had jury in charge).

Georgia. — Mathis *v.* State, 18 Ga. 343.

Illinois. — Waller *v.* People, 209 Ill. 284, 70 N. E. 681 (affidavit alleging separation not sufficient because circumstances not stated).

Indiana. — McClary *v.* State, 75 Ind. 260 (affidavit that bailiff told affiant that he was in the jury room is not sufficient).

Iowa. — State *v.* Tucker, 68 Iowa

III. MOTIONS BASED UPON DISQUALIFICATION OF JURORS.

1. In General. — Upon a motion for a new trial on the ground of disqualification of a juror the court may receive affidavits.[54]

2. Requisites of Affidavits. — The party and his attorney must set forth unequivocally in their affidavits that they were ignorant of the disqualification at the time the juror was accepted;[55] for

50, 25 N. W. 924 (affidavit that juror said during trial that he would convict or hang the jury is not sufficient); State *v.* Kennedy, 77 Iowa 208, 41 N. W. 609; State *v.* Lee, 80 Iowa 75, 45 N. W. 545, 20 Am. St. Rep. 401 (defendant's affidavit that juror was drunk overcome by juror's affidavit).

Louisiana. — State *v.* Garig, 43 La. Ann. 365, 8 So. 934.

Massachusetts. — Com. *v.* McCauley, 156 Mass. 49, 30 N. E. 76.

Montana. — State *v.* Jackson, 9 Mont. 508, 24 Pac. 213.

Nebraska. — Tracey *v.* State, 46 Neb. 361, 64 N. W. 1069.

South Dakota. — State *v.* Vincent, 16 S. D. 62, 91 N. W. 347.

Tennessee. — Stone *v.* State, 4 Humph. 27; Hannum *v.* State, 90 Tenn. 647, 18 S. W. 269.

Texas. — Kutch *v.* State, 32 Tex. Crim. 184, 22 S. W. 594; McAvoy *v.* State (Tex. Crim.), 58 S. W. 1010 (unsupported affidavit of defendant insufficient when there is no showing that the court refused to enforce the attendance of witnesses to substantiate the statements).

Washington. — State *v.* Underwood, 35 Wash. 558, 77 Pac. 863.

A new trial will not be granted upon the unsupported affidavit of the defendant stating that the verdict was agreed to under a misunderstanding as to its effect, where the jurors refused to make affidavit. Lancaster *v.* State, 91 Tenn. 267, 18 S. W. 777. See State *v.* Washington, 108 La. 226, 32 So. 396, where a new trial was granted under peculiar circumstances upon the affidavit of one who was a witness at the trial stating that he had committed perjury.

54. United States *v.* McKee, 26 Fed. Cas. No. 15,683; Shutt *v.* State (Tex. Crim.), 71 S. W. 18 (motion must be supported by affidavit).

An affidavit showing that a juror has prejudged the case is admissible. State *v.* Gonce, 87 Mo. 627; Heath *v.* Com., 1 Rob. (Va.) 796.

Affidavits as to the general reputation of the juror are admissible in support of his counter-affidavit. State *v.* Levy (Idaho), 75 Pac. 227.

Of course, only such affidavits as are relevant to the matter in controversy can be considered. Thus where a motion for a new trial is based upon statements made by one of the jurors before the trial, affidavits of jurors as to what occurred in the jury room are not admissible. Woodward *v.* Leavitt, 107 Mass. 453, 9 Am. Rep. 49. Likewise affidavits of jurors as to how another juror acted are not admissible to show that the latter was ignorant of his relationship to one of the parties. Tegarden *v.* Phillips (Ind. App.), 39 N. E. 212.

55. *Florida.* — Irvin *v.* State, 19 Fla. 872; Webster *v.* State, 36 So. 584.

Georgia. — Rhodes *v.* State, 50 S. E. 361.

Iowa. — McKinney *v.* Simpson, 51 Iowa 662, 2 N. W. 535.

Maine. — Jameson *v.* Androscoggin R. Co., 52 Me. 412; Minot *v.* Bowdoin, 75 Me. 205.

Mississippi. — Brown *v.* State, 60 Miss. 447.

Missouri. — State *v.* Nocton, 121 Mo. 537, 26 S. W. 551.

Nebraska. — Clough *v.* State, 7 Neb. 320.

Ohio. — Clerke *v.* Commercial Tribune Co., 7 Ohio N. P. 479, 10 Ohio S. & C. P. Dec. 176.

Oklahoma. — Berry *v.* Smith, 2 Okla. 345, 35 Pac. 576.

Tennessee. — Booby *v.* State, 4 Yerg. 111 (juror had made wager on result).

Wisconsin. — Grottkan *v.* State, 70 Wis. 462, 36 N. W. 31.

It has been held that the affidavits of both the party and his counsel are

otherwise they should object to him for cause or excuse him peremptorily. And it must be shown that the juror was examined as to his qualifications before being accepted,[56] since otherwise there would be such laches as would preclude relief.

3. Affidavits of Jurors. — It has been held that affidavits of jurors are admissible to show disqualification of a fellow juror.[57] They are admissible to rebut the charges of disqualification.[58]

4. Burden of Proof. — When the competency of a juror is assailed after verdict the burden of proof is upon the one who attacks him; all the presumptions of law are in favor of his competency.[59]

5. Sufficiency of Evidence. — Case Prejudged. — Evidence that a juror has prejudged the case must be clear and satisfactory.[60]

necessary. State *v.* Hunt, 141 Mo. 626, 43 S. W. 389.

56. *Florida.* — Webster *v.* State, 36 So. 584.

Iowa. — State *v.* Shelledy, 8 Iowa 477.

Louisiana. — State *v.* Nash, 45 La. Ann. 1137, 13 So. 732, 734.

Michigan. — People *v.* Scott, 56 Mich. 154, 22 N. W. 274.

Mississippi. — Brown *v.* State, 60 Miss. 447.

Nebraska. — Clough *v.* State, 7 Neb. 320.

South Carolina. — State *v.* Robertson, 54 S. C. 147, 31 S. E. 868.

Texas. — Lester *v.* State, 2 Tex. App. 432; Armstrong *v.* State, 34 Tex. Crim. 248, 30 S. W. 235.

It is not necessary, however, to show that the party or his attorney made inquiries or investigation in regard to the juror before the trial. Manning *v.* Boston Elev. R. Co., 187 Mass. 496, 73 N. E. 645.

57. Hyman *v.* Eames, 41 Fed. 676. In this case it was contended that one of the jurors had prejudged the case. In support of this, affidavits of other jurors were admitted to the effect that the juror in question had stated in the jury room that he had seen the ground in controversy, had talked with various parties, and was capable of judging of the matters in issue from his own personal knowledge and information. West Chicago St. R. Co. *v.* Huhnke, 82 Ill. App. 404. But see *contra,* Cain *v.* Cain, 1 B. Mon. (Ky.) 213.

58. Upon a motion for a new trial upon the ground that a juror had formed or expressed an opinion before trial, affidavits of other jurors denying the allegations are admissible.

Georgia. — Monroe *v.* State, 5 Ga. 85.

New Hampshire. — State *v.* Howard, 17 N. H. 171.

Tennessee. — Rader *v.* State, 5 Lea 610. But see Brakefield *v.* State, 1 Sneed 215.

Texas. — Gilleland *v.* State, 44 Tex. 356.

An affidavit or testimony of a juror is admissible to show that he did not prejudge the case. Columbus *v.* Goetchius, 7 Ga. 139; Haskell *v.* Becket, 3 Me. 92; Taylor *v.* Greely, 3 Me. 204. But see Vance *v.* Haslett, 4 Bibb (Ky.) 191.

But a statement that notwithstanding such expression of opinion he felt that he was able to render a fair and impartial verdict, or that he had rendered such verdict, is not admissible. McGuffie *v.* State, 17 Ga. 497.

59. Moon *v.* State, 68 Ga. 687; Keenan *v.* State, 8 Wis. 132.

60. Hughes *v.* People, 116 Ill. 330, 6 N. E. 55; Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320; Mann *v.* State, 3 Head (Tenn.) 373; State *v.* Mickle, 25 Utah 179, 70 Pac. 856.

In the first case cited the court said: "Scarcely a criminal case comes to this court where the same objection to the competency of jurors is not taken, founded on mere *ex parte* affidavits. Such affidavits are a most unsatisfactory mode of establishing any fact in a case. The parties making them are subject to no cross-examination, one of the

Mere *ex parte* affidavits which are flatly contradicted by the affidavits of the jurors themselves are not sufficient.[61] An affidavit of a party

most potent methods ever adopted to elicit truth and to detect falsehood. Besides that, a mere casual remark concerning any matter may be imperfectly understood or not accurately remembered."

61. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320; Hughes *v.* People, 116 Ill. 330, 6 N. E. 55.

In the following cases, where a new trial was asked for on the ground that a juror had prejudged the case, the evidence was held insufficient.

United States. — United States *v.* Wilson, 69 Fed. 584 (facts denied by juror).

Arizona. — Trimble *v.* Territory, 71 Pac. 932 (mere street conversation in which juror said he liked to send such fellows over the road not sufficient).

District of Columbia. — United States *v.* Wood, 1 McArthur 241 (juror asserted what would be done to defendant, rather than what he would do).

Florida. — Yates *v.* State, 26 Fla. 484, 7 So. 880 (evidence conflicting; witness who testified as to statements of juror was related to the accused by marriage, and was an enemy of the juror).

Georgia. — Jim *v.* State, 15 Ga. 535; Epps *v.* State, 19 Ga. 102 (single witness not sufficient to overthrow oath of juror); O'Shields *v.* State, 55 Ga. 696 (juror made affidavit that he had no feeling against the defendant, and that what he said was in jest); Dumas *v.* State, 63 Ga. 600 (affidavit of one witness overcome by affidavit of juror); Fogarty *v.* State, 80 Ga. 450, 5 S. E. 732; McDuffie *v.* State, 90 Ga. 786, 17 S. E. 105; Sumner *v.* State, 34 S. E. 293 (one witness not sufficient); Sullivan *v.* State, 121 Ga. 183, 48 S. E. 949.

Idaho. — State *v.* Davis, 6 Idaho 159, 53 Pac. 678; State *v.* Levy, 75 Pac. 227.

Indiana. — Clem *v.* State, 33 Ind. 418; Achey *v.* State, 64 Ind. 56.

Kansas. — State *v.* Peterson, 38 Kan. 204, 16 Pac. 263.

Louisiana. — State *v.* Nash, 45 La. Ann. 1137, 13 So. 732.

Minnesota. — State *v.* Dumphey, 4 Minn. 438 (overcome by denials of jurors); State *v.* Gallehugh, 89 Minn. 212, 94 N. W. 723 (same).

Missouri — State *v.* Howard, 118 Mo. 127, 24 S. W. 41; State *v.* Brooks, 92 Mo. 542, 5 S. W. 257; State *v.* South, 145 Mo. 663, 47 S. W. 790 (affidavits on behalf of defendant overcome by juror's denial and by evidence of juror's good reputation and of witness' bad reputation).

Montana. — Burgess *v.* Territory, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808; State *v.* Anderson, 14 Mont. 541, 37 Pac. 1 (affidavit that juror had stated that defendant was a tough citizen is not sufficient when juror had sworn on his *voir dire* that he was not prejudiced).

New Hampshire. — Palmer *v.* State, 65 N. H. 221, 19 Atl. 1003.

Ohio. — Blackburn *v.* State, 23 Ohio St. 146.

Oregon. — State *v.* McDaniel, 39 Or. 161, 65 Pac. 520; State *v.* Lauth, 80 Pac. 660.

Tennessee. — Ellis *v.* State, 92 Tenn. 85, 20 S. W. 500.

Texas. — Armstrong *v.* State, 34 Tex. Crim. 248, 30 S. W. 235; Shaw *v.* State, 32 Tex. Crim. 155, 22 S. W. 588; Cockerell *v.* State, 32 Tex. Crim. 585, 25 S. W. 421 (affiant subsequently contradicted her own affidavit); Lounder *v.* State (Tex. Crim.), 79 S. W. 552; Fonseca *v.* State (Tex. Crim.), 85 S. W. 1069.

Utah. — State *v.* Mickle, 25 Utah, 179, 70 Pac. 856.

Vermont. — State *v.* Hayden, 51 Vt. 296 (evidence did not show an unqualified opinion).

Virginia. — Smith *v.* Com., 2 Va. Cas. 6 (statement that defendant "ought to be hung" not sufficient, because it did not appear that it was a deliberate opinion); Brown *v.* Com., 2 Va. Cas. 516.

Washington. — State *v.* Gile, 8 Wash. 12, 35 Pac. 417; State *v.* Hall, 24 Wash. 255, 64 Pac. 153.

West Virginia. — State *v.* Strander, 11 W. Va. 745, 27 Am. Rep. 606

is sufficient to show that a juror is related to his adversary when no counter-showing is made.[62]

IV. MOTIONS BASED UPON SURPRISE, ACCIDENT OR MISTAKE.

1. Motion Must Be Supported by Affidavit. — A motion for a new trial on the ground of surprise, accident or mistake must be supported by affidavit.[63]

2. Affidavit Must Show Surprise. — The affidavit must show[64] that

(juror denied charge, and it did not appear that injustice had been done).

Wisconsin. — Carthaus *v.* State, 78 Wis. 560, 47 N. W. 629; Hughes *v.* State, 109 Wis. 397, 85 N. W. 333.

Wyoming. — Black *v.* Territory, 3 Wyo. 313, 22 Pac. 1090.

An affidavit of a juror to the effect that notwithstanding his unfavorable opinion of the prisoner he gave him a fair trial and would have acquitted him if the evidence had warranted it is sufficient to overthrow an affidavit alleging that he had prejudged the case, when the evidence clearly warrants the verdict. Anderson *v.* State, 14 Ga. 709.

The evidence was sufficient to warrant the granting of a new trial in State *v.* Wright, 112 Iowa 436, 84 N. W. 541; State *v.* Cleary, 40 Kan. 287, 19 Pac. 776; Long *v.* State, 32 Tex. Crim. 140, 22 S. W. 409 (juror stated that he hoped he could get on the jury; that he would send the defendant to the penitentiary); Long *v.* State, 10 Tex. App. 186; Brackenridge *v.* State, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360; Washburn *v.* State, 31 Tex. Crim. 352, 20 S. W. 715.

62. Dailey *v.* Gaines, 1 Dana (Ky.) 529.

But the degree of relationship must be stated. Shinn *v.* Tucker, 37 Ark. 580; Waltz *v.* Neusbamer, 18 Ind. 374. An affidavit alleging disqualification on information and belief is insufficient. Texas Farm & Land Co. *v.* Story (Tex. Civ. App.), 43 S. W. 933.

63. People *v.* Stuart, 4 Cal. 218; State *v.* Stanley, 4 Nev. 71. See also cases cited in following notes.

An uncontradicted affidavit of the defendant that the witness upon whose testimony he was convicted admitted that she had testified falsely is sufficient to warrant the granting of a new trial. Townsend *v.* State (Tex. Crim.), 22 S. W. 405.

64. *Arkansas.* — Ballard *v.* Noaks, 2 Ark. 45.

Delaware. — Rice *v.* Simmons, 2 Har. 309 (witness did not appear at trial; affidavit must show beyond a doubt that the party was surprised by the running away of his witness).

Idaho. — Lillienthal *v.* Anderson, 1 Idaho 673.

Indiana. — Iseley *v.* Lovejoy, 8 Blackf. 462 (witness intoxicated; affidavit not sufficient because it did not appear that the party did not previously know of the intoxication and was not instrumental in occasioning it).

Texas. — Sheppard *v.* Avery (Tex. Civ. App.), 32 S. W. 791.

See also Powers *v.* Penn Mut. L. Ins. Co., 91 Mo. App. 55.

The affidavit must state *facts* showing the surprise. Therefore when reliance is placed on mere verbal statements of counsel, "such statements should be so specifically shown as to enable the court to see if they were such as could be fairly said to leave the impression sought to be given them." Smith & Keating Imp. Co. *v.* Wheeler, 27 Mo. App. 16.

Mistake. — And when the motion is made upon the ground of mistake it must be accompanied by affidavits showing the mistake. Wheeler *v.* Russell, 93 Wis. 135, 67 N. W. 43.

Surprise. — An affidavit of the plaintiff that he was surprised at the testimony given by a certain witness at the trial, "as his attorney had advised him that it could not be admitted, and he was further surprised

the moving party was surprised. This must be shown by the best evidence procurable under the circumstances.[65]

3. Affidavit Must Set Forth Evidence To Be Produced on New Trial. — The evidence which the party moving expects to be able to produce on the second trial should be fully and distinctly set forth in the affidavits on which the application is based, in order that the court may see whether the testimony, if given, could have any legal effect on the result of the controversy.[66]

4. Affidavits of Witnesses Must Be Produced. — The party applying for a new trial on these grounds should, if practicable, produce the affidavits of witnesses by whom he expects to make out his case on a second trial.[67] If they cannot be obtained their absence must

at the testimony given by Kimball on the trial, as he stated the conversation between them entirely different from what he understood it," is not sufficient. Klockenbaum *v.* Pierson, 22 Cal. 160. Nor is an affidavit of a losing party, unsupported by other proof, that the testimony of the witnesses of his adversary was false. Iser *v.* Cohn, 1 Baxt. (Tenn.) 421.

Where the affidavits on the question of surprise are conflicting, the discretion of the lower court in refusing a new trial will not generally be interfered with on appeal. Symons *v.* Bunnell (Cal.), 20 Pac. 859.

65. Schellhous *v.* Ball, 29 Cal. 605; Lillienthal *v.* Anderson, 1 Idaho 673 (witness testified differently from former statements. "The surprise should have been shown by the best and most satisfactory evidence within the reach of plaintiffs, which was the affidavits of persons in whose hearing the witness stated that he could testify to the truth of matters which he failed to state when questioned on the witness stand"); Martin *v.* Hill, 3 Utah 157, 2 Pac. 62 (surprise resulting from instructions of the court should be shown by the affidavit of the attorney, not of the client).

Where the ground for a new trial is that the appellant was misled by statements to him by appellee before trial, and that he was thereby prevented from making his defense, the affidavit must state the declarations, and not the inference drawn therefrom by the appellant. Sullivan *v.* O'Conner, 77 Ind. 149.

66. *California.* —Rogers *v.* Huie, 1 Cal. 429, 54 Am. Dec. 300; Brooks *v.* Douglass, 32 Cal. 208.

Georgia. — Cheney *v.* Walton, 46 Ga. 432 (accident; party unable to attend trial).

Kentucky. — Reed *v.* Miller, 1 Bibb 142 (surprise by sudden departure of witness; affidavit should disclose facts expected to be proved by such witness); Picket *v.* Richet, 2 Bibb 178 (absence of witnesses); Jones *v.* Gaither, 3 A. K. Marsh. 166 ("Instead of stating his belief of the importance of the testimony of the absent witnesses, the affiant should have stated the facts to which they would have deposed"); South *v.* Thomas, 7 T. B. Mon. 59.

Mississippi. — Cole *v.* Harman, 8 Smed. & M. 562 (facts that absent party might have proved insufficient to warrant new trial); Ellis *v.* Kelly, 33 Miss. 695.

Missouri. — Warren *v.* Ritter, 11 Mo. 354; Peers *v.* Davis, 29 Mo. 184.

Nebraska. — Felton *v.* Moffett, 29 Neb. 582, 45 N. W. 930 (accident — loss of deposition; affidavit should set out at least the substance of the testimony of the witness contained in the deposition).

Texas. — Spillars *v.* Curry, 10 Tex. 143.

67. *California.* — Rogers *v.* Huie, 1 Cal. 429, 54 Am. Dec. 300.

Illinois. — Cowan *v.* Smith, 35 Ill. 416.

Indiana. — Mann *v.* Clifton, 3 Blackf. 304; Cummins *v.* Walden, 4 Blackf. 307.

Tennessee. — Cozart *v.* Lisle, 1 Meigs 65; Riley *v.* State, 9 Humph. 646.

Texas. — Steinlein *v.* Dial, 10 Tex.

be accounted for or some excuse must be shown for their non-production.[68]

5. Diligence Must Be Shown. — A party seeking a new trial on the ground of surprise, accident or mistake must show, by his affidavit, proper diligence to prevent such surprise, accident or mistake.[69]

268; Welsh *v.* State, 11 Tex. 368; Ward *v.* Cobbs, 14 Tex. 303.

He must at least state the names of the witnesses by whom he expects to support his case. Nelson *v.* Waters, 18 Ark. 570.

Affidavits of defendant alone to the effect that he was surprised by the testimony, and that he believes he can overthrow it upon another trial, are insufficient. Jordan *v.* State, 10 Tex. 479.

68. Cowan *v.* Smith, 35 Ill. 416; Mann *v.* Clifton, 3 Blackf. (Ind.) 304; Cummins *v.* Walden, 4 Blackf. (Ind.) 307; Riley *v.* State, 9 Humph. (Tenn.) 646; Welsh *v.* State, 11 Tex. 368; Ward *v.* Cobbs, 14 Tex. 303.

69. *Alabama.* — *Ex parte* Wallace, 60 Ala. 267.

Arkansas. — Nelson *v.* Waters, 18 Ark. 570 (affidavit should show that party conversed with his witness before putting him on the stand); Ballard *v.* Noaks, 2 Ark. 45.

California. — Rogers *v.* Huie, 1 Cal. 429, 54 Am. Dec. 300 (application on ground of surprise because witnesses did not appear; no attempt was made to subpoena them until the day of trial; *held*, not a sufficient showing of diligence); Brooks *v.* Lyon, 3 Cal. 113.

Colorado. — Union Brew. Co. *v.* Cooper, 15 Colo. App. 65, 60 Pac. 946.

Georgia. — Ferrill *v.* Marks, 76 Ga. 21.

Illinois — Singer Mfg. Co. *v.* May, 86 Ill. 398; North Chicago City R. Co. *v.* Gastka, 128 Ill. 613, 21 N. E. 522, 4 L. R. A. 481, *affirming* 27 Ill. App. 518 (absence of witnesses; affidavit must negative consent); Staunton Coal Co. *v.* Menk, 197 Ill. 369, 64 N. E. 278 (new trial refused because diligence not shown); Miller *v.* McGraw, 20 Ill. App. 203.

Indiana. — Dowell *v.* State, 97 Ind. 310.

Kentucky. — Smith *v.* Morrison, 3 A. K. Marsh. 81; Stewart *v.* Durrett, 2 T. B. Mon. 122 (affidavit that party was unable to move for a continuance on account of sickness not sufficient unless it shows that absent witnesses had been subpoenaed); Holmes *v.* McKinney, 4 T. B. Mon. 4.

Mississippi. — Ellis *v.* Kelly, 33 Miss. 695.

Missouri. — Frick Co. *v.* Caffery, 48 Mo. App. 120 (accident — sickness of party; new trial refused because affidavit showed lack of diligence); Peers *v.* Davis, 29 Mo. 184.

Texas. — Addington *v.* Bryson, 1 White & W. Civ. Cas., § 1292 (must negative neglect in failing to move for a continuance).

Vermont. — Burr *v.* Palmer, 23 Vt. 244.

An affidavit that the testimony of the principal witness was incompetent because she was under sixteen years of age states no ground for a new trial. The objection should have been discovered and made at the time. Haughton *v.* Haughton, 11 La. Ann. 200.

If he can relieve himself from his embarrassment at the trial in any mode, either by a non-suit or a continuance, or the introduction of other testimony, or otherwise, he must not take the chances of a verdict, but must at once fortify his position by resorting to all available modes of present relief; and his affidavit must show that he could not so protect himself. Schellhous *v.* Ball, 29 Cal. 605.

Prudential Ins. Co. *v.* De Bord, 17 Ind. App. 224, 46 N. E. 553 (affidavit which fails to show that continuance was asked for is insufficient); Nolan *v.* Grant, 53 Iowa 392, 5 N. W. 513 (party was sick and therefore unable to attend the trial and give his testimony; affidavit insufficient because it did not appear that he could not have applied for a continuance); Jones *v.* Gaither, 3 A. K. Marsh. (Ky.) 166 (absence of witness; affidavit must

6. Injury Must Be Shown. — The party moving for a new trial must show that he has been injured. Therefore it is essential that he make a showing of merits,[70] and that he prove that the fact or facts from which the surprise resulted had a material bearing upon the case, and that the verdict may be mainly attributed to their effect.[71]

V. MOTIONS BASED UPON NEWLY DISCOVERED EVIDENCE.

1. In General. — A motion for a new trial upon the ground of newly discovered evidence must be supported by affidavits.[72] Gen-

show why application for continuance was not made).

An affidavit for new trial on the ground that the party was surprised by the non-attendance of witnesses must show that an attempt was made to secure attendance by compulsory process. Marks *v.* State, 101 Ind. 353.

70. *Alabama.* — *Ex parte* Wallace, 60 Ala. 267.

Colorado. — Union Brew. Co. *v.* Cooper, 15 Colo. App. 65, 60 Pac. 946.

Florida. — Judge *v.* Moore, 9 Fla. 269.

Georgia. — Ferrill *v.* Marks, 76 Ga. 21 (party unable to attend trial must show that result would have been different if he had been present).

Illinois. — Miller *v.* McGraw, 20 Ill. App. 203; Waarich *v.* Winter, 33 Ill. App. 36; Auburn Cycle Co. *v.* Foote, 69 Ill. App. 644.

Indiana. — Montgomery *v.* Wilson, 58 Ind. 591; Prudential Ins. Co. *v.* De Bord, 17 Ind. App. 224, 46 N. E. 553.

Kentucky. — Smith *v.* Morrison, 3 A. K. Marsh. 81; Holley *v.* Christopher, 3 T. B. Mon. 14 (statement that party expects to be able to prove something inconsistent with the facts proved by the witness insufficient); Holmes *v.* McKinney, 4 T. B. Mon. 4; Theobald *v.* Hare, 8 B. Mon. 39; Embry *v.* Devinney, 8 Dana 202.

Minnesota. — O'Keeffe *v.* Lenfest, 35 Minn. 237, 28 N. W. 260.

Mississippi. — Thompson *v.* Williams, 7 Smed. & M. 270; Haber *v.* Lane, 45 Miss. 608.

Missouri. — Peers *v.* Davis, 29 Mo. 184; Campbell *v.* Buller, 32 Mo. App. 646; Culbertson *v.* Hill, 87 Mo. 553.

North Carolina. — Gardner *v.* Harrel, 4 N. C. 51.

Texas. — Holliday *v.* Holliday, 72 Tex. 581, 10 S. W. 690.

Vermont. — Blake *v.* Howe, 1 Aik. 306, 15 Am. Dec. 681.

It must affirmatively appear that injustice has been done. Singer Mfg. Co. *v.* May, 86 Ill. 398. A mere statement that there is a good defense on the merits is not sufficient. The facts constituting the defense must be stated. Ross *v.* McDuffie, 91 Ga. 120, 16 S. E. 648; Hammonds *v.* Kemer, 3 Hayw. (Tenn.) 145 (particulars must be stated).

71. Schellhous *v.* Ball, 29 Cal. 605.

72. *United States.* — Vose *v.* Mayo, 3 Cliff. 484, 28 Fed. Cas. No. 17,009.

Arkansas. — Halliburton *v.* Johnson, 30 Ark. 723.

California. — Beans *v.* Emanuelli, 36 Cal. 117.

Georgia. — Johnson *v.* Lovett, 31 Ga. 187; Maddox *v.* Stephenson, 60 Ga. 125; Thompson *v.* Feagin, 60 Ga. 82.

Indiana. — McDaniel *v.* Graves, 12 Ind. 465.

Iowa. — Patterson *v.* Jack, 59 Iowa 632, 13 N. W. 724.

Kentucky. — Slone *v.* Slone, 2 Metc. 339; Hall *v.* Graziana, 25 Ky. L. Rep. 14, 74 S. W. 670.

Missouri. — Leonard *v.* Schuler, 34 Mo. 475; State *v.* Flutcher, 166 Mo. 582, 66 S. W. 429.

Texas. — Winters *v.* State (Tex. Crim.), 68 S. W. 991. See further cases cited in the following notes.

erally, an affidavit must be made by the moving party himself, showing that the evidence is newly discovered, and setting forth the requisites hereafter stated.[73] He must be prepared to establish every essential element, strongly, clearly and satisfactorily.[74]

2. Must Show Evidence Discovered After Trial. — It must appear that the evidence has been discovered since the trial.[75]

The affidavit must state that the newly discovered evidence is true. Murphy *v.* McGrath, 79 Ill. 594. In Massachusetts the court may, in its discretion, admit oral evidence. Spaulding *v.* Knight, 118 Mass. 528.

73. Who Must Make Affidavit. The motion should generally be supported by the affidavit of the moving party. Chew *v.* Police Jury, 2 La. Ann. 796; State *v.* McLaughlin, 27 Mo. 111; Bradish *v.* State, 35 Vt. 452.

Where, however, the party is absent, the attorney who conducted the case, and who is familiar with the facts, may make the affidavit. Sterling *v.* Arnold, 54 Ga. 690 (where clients reside out of the county, and counsel have entire control and management, affidavit by counsel is sufficient). Williams *v.* Brashear, 16 La. 77. See, however, Harber *v.* Sexton, 66 Iowa 211, 23 N. W. 635.

It has been said that when some other party makes the affidavit for the party to the action the reason therefor should be stated. Chew *v.* Police Jury, 2 La. Ann. 796; State *v.* McLaughlin, 27 Mo. 111.

An affidavit by an attorney to the effect that he has discovered new evidence, of which he was not aware at the trial, is not sufficient. Lowry *v.* Erwin, 6 Rob. (La.) 192, 39 Am. Dec. 556. See also Roziene *v.* Wolf, 43 Iowa 393. Affidavits of witnesses alone, unaccompanied by affidavits of anyone connected with the moving party, are not sufficient. Kansas City *v.* Marsh Oil Co., 140 Mo. 458, 41 S. W. 943.

In Nebraska it is held that affidavits of both the party and his attorney must be produced. Draper *v.* Taylor, 58 Neb. 787, 79 N. W. 709.

Criminal Cases. — The motion should be supported by the affidavit of the defendant.

Georgia. — Malone *v.* State, 116 Ga. 272, 42 S. E. 468.

Mississippi. — Friar *v.* State, 3 How. 422.

Missouri. — State *v.* Campbell, 115 Mo. 391, 22 S. W. 367; State *v.* McLaughlin, 27 Mo. 111; State *v.* Elliott, 16 Mo. App. 552; State *v.* Laycock, 136 Mo. 93, 37 S. W. 802; State *v.* Nagel, 136 Mo. 45, 37 S. W. 821; State *v.* Miller, 144 Mo. 26, 45 S. W. 1104; State *v.* Tomasitz, 114 Mo. 86, 45 S. W. 1106; State *v.* Lucas, 147 Mo. 70, 47 S. W. 1067; State *v.* Soper, 148 Mo. 217, 49 S. W. 1007 (if not filed, excuse for not filing it must be presented).

Texas. — Marquez *v.* State (Tex. Crim.), 51 S. W. 1119.

Affidavits of both party and counsel should be introduced. Weeks *v.* State, 79 Ga. 36, 3 S. E. 323; Tuberville *v.* State (Miss.), 38 So. 333.

74. Gaines *v.* White, 1 S. D. 434, 47 N. W. 524.

75. *Arkansas.* — Robins *v.* Fowler, 2 Ark. 133.

Illinois. — Crozier *v.* Cooper, 14 Ill. 139.

Indiana. — Barnett *v.* State, 141 Ind. 149, 40 N. E. 666.

Kentucky. — Bronson *v.* Green, 2 Duv. 234 (affidavit of witness that he did not communicate facts until after trial is insufficient); Ewing *v.* Price, 3 J. J. Marsh. 520.

Missouri. — State *v.* Ray, 53 Mo. 345; State *v.* Miller, 144 Mo. 26, 45 S. W. 1104.

Montana. — Spencer *v.* Spencer, 79 Pac. 320.

New York. — Conable *v.* Smith, 64 Hun 638, 19 N. Y. Supp. 446; Glassford *v.* Lewis, 82 Hun 46, 31 N. Y. Supp. 162; Haight *v.* Elmira, 42 App. Div. 391, 59 N. Y. Supp. 193.

Pennsylvania. — Marsh *v.* Moser, 1 Woodw. 218.

Texas. — Choate *v.* McIlhenny Co., 71 Tex. 119, 9 S. W. 83 (affidavit insufficient because it did not appear

3. By Whom Discovered. — The affidavit must show by whom the evidence was discovered.[76]

4. Affidavit Must Show Diligence. — The party applying for a new trial must show in his affidavit not only his ignorance of the existence of the testimony, but that a knowledge of it could not have been obtained by the exercise of reasonable diligence.[77] A mere

that party was ignorant of the facts at the trial); Templeton *v.* State, 5 Tex. App. 398; Franklin *v.* State, 34 Tex. Crim. 203, 29 S. W. 1088; Gay *v.* State (Tex. Crim.), 69 S. W. 511; Wisson *v.* Baird, 1 White & W. Civ. Cas., § 708.

Vermont. — Myers *v.* Brownell, 2 Aik. 407, 16 Am. Dec. 729.

West Virginia. — State *v.* Betsall, 11 W. Va. 703; Swisher *v.* Malone, 31 W. Va. 442, 7 S. E. 439.

See also cases cited under next section.

The defendant must make affidavit that he did not know of the facts at the time of the trial. Sarah *v.* State, 28 Ga. 576; Milner *v.* State, 30 Ga. 137; Dean *v.* State, 93 Ga. 184, 18 S. E. 557; Smith *v.* Shook (Mont.), 75 Pac. 513; Williams *v.* State, 7 Tex. App. 163 (affidavit that it was unknown to counsel is not sufficient); McNeal *v.* State (Tex. Crim.), 43 S. W. 792.

The party as well as his counsel, should negative all previous knowledge of the testimony. Childers *v.* State, 68 Ga. 837.

When there is no affidavit of the party showing ignorance of the evidence, and only one of three counsel makes such affidavit, the showing is insufficient. Weeks *v.* State, 79 Ga. 36, 3 S. E. 323.

76. Bourland *v.* Skimnee, 11 Ark. 671.

He must state the source of his information, and, further, that he believes it to be true. Simms *v.* State, 1 Tex. App. 627.

77. *United States.* — Payan *v.* United States, 15 Ct. Cl. 56.

Alabama. — McLeod *v.* Shelly Mfg. & Imp. Co., 108 Ala. 81, 19 So. 326.

Arkansas. — Halliburton *v.* Johnson, 30 Ark. 723; Merrick *v.* Britton, 26 Ark. 496; Bourland *v.* Skimnee, 11 Ark. 671; Burriss *v.* Wise, 2 Ark. 33; Ballard *v.* Noaks, 2 Ark. 45; St. Louis S. W. R. Co. *v.* Goodwin, 84 S. W. 728; Robins *v.* Fowler, 2 Ark. 133.

California. — Arnold *v.* Skaggs, 35 Cal. 684.

Delaware. — McCombs *v.* Chandler, 5 Har. 423.

Georgia. — Atlanta Rapid Transit Co. *v.* Young, 117 Ga. 349, 43 S. E. 861.

Illinois. — Crozier *v.* Cooper, 14 Ill. 139; Dyk *v.* DeYoung, 133 Ill. 82, 24 N. E. 520.

Indiana. — Martin *v.* Garver, 40 Ind. 351; Gish *v.* Gish, 7 Ind. App. 104, 34 N. E. 305; Johnson *v.* Herr, 88 Ind. 280; Lewis *v.* Crow, 69 Ind. 434.

Iowa. — Sully *v.* Kuehl, 30 Iowa 275; Mays *v.* Deaver, 1 Iowa 216; Mather *v.* Butler Co., 33 Iowa 250; Taylor *v.* Chicago, M. & St. P. R. Co., 80 Iowa 431, 46 N. W. 64 (new trial denied because diligence was not shown).

Kansas. — Sexton *v.* Lamb, 27 Kan. 432.

Louisiana. — Bonnet *v.* Legras, 1 Rob. 92; Ingram *v.* Croft, 7 La. 82; Union Bank *v.* Robert, 9 Rob. 177; Berger *v.* Spalding, 13 La. Ann. 580.

Maine. — Greenleaf *v.* Grounder, 84 Me. 50, 24 Atl. 461.

Minnesota. — Keough *v.* McNitt, 6 Minn. 513 (relief refused because affidavit did not show proper diligence).

Mississippi. — Hare *v.* Sproul, 2 How. 772.

Missouri. — Smith *v.* Matthews, 6 Mo. 600; Kansas City *v.* Marsh Oil Co., 140 Mo. 458, 41 S. W. 943.

Nebraska. — Axtell *v.* Warden, 7 Neb. 186 (should negative every circumstance from which negligence may be inferred); Nebraska Tel. Co. *v.* Jones, 60 Neb. 396, 83 N. W. 197.

New Jersey. — Hoban *v.* Sandford, 64 N. J. L. 426, 45 Atl. 819.

New York. — Roberts *v.* Johns-

town Bank, 60 Hun 576, 14 N. Y. Supp. 432 (must show due diligence); Conable *v.* Smith, 64 Hun 638, 19 N. Y. Supp. 446; Glassford *v.* Lewis, 82 Hun 46, 31 N. Y. Supp. 162; Haight *v.* Elmira, 42 App. Div. 391, 59 N. Y. Supp. 193.

Pennsylvania. — Marsh *v.* Moser, 1 Woodw. 218.

Rhode Island. — Harris *v.* Cheshire R. Co., 16 Atl. 512; Riley *v.* Shannon, 19 R. I. 503, 34 Atl. 989.

Texas. — Adams *v.* Halff (Tex. Civ. App.), 24 S. W. 334 (failure to introduce recorded deeds shows lack of diligence); Scranton *v.* Tilley, 16 Tex. 183; Burnley *v.* Rice, 21 Tex. 171; Moores *v.* Wills, 69 Tex. 109, 5 S. W. 675; Harrell *v.* Hill, 15 Tex. 270; Wisson *v.* Baird, 1 White & W. Civ. Cas., § 708; Houston & T. C. R. Co. *v.* Hollis, 2 Wills. Civ. Cas., § 217.

Virginia. — Brown *v.* Speyers, 20 Gratt. 296.

West Virginia. — Varner *v.* Core, 20 W. Va. 472; Snider *v.* Myers, 3 W. Va. 195; Swisher *v.* Malone, 31 W. Va. 442, 7 S. E. 439.

Wisconsin. — Wilson *v.* Johnson, 74 Wis. 337, 43 N. W. 148; Johnson *v.* Goult, 106 Wis. 247, 82 N. W. 139.

Criminal Cases. — The affidavit must show due diligence.

Alabama. — Lowery *v.* State, 98 Ala. 45, 13 So. 498.

Arkansas. — Pleasant *v.* State, 13 Ark. 360; Runnels *v.* State, 28 Ark. 121.

California. — People *v.* Warren, 130 Cal. 683, 63 Pac. 86.

Georgia. — Tipton *v.* State, 119 Ga. 304, 46 S. E. 436.

Indiana. — Townsend *v.* State, 13 Ind. 357; O'Dea *v.* State, 57 Ind. 31.

Louisiana. — State *v.* Washington, 36 La. Ann. 341.

Mississippi. — Friar *v.* State, 3 How. 422.

Missouri. — State *v.* Ray, 53 Mo. 345; State *v.* Luke, 104 Mo. 563, 16 S. W. 242; State *v.* Campbell, 115 Mo. 391, 22 S. W. 367; State *v.* Lichliter, 95 Mo. 402, 8 S. W. 720; State *v.* Musick, 101 Mo. 260, 14 S. W. 212; State *v.* Nagel, 136 Mo. 45, 37 S. W. 821; State *v.* Miller, 144 Mo. 26, 45 S. W. 1104.

Nebraska. — St. Louis *v.* State, 8 Neb. 405, 1 N. W. 371.

South Carolina. — State *v.* Workman, 15 S. C. 540.

Texas. — Simms *v.* State, 1 Tex. App. 627; Templeton *v.* State, 5 Tex. App. 398; Davidson *v.* State, 33 Tex. 247; Dansby *v.* State, 34 Tex. 392; Evans *v.* State, 6 Tex. App. 513; Smith *v.* State, 22 Tex. App. 350, 3 S. W. 238; Sarvis *v.* State (Tex. Crim.), 47 S. W. 463; Passmore *v.* State (Tex. Crim.), 64 S. W. 1040; Winn *v.* State (Tex. Crim.), 73 S. W. 807.

"The party desiring a second trial should show by his application what diligence he used in preparing for the first; how the new evidence was discovered; what it consists of, and what facts it will establish; why it was not discovered before the trial; and must make it clear that the failure to produce the evidence was not through his own want of diligence." Lee-Kinsey Imp. Co. *v.* Jenks, 13 Colo. App. 265, 57 Pac. 191 (officer of corporation making affidavit must state facts showing not only that he was unaware of the testimony and that he used diligence, but that the corporation was also unaware of it and used diligence).

"The interests of public policy demand that when a cause has once been fairly tried, and a reasonable opportunity afforded the parties to present their evidence, it shall remain forever at repose. There are cases in which great injustice might result, however, if a party should be denied the benefit of newly discovered evidence; but in all such cases the applicant must make out a clear case of diligence, and show particularly that he made all reasonable efforts to discover the evidence before the trial, or he will be denied relief. It is not sufficient to say generally that he made inquiry of all whom he had reason to believe knew anything about the controversy." Richter *v.* Meyers, 5 Ind. App. 33, 31 N. E. 582, *per* Crumpacker, J.

Where the diligence consists in making inquiries, "the time, place and circumstances must be stated, to the end that the court may know

that such inquiries were made in the proper quarter, and in due season." McDonald *v.* Coryell, 134 Ind. 493, 34 N. E. 7.

An affidavit that the plaintiff was not "apprised of the existence and materiality" of the evidence is insufficient. It is the discovery of unknown evidence, not the materiality of known evidence, which can serve as a cause for a new trial. Carlisle *v.* Tidwell, 16 Ga. 33. See also Smith *v.* Rentz, 73 Hun 195, 25 N. Y. Supp. 914 (real discovery was that checks were important as evidence).

An affidavit of a party that he did not know until after the trial that his wife was a competent witness in his behalf is insufficient. It was his duty before the trial to have informed his counsel, and inquired of them whether she was competent. Gibson *v.* Williams, 39 Ga. 660.

An affidavit of appellant that "she and her husband made inquiries among such persons as would be likely to know about the facts in such cause, and she did not know and did not learn that said witnesses knew or would swear to said facts [stated in her affidavit] until after the trial," is too general and indefinite. Pemberton *v.* Johnson, 113 Ind. 538, 15 N. W. 801.

An affidavit that the party did not know that he could prove certain facts by certain expert witnesses is insufficient when it is not stated that there were not other experts whose attendance he could have procured. Kannon *v.* Galloway, 2 Baxt. (Tenn.) 230.

"Proper diligence cannot be shown by any general statement that he inquired among such persons as would be likely to know, and that he did not learn what they knew until after the trial." Hoban *v.* Sandford, 64 N. J. L. 426, 45 Atl. 819.

A mere allegation in the motion for a new trial sufficient to establish the fact that the evidence was unknown, or that due diligence had been exercised to prepare for trial, is not sufficient. Etowah Gold Min. Co. *v.* Exter, 91 Ga. 171, 16 S. E. 991 (see syllabus of court).

It is only a reasonable diligence that need be shown. Feister *v.* Kent, 92 Iowa 1, 60 N. W. 493.

The party must negative in his affidavit every circumstance from which negligence may be inferred. Champion *v.* Ulmer, 70 Ill. 322; Wright *v.* Gould, 73 Ill. 56; Harley *v.* Harley, 67 Ill. App. 138.

Where the newly discovered evidence consists of papers unknown to the party, and which naturally would be unknown, it is not necessary to show any effort to find such papers before trial. Conlon *v.* Mission of the Immaculate Virgin, 87 App. Div. 165, 84 N. Y. Supp. 49.

See also the following cases, in which there was not sufficient diligence: Atwater *v.* Hannah, 116 Ga. 745, 42 S. E. 1007; Hixson *v.* Carqueville Lithographing Co., 115 Ill. App. 427; Kentucky Cent. R. Co. *v.* Smith, 93 Ky. 449, 20 S. W. 392, 18 L. R. A. 63 (witness had been previously summoned, except one who was in the employ of the party moving for the new trial); Netcher *v.* Bernstein, 110 Ill. App. 484; Stafford *v.* Calliham, 3 Mart. (N. S.) (La.) 124; Keith *v.* Briggs, 32 Minn. 185, 20 N. W. 91; Levy *v.* Hatch, 92 N. Y. Supp. 287; Pride *v.* Whitfield (Tex. Civ. App.), 51 S. W. 1100.

Criminal Cases. — New trials were denied because sufficient diligence was not shown. Volmer *v.* State, 34 Ark. 487; People *v.* Kloss, 115 Cal. 567, 47 Pac. 459; Wynn *v.* State, 81 Ga. 744, 7 S. E. 689; Kinnebrew *v.* State, 81 Ga. 765, 7 S. E. 691 (affidavit of new evidence was by witness who stated she was present when defendant committed the act; affidavit insufficient because it did not state that defendant did not know she was present); Neill *v.* State, 79 Ga. 779, 4 S. E. 871; Townsend *v.* State, 13 Ind. 357.

New trials were denied because lack of diligence appeared. Sconyers *v.* State, 85 Ga. 672, 12 S. E. 1069; Ramsey *v.* State, 89 Ga. 198, 15 S. E. 6; State *v.* Barrett, 40 Minn. 65, 41 N. W. 459; State *v.* Gay, 18 Mont. 51, 44 Pac. 411; —— *v.* State, 26 Ohio Cir. Ct. 723; State *v.* Smith (S. D.), 100 N. W. 740; Smith *v.* State, 31 Tex. Crim. 14, 19 S. W. 252.

statement that diligence was used is not sufficient. The party must show what he did, that the court may judge of its sufficiency,[78] and it has been held that both the party and his attorney must make affidavit that they were ignorant of the facts at the time of trial.[79]

5. Affidavit Must Name Witnesses and State Facts to Which They Will Testify. — The party making the motion must state in his affidavit the names of his new witnesses;[80] and he must also state the facts he expects to establish by them.[81] In some jurisdictions

78. *Arkansas.* — St. Louis S. W. R. Co. *v.* Stanfield, 63 Ark. 643, 40 S. W. 126.

Illinois. — Heldmaier *v.* Taman, 188 Ill. 283, 58 N. E. 960, *affirming* 88 Ill. App. 209.

Indiana. — Schnurr *v.* Stults, 119 Ind. 429, 21 N. E. 1089; State *v.* Taylor, 5 Ind. App. 29, 31 N. E. 543; Hines *v.* Driver, 100 Ind. 315; Eddingfield *v.* State, 12 Ind. App. 312, 39 N. E. 1057; Rinehart *v.* State, 23 Ind. App. 419, 55 N. E. 504; Skaggs *v.* State, 108 Ind. 53, 8 N. E. 695.

Iowa. — Sully *v.* Kuehl, 30 Iowa 275; Carson *v.* Cross, 14 Iowa 463; Woodman *v.* Dutton, 49 Iowa 398; Boot *v.* Brewster, 75 Iowa 631, 36 N. W. 649, 9 Am. St. Rep. 515.

Kansas. — Smith *v.* Williams, 11 Kan. 104; Boyd *v.* Sanford, 14 Kan. 280; Wilkes *v.* Wolbeck, 30 Kan. 375, 2 Pac. 508.

Louisiana. — Loccard *v.* Bullitt, 3 Mart. (N. S.) 170; Burton *v.* Maltby, 18 La. 531.

Minnesota. — Bradley *v.* Norris, 67 Minn. 48, 69 N. W. 624 (this case intimates that the affidavit should show when, where and how the witnesses were discovered); Revor *v.* Bagley, 76 Minn. 326, 79 N. W. 171.

Missouri. — State *v.* Crawford, 99 Mo. 74, 12 S. W. 354.

Montana. — Nicholson *v.* Metcalf, 78 Pac. 483.

Nebraska. — Heady *v.* Fishburn, 3 Neb. 263.

New York. — Wilcox *v.* Joslin, 56 Hun 645, 10 N. Y. Supp. 342.

North Carolina. — Shehan *v.* Malone, 72 N. C. 59; Sikes *v.* Parker, 95 N. C. 232.

Oklahoma. — Twine *v.* Kilgore, 3 Okla. 640, 39 Pac. 388; B. S. Flersheim Merc. Co. *v.* Gillespie, 77 Pac. 183.

Texas. — Burnley *v.* Rice, 21 Tex. 171; Traylor *v.* Townsend, 61 Tex. 144.

79. Morgan *v.* Taylor, 55 Ga. 224. See also Campbell Real Estate Co. *v.* Wiley (Tex. Civ. App.), 83 S. W. 251.

A showing that the attorney was ignorant of the evidence is not sufficient. Roziene *v.* Wolf, 43 Iowa 393; Harber *v.* Sexton, 66 Iowa 211, 23 N. W. 635; Russell *v.* Oliver, 78 Tex. 11, 14 S. W. 264; King *v.* Hill (Tex. Civ. App.), 75 S. W. 550 (must negative the fact of knowledge in party or in attorney).

80. *Alabama.* — McLeod *v.* Shelly Mfg. & Imp. Co., 108 Ala. 81, 19 So. 326.

Arkansas. — Merrick *v.* Britton, 26 Ark. 496; Burriss *v.* Wise, 2 Ark. 33.

Illinois. — Forester *v.* Guard, 1 Ill. 74, 12 Am. Dec. 141; Edwards *v.* Barnes, 55 Ill. App. 38.

Indiana. — Martin *v.* Garver, 40 Ind. 351.

Kentucky. — Ewing *v.* Price, 3 J. J. Marsh. 520.

Louisiana. — Loccard *v.* Bullitt, 3 Mart. (N. S.) 170; Arpine *v.* Harrison, 6 Mart. (N. S.) 326; State *v.* Lennon, 8 Rob. 543.

New York. — Richardson *v.* Backus, 1 Johns. 59.

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

81. *Arkansas.* — Merrick *v.* Britton, 26 Ark. 496; Burriss *v.* Wise, 2 Ark. 33.

Illinois. — Forester *v.* Guard, 1 Ill. 74, 12 Am. Dec. 141; Butterworth *v.* Pfeifer, 80 Ill. App. 240.

Kentucky. — Adams *v.* Ashby, 2 Bibb 287.

New York. — Hollingsworth *v.*

he must present an affidavit as to their character or credibility.[82]

6. Affidavit Must Show That Evidence Can Be Procured. — It must appear that the evidence of the witness can be procured upon the new trial.[83]

7. Affidavit Must Show That Evidence Is Competent and Material. It must appear from the affidavit that the newly discovered evidence is competent and material to the issues involved in the case.[84]

8. Affidavit Must Show That Result Will Be Affected. — It must appear that the newly discovered evidence, if adduced at another trial, would operate to produce a different result.[85]

Napier, 3 Caines 182, 2 Am. Dec. 268; Richardson *v.* Backus, 1 Johns. 59.

Texas. — Wisson *v.* Baird, 1 White & W. Civ. Cas., § 708.

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

82. Perryman *v.* Equitable Mtge. Co., 115 Ga. 769, 42 S. E. 94; Grant *v.* State, 97 Ga. 789, 25 S. E. 399; Atwater *v* Hannah, 116 Ga. 745, 42 S. E. 1007.

It should be shown, not only who the new witness is, but where he resides, what is his character, and who are some of his associates or acquaintances. Hutchins *v.* State, 70 Ga. 724; Hatcher *v.* State, 116 Ga. 617, 42 S. E. 1018 (by Civ. Code, § 5841, affidavits as to residence, associates, means of knowledge, character and credibility must be adduced); Miller *v.* State, 118 Ga. 12, 43 S. E. 851. See also State *v.* Fay, 88 Minn. 269, 92 N. W. 978.

83. Bourland *v.* Skimnee, 11 Ark. 671.

84. *Arkansas* — Burriss *v.* Wise, 2 Ark. 33; Robins *v.* Fowler, 2 Ark. 133.

Illinois. — Crozier *v.* Cooper, 14 Ill. 139.

Louisiana. — Bonnet *v.* Legras, 1 Rob. 92 (did not appear that evidence was material); Ingram *v.* Croft, 7 La. 82 (must be material and competent. In this case the newly discovered evidence consisted of depositions taken in another case, inadmissible because *ex parte* as to the other party here); Union Bank *v.* Robert, 9 Rob. 177.

New York. — Roberts *v.* Johnstown Bank, 60 Hun 576, 14 N. Y. Supp. 432; Glassford *v.* Lewis, 82 Hun 46, 31 N. Y. Supp. 162 (must show that evidence is material); Haight *v.* Elmira, 42 App. Div. 391, 59 N. Y. Supp. 193.

Pennsylvania. — Marsh *v.* Moser, 1 Woodw. 218.

Vermont. — Myers *v.* Brownell, 2 Aik. 407, 16 Am. Dec. 729.

Virginia. — Grayson *v.* Buchanan, 88 Va. 251, 13 S. E. 457.

West Virginia. — State *v.* Betsall, 11 W. Va. 703; Swisher *v.* Malone, 31 W. Va. 442, 7 S. E. 439.

Hearsay. — Indefinite Matters. An affidavit showing discovery of hearsay evidence is not sufficient. State *v.* Jones, 112 La. 980, 36 So. 825; Spaulding *v.* Edina, 104 Mo. App. 45, 78 S. W. 302; Gassoway *v.* White, 70 Tex. 475, 8 S. W. 117. Nor is an affidavit showing uncertain and indefinite evidence. Gassoway *v.* White, 70 Tex. 475, 8 S. W. 117.

Privileged Communication. — An affidavit showing discovery of a privileged communication to a physician is not sufficient in the absence of a showing that the opposing party would waive the privilege on the trial. Harris *v.* Rupel, 14 Ind. 209.

Criminal Cases. — The affidavit must show the materialty of the evidence. People *v.* Warren, 130 Cal. 683, 63 Pac. 86; Barnett *v.* State, 141 Ind. 149, 40 N. E. 666; State *v.* Crawford, 99 Mo. 74, 12 S. W. 354; State *v.* Luke, 104 Mo. 563, 16 S. W. 242. A mere allegation that the evidence is material is insufficient. Barnett *v.* State, 141 Ind. 149, 40 N. E. 666.

85. *Arkansas.* — Merrick *v.* Britton, 26 Ark. 496; Burriss *v.* Wise, 2 Ark. 33.

Georgia. — Carlisle *v.* Tidwell, 16 Ga. 33.

Indiana. — Barnett *v.* State, 141 Ind. 149, 40 N. E. 666.

Iowa. — Harber *v.* Sexton, 66

9. Affidavit Must Show That Evidence Is Not Merely Cumulative. The affidavits must make it appear that the newly discovered evidence is not merely cumulative.[86]

10. Affidavits of Witnesses Must Be Produced. — The moving

Iowa 211, 23 N. W. 635 (relief refused because result would not be different).

Kansas. — Sexton *v.* Lamb, 27 Kan. 432.

Minnesota. — Eddy *v.* Caldwell, 7 Minn. 225.

Mississippi. — Rulon *v.* Lintol, 2 How. 891; Hare *v.* Sproul, 2 How. 772.

Missouri. — State *v.* Ray, 53 Mo. 345; State *v.* Campbell, 115 Mo. 391, 22 S. W. 367; State *v.* Nagel, 136 Mo. 45, 37 S. W. 821; State *v.* Miller, 144 Mo. 26, 45 S. W. 1104; State *v.* Schaefer, 56 Mo. App. 496.

Montana. — Smith *v.* Shook, 75 Pac. 513.

New York. — Roberts *v.* Johnstown Bank, 60 Hun 576, 14 N. Y. Supp. 432; Conable *v.* Smith, 64 Hun 638, 19 N. Y. Supp. 446; Glassford *v.* Lewis, 82 Hun 46, 31 N. Y. Supp. 162; Haight *v.* Elmira, 42 App. Div. 391, 59 N. Y. Supp. 193; Brady *v.* New York, 22 Jones & S. 457.

North Carolina. — Sikes *v.* Parker, 95 N. C. 232.

Oklahoma. — Huster *v.* Wynn, 8 Okla 569, 58 Pac. 736.

Pennsylvania. — Marsh *v.* Moser, 1 Woodw. 218.

Texas. — Russell *v.* Nall, 79 Tex. 664, 15 S. W. 635; Rodgers *v.* State, 20 S. W. 709; Wisson *v.* Baird, 1 White & W. Civ. Cas., § 708.

He must show that the newly discovered evidence is of a controlling and conclusive character. Champion *v.* Ulmer, 70 Ill. 322.

86. *Alabama.* — McLeod *v.* Shelly Mfg. & Imp. Co., 108 Ala. 81, 19 So. 326.

Arkansas. — Merrick *v.* Britton, 26 Ark. 496; Burriss *v.* Wise, 2 Ark. 33; Robins *v.* Fowler, 2 Ark. 133.

Illinois. — Crozier *v.* Cooper, 14 Ill. 139.

Iowa. — Mays *v.* Deaver, 1 Iowa 216.

Kansas. — Sexton *v.* Lamb, 27 Kan. 432.

Missouri. — State *v.* Ray, 53 Mo. 345; State *v.* Campbell, 115 Mo. 391, 22 S. W. 367; State *v.* Miller, 144 Mo. 26, 45 S. W. 1104.

New York. — Roberts *v.* Johnstown Bank, 60 Hun 576, 14 N. Y. Supp. 432; Conable *v.* Smith, 64 Hun 638, 19 N. Y. Supp. 446; Glassford *v.* Lewis, 82 Hun 46, 31 N. Y. Supp. 162; Haight *v.* Elmira, 42 App. Div. 391, 59 N. Y. Supp. 193; Margolius *v.* Muldberg, 88 N. Y. Supp. 1048.

North Carolina. — Sikes *v.* Parker, 95 N. C. 232.

Pennsylvania. — Marsh *v.* Moser, 1 Woodw. 218.

Texas. — Templeton *v.* State, 5 Tex. App. 398; Rodgers *v.* State (Tex. Crim.), 20 S. W. 709.

Virginia. — Brown *v.* Speyers, 20 Gratt. 296.

West Virginia. — Swisher *v.* Malone, 31 W. Va. 442, 7 S. E. 439.

When a point is left doubtful by the testimony on the trial, and the newly discovered evidence will remove all doubt, or it is apparent that injustice has been done, a new trial may be granted. Myers *v.* Brownell, 2 Aik. (Vt.) 407, 16 Am. Dec. 729.

It has been held in California, however, that the fact that evidence is cumulative is an affirmative proposition, and, unless sufficiently appearing in the moving papers, ought to be shown to be such by the party opposing the motion. "There is no presumption that it is cumulative — the mere presumption is rather to the contrary." Hobler *v.* Cole, 49 Cal. 250.

And it is not sufficient to state in round terms that the evidence is not cumulative. Bourland *v.* Skimnee, 11 Ark. 671.

Texas Rule. — In Texas the rules in regard to cumulative testimony and the failure to use due diligence are not applicable where a verdict is shown to rest upon the testimony of the adverse party, which is proved to be absolutely untrue. Halliday *v.* Lambright, 29 Tex. Civ. App. 226, 68 S. W. 712. See also McMurray *v.* McMurray, 67 Tex. 665, 4 S. W. 357.

party should present affidavits of the witnesses who are to give the newly discovered evidence, stating the facts to which they will testify.[87] If he is unable to procure such affidavits he must account

87. *Alabama.* — McLeod *v.* Shelly Mfg. & Imp. Co., 108 Ala. 81, 19 So. 326.

California. — Rogers *v.* Huie, 1 Cal. 429, 54 Am. Dec. 300; Jenny Lind Co. *v.* Bower, 11 Cal. 194.

Georgia. — Suggs *v.* Anderson, 12 Ga. 461.

Illinois. — Cowan *v.* Smith, 35 Ill. 416; Emory *v.* Addis, 71 Ill. 273; Janeway *v.* Burton, 201 Ill. 78, 66 N. E. 337, *affirming* 102 Ill. App. 403.

Indiana. — Priddy *v.* Dodd, 4 Ind. 84; Brandendistle *v.* Wilhelm, 32 Ind. 496; Ogden *v.* Kelsey, 4 Ind. App. 299, 30 N. E. 922; McQueen *v.* Stewart, 7 Ind. 535; Atkinson *v.* Staltsman, 3 Ind. App. 139, 29 N. E. 435; Harris *v.* Rupel, 14 Ind. 209.

Iowa. — Sully *v.* Kuehl, 30 Iowa 275; Mays *v.* Deaver, 1 Iowa 216; Manix *v.* Malony, 7 Iowa 81.

Kentucky. — Bright *v.* Wilson, 7 B. Mon. 122; Gartland *v.* Conner, 22 Ky. L. Rep. 920, 59 S. W. 29; Dayton *v.* Hirth, 87 S. W. 1136.

Minnesota. — Keough *v.* McNitt, 6 Minn. 513; Eddy *v.* Caldwell, 7 Minn. 225.

Mississippi. — Rulon *v.* Lintol, 2 How. 891; Hare *v.* Sproul, 2 How. 772 (party's affidavit alone not sufficient).

Missouri. — Caldwell *v.* Dickson, 29 Mo. 227; Obert *v.* Strube, 51 Mo. App. 621.

Montana. — Elliott *v.* Martin, 27 Mont. 519, 71 Pac. 756.

Nebraska. — Axtell *v.* Warden, 7 Neb. 186; Draper *v.* Taylor, 58 Neb. 787, 79 N. W. 709.

New York. — Adams *v.* Bush, 2 Abb. Pr. (N. S.) 104; Denny *v.* Blumenthal, 8 Misc. 544, 28 N. Y. Supp. 744; *In re* Mayer's Estate, 84 Hun 539, 32 N. Y. Supp. 850; Roberts *v.* Johnstown Bank, 60 Hun 576, 14 N. Y. Supp. 432; Cheever *v.* Scottish Union & Nat. Ins. Co., 86 App. Div. 331, 83 N. Y. Supp. 732, *affirmed* 73 N. E. 1121; Armstrong Mfg. Co. *v.* Thompson, 88 N. Y. Supp. 151; Denn *v.* Morrells, 1 Hall 424.

Oklahoma. — Huster *v.* Wynn, 8 Okla. 569, 58 Pac. 736.

Tennessee. — Chambers *v.* Brown, 3 Tenn. 292.

Texas. — Edrington *v.* Kiger, 4 Tex. 89; Welsh *v.* State, 11 Tex. 368; Russell *v.* Nall, 79 Tex. 664, 15 S. W. 635; Adams *v.* Halff (Tex. Civ. App.), 24 S. W. 334; Hodges *v.* Ross, 6 Tex. Civ. App. 437, 25 S. W. 975; Glascock *v.* Manor, 4 Tex. 7; Burnley *v.* Rice, 21 Tex. 171; Moores *v.* Wills, 69 Tex. 109, 5 S. W. 675; Marrast *v.* Smith (Tex. Civ. App.), 53 S. W. 707; Wisson *v.* Baird, 1 White & W. Civ. Cas., § 708.

Vermont. — Webber *v.* Ives, 1 Tyl. 441; Cardell *v.* Lawton, 16 Vt. 606; Bradish *v.* State, 35 Vt. 452.

West Virginia. — Varner *v.* Core, 20 W. Va. 472.

Wisconsin. — Dunbar *v.* Hollinshead, 10 Wis. 505; Smith *v.* Cushing, 18 Wis. 310.

Affidavits of witnesses on information and belief are not sufficient. Hecla Powder Co. *v.* Sigua Iron Co., 1 App. Div. 371, 37 N. Y. Supp. 149.

"On a motion for a new trial, on any ground, resting on the information of others, the mover's own affidavit alone cannot be sufficient. The affidavit of the person possessing knowledge, or at least the affidavit of some disinterested individual to whom the information was communicated, should be produced." Scott *v.* Wilson, 3 Tenn. 315. See also Read *v.* Staton, 3 Hayw. (Tenn.) 159, 9 Am. Dec. 740.

An affidavit of counsel based on information and belief as to what a witness will testify is insufficient. Cole *v.* Thornburg, 4 Colo. App. 95, 34 Pac. 1013; Hand *v.* Langland, 67 Iowa 185, 25 N. W. 122. To the effect that the affidavit of a party alone is not sufficient, see, in addition to the foregoing cases, White *v.* Wallen, 17 Ga. 106; Hammond *v.* Pullman, 129 Mich. 567, 89 N. W. 358; Shumway *v.* Fowler, 4 Johns. (N. Y.) 425.

There must at least be an affidavit that the newly discovered evidence is true. Ritchey *v.* West, 23 Ill. 329. If the affidavits of the witnesses cannot be obtained, the moving party

for their non-production, and give a reasonable excuse therefor.[88]

must present affidavits of persons who have conversed with them, showing the facts they will state. Brown *v.* Speyers, 20 Gratt. (Va.) 296.

A motion for a new trial on the ground that certain evidence has become admissible because of the reversal of a judgment which operated as an estoppel is in the nature of a motion on the ground of newly discovered evidence, and should be supported by the affidavit of the witness. Seaman *v.* Clarke, 75 App. Div. 345, 78 N. Y. Supp. 171.

Criminal Cases. — The affidavit of the witness himself should be produced.

Arkansas. — Pleasant *v.* State, 13 Ark. 360; Runnels *v.* State, 28 Ark. 121; Robinson *v.* State, 33 Ark. 180.

Indiana. — Shipman *v.* State, 38 Ind. 549; Gibson *v.* State, 9 Ind. 264; Spaulding *v.* State, 162 Ind. 297, 70 N. E. 243.

Iowa. — Warren *v.* State, 1 Greene 106.

Kansas. — State *v.* Kellerman, 14 Kan. 135.

Louisiana. — State *v.* Washington, 36 La. Ann. 341; State *v.* Adams, 39 La. Ann. 238, 1 So. 455; State *v.* Oliver, 46 La. Ann. 654, 15 So. 86; State *v.* Valsin, 47 La. Ann. 115, 16 So. 768 (new trial refused because no affidavit of witnesses); State *v.* Adam, 31 La. Ann. 717; State *v.* Hollier, 49 La. Ann. 371, 21 So. 633.

Missouri. — State *v.* Ray, 53 Mo. 345; State *v.* Nagel, 136 Mo. 45, 37 S. W. 821; State *v.* Miller, 144 Mo. 26, 45 S. W. 1104; State *v.* Tomasitz, 114 Mo. 86, 45 S. W. 1106; State *v.* Nettles, 153 Mo. 464, 55 S. W. 70; State *v.* Bowman, 161 Mo. 88, 62 S. W. 996; State *v.* McCullough, 171 Mo. 571, 71 S. W. 1002.

Texas. — Mabbit *v.* State (Tex. Crim.), 22 S. W. 412; Evans *v.* State, 6 Tex. App. 513; Williams *v.* State, 7 Tex. App. 163; Campbell *v.* State, 29 Tex. 490; Polser *v.* State, 6 Tex. App. 510; Winn *v.* State, (Tex. Crim.), 73 S. W. 807; McClarney *v.* State (Tex. Crim.), 80 S. W. 1142.

West Virginia. — State *v.* Williams, 14 W. Va. 851.

Wisconsin. — State *v.* Leppere, 66 Wis. 355, 28 N. W. 376.

When an incompetent witness becomes competent after the trial a new trial should be granted; but the defendant must present the affidavit of such witness. State *v.* Drake, 11 Or. 396, 4 Pac. 1204.

An uncorroborated affidavit of a party is insufficient.

Arkansas. — Jackson *v.* State, 29 Ark. 62.

Florida. — Jones *v.* States, 35 Fla. 289, 17 So. 284.

Kansas. — State *v.* Kellerman, 14 Kan. 135.

Louisiana. — State *v.* Jones, 112 La. 980, 36 So. 825; State *v.* Adams, 39 La. Ann. 238, 1 So. 455; State *v.* Hanks, 39 La. Ann. 234, 1 So. 458; State *v.* Covington, 45 La. Ann. 979, 13 So. 266; State *v.* Oliver, 46 La. Ann. 654, 15 So. 86.

Texas. — Berry *v.* State (Tex. Crim.), 75 S. W. 858.

Virginia. — Bennett *v.* Com., 8 Leigh 745.

88. *Alabama.* — McLeod *v.* Shelly Mfg. & Imp. Co., 108 Ala. 81, 19 So. 326.

Illinois. — Cowan *v.* Smith, 35 Ill. 416; Emory *v.* Addis, 71 Ill. 273.

Indiana. — Brandendistle *v.* Wilhelm, 32 Ind. 496; Ogden *v.* Kelsey, 4 Ind. App. 299, 30 N. E. 922; McQueen *v.* Stewart, 7 Ind. 535.

Kentucky. — Bright *v.* Wilson, 7 B. Mon. 122; Dayton *v.* Hirth, 87 S. W. 1136.

Minnesota. — Eddy *v.* Caldwell, 7 Minn. 225.

Mississippi. — Rulon *v.* Lintol, 2 How. 891; Hare *v.* Sproul, 2 How. 772.

Missouri. — Caldwell *v.* Dickson, 29 Mo. 227; Obert *v.* Strube, 51 Mo. App. 621.

Montana. — Elliott *v.* Martin, 27 Mont. 519, 71 Pac. 756.

Nebraska. — Axtell *v.* Warden, 7 Neb. 186; Draper *v.* Taylor, 58 Neb. 787, 79 N. W. 709.

New York. — *In re* Mayer's Estate, 84 Hun 539, 32 N. Y. Supp. 850; Cheever *v.* Scottish Union & Nat. Ins. Co., 86 App. Div. 331, 83 N. Y. Supp. 732, *affirmed* 73 N. E. 1121; Armstrong Mfg. Co. *v.* Thompson,

11. When Evidence Is Documentary It Must Be Produced. When the newly discovered evidence is documentary it should be

88 N. Y. Supp. 151; Denn *v.* Morrell, 1 Hall 424.

Oklahoma. — Huster *v.* Wynn, 8 Okla. 569, 58 Pac. 736.

Tennessee. — Chambers *v.* Brown, 3 Tenn. 292.

Texas. — Welsh *v.* State, 11 Tex. 368; Glascock *v.* Manor, 4 Tex. 7; Burnley *v.* Rice, 21 Tex. 171; Wisson *v.* Baird, 1 White & W. Civ. Cas., § 708.

West Virginia. — Varner *v.* Core, 20 W. Va. 472.

Wisconsin. — Dunbar *v.* Hollinshead, 10 Wis. 505; Smith *v.* Cushing, 18 Wis. 310.

"The affidavit of the party himself is but hearsay testimony, and cannot be received, unless, for good cause shown, the affidavits of the newly discovered witnesses cannot be obtained in time, or in such further time as may have been granted for that purpose." Arnold *v.* Skaggs, 35 Cal. 684.

Excuses Held Not Sufficient. Jenny Lind Co. *v.* Bower, 11 Cal. 194 (absence of witness from his residence and consequent inability to obtain affidavit in time not sufficient; continuance of hearing should have been asked for); Suggs *v.* Anderson, 12 Ga. 461 (that newly discovered witness was a woman, and that she lived sixteen miles from the court house, no excuse); Keough *v.* McNitt, 6 Minn. 513 (that witnesses have given testimony under oath in another matter is not sufficient when the official report of their testimony is not presented); Western Union Tel. Co. *v.* Haman, 2 Tex. Civ. App. 100, 20 S. W. 1133 (party attached to his affidavit telegram from employe who had interviewed witness, stating facts; *held*, insufficient).

Criminal Cases. — If the affidavit of the witness cannot be secured its absence should be accounted for.

Indiana. — Spaulding *v.* State, 162 Ind. 297, 70 N. E. 243.

Kansas. — State *v.* Kellerman, 14 Kan. 135.

Missouri. — State *v.* Schorn, 12 Mo. App. 590; State *v.* Nagel, 136 Mo. 45, 37 S. W. 821; State *v.* Nettles, 153 Mo. 464, 55 S. W. 70.

Texas. — Mabbit *v.* State (Tex. Crim.), 22 S. W. 412; Williams *v.* State, 7 Tex. App. 163; Campbell *v.* State, 29 Tex. 490; Polser *v.* State, 6 Tex. App. 510.

Sufficient Excuse. — The absence of such affidavit is sufficiently accounted for by the fact that the witness is not in the state, and that the defendant has been in prison and without the means to find him. Gibson *v.* State, 9 Ind. 264.

Insufficient Excuse. — The fact that defendant is in custody is not a sufficient excuse. Shipman *v.* State, 38 Ind. 549; Quinn *v.* State, 123 Ind. 59, 23 N. E. 977; Vandyne *v.* State, 130 Ind. 26, 29 N. E. 392. An allegation that defendant did not have time to procure the affidavit is insufficient. Winn *v.* State (Tex. Crim.), 73 S. W. 807.

The fact that the new witness is interested adversely is no excuse. Rater *v.* State, 49 Ind. 507. That the testimony would incriminate the witness is not sufficient. State *v.* McCullough, 171 Mo. 571, 71 S. W. 1002. The refusal of a witness to make affidavit is not sufficient excuse, for, upon proper showing, the court may compel the witness to do so. Gardner *v.* State, 94 Ind. 489.

Corroborative Affidavit. — If the affidavit of the witness cannot be secured, a corroborative affidavit of some disinterested person, through whom the information was communicated to the prisoner, should be produced, so that it can be seen whether it was derived from the witness, or was mere report, intangible and unreliable. "It is not doubted but that the state may, under some circumstances, adduce counter-affidavits upon applications of this kind; but there can be no means of repelling the statements of the prisoner so long as he relies only upon his own belief, and the sources of his information are kept concealed." Bixby *v.* State, 15 Ark. 395.

produced, that the court may judge of its materiality.[89] The document should be accompanied by affidavits showing its genuineness.[90]

12. Counter-Affidavits. — The party opposing the motion for a new trial may introduce counter-affidavits showing the untruth of the statements contained in the affidavits of the moving party.[91] It

89. Edrington *v.* Kiger, 4 Tex. 89.

90. Smithers *v.* Fitch, 82 Cal. 153, 22 Pac. 935 (lost petition for road; affidavit did not show that signature was genuine, or that road would cross signer's land; *held,* insufficient); Loccard *v.* Bullitt, 3 Mart. (N. S.) (La.) 170 (affidavit must state nature of writing and where found).

91. In the following cases counter-affidavits were filed and new trials were denied:

California. — Thompson *v.* Thompson, 88 Cal. 110, 25 Pac. 962.

Georgia. — Coast Line R. Co. *v.* Boston, 83 Ga. 387, 9 S. E. 1108; Webb *v.* Wright, 112 Ga. 432, 37 S. E. 710.

Indiana. — First Nat. Bank *v.* Gibbons, 7 Ind. App. 629, 35 N. E. 31; Hammond W. & E. C. Elec. R. Co. *v.* Spyzchalski, 17 Ind. App. 7, 46 N. E. 47.

Iowa. — Searcy *v.* Martin Woods Co., 93 Iowa 420, 61 N. W. 934; Barber *v.* Maden, 102 N. W. 120.

Kansas. — Culp *v.* Mulvane, 66 Kan. 143, 71 Pac. 273.

Minnesota. — Finch *v.* Green, 16 Minn. 355.

Ohio. — Ousley *v.* Witheron, 13 Ohio Cir. Ct. 298.

South Dakota. — Wilson *v.* Seaman, 15 S. D. 103, 87 N. W. 577.

Texas. — San Antonio Gas Co. *v.* Singleton, 24 Tex. Civ. App. 341, 59 S. W. 920.

Contra. — In Illinois the use of counter-affidavits is not allowable. See Nelson *v.* Equitable Life Assur. Soc., 73 Ill. App. 133, 137, and cases therein cited.

In the following cases counter-affidavits were not sufficient to overcome the showing of the moving party, and new trials were granted: Gregory *v.* Harrell, 88 Ga. 170, 14 S. E. 186; Meisch *v.* Sippy, 102 Mo. App. 559, 77 S. W. 141.

Counter-affidavits on the question of diligence are admissible. Zeller *v.* Griffith, 89 Ind. 80. In general, see Hesse *v.* Seyp, 88 Mo. App. 66.

Affidavits of other witnesses denying the facts stated by the witnesses of the moving party are admissible. Harmon *v.* Charleston & S. R. Co., 88 Ga. 261, 14 S. E. 574 (relief denied).

When the affidavits of the moving party state that witnesses have stated and will testify to certain facts, counter-affidavits of the witnesses themselves denying the truth of the affidavits are admissible. Griffith *v.* Baltimore & O. R. Co., 44 Fed. 574.

Where an alleged conversation with a witness is directly denied by the counter-affidavit of the other party to it, and the integrity of the affiant of it is assailed, the court may deny a new trial. Erskine *v.* Duffy, 76 Ga. 602.

In an early New York case affidavits that the new witness was not worthy of belief, and was actuated by motives of revenge, were admitted. Pomroy *v.* Columbian Ins. Co., 2 Caines (N. Y.) 260. See also Fleming *v.* Hollenback, 7 Barb. (N. Y.) 271; Greenleaf *v.* Grounder, 84 Me. 50, 24 Atl. 461 (the burden is upon the moving party to satisfy the court that the evidence is credible); Parker *v.* Hardy, 24 Pick. (Mass.) 246.

But see Callen *v.* Kearny, 2 Cow. (N. Y.) 529; Phelps *v.* Delmore, 4 Misc. 508, 26 N. Y. Supp. 278, where it was held that such affidavits would not be returned.

An affidavit for a new trial on the ground of newly discovered evidence is not of that class "which the court is under a legal obligation to treat as true, although it may bear upon its face the impress of falsehood, but it is subject to the scrutiny of its judgment and reason." Bruce *v.* Truett, 5 Ill. 454.

Counter-Affidavits in Criminal Cases. — People *v.* Sing Yow, 145 Cal. 1, 78 Pac. 235; Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364.

Counter-affidavits are admissible to

is then for the court to decide from the evidence so presented whether sufficient ground is shown to warrant a new trial.[92]

13. Affidavits of Impeaching Evidence Not Sufficient. — Affidavits setting forth newly discovered evidence tending merely to impeach the character of one of the witnesses are not sufficient to warrant a new trial.[93]

show that there has not been due diligence. People *v.* Cesena, 90 Cal. 381, 27 Pac. 300.

The court may hear affidavits for and against the truth of the alleged new facts, and for and against the credibility of the witnesses by whom it is proposed to establish them. Meeks *v.* State, 57 Ga. 329; Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046.

92. In the following cases a new trial was refused because the showing was overcome by counter-affidavits: State *v.* Sansone, 116 Mo. 1, 22 S. W. 617; People *v.* Fice, 97 Cal. 459, 32 Pac. 531; Mann *v.* State, 34 Ga. 1; People *v.* Benham, 30 Misc. 466, 14 N. Y. Crim. 434, 63 N. Y. Supp. 923; Deindorfer *v.* Bachmor, 12 S. D. 285, 81 N. W. 297; Wilkerson *v.* State (Tex. Crim.), 57 S. W. 956.

93. *Arkansas.* — Robins *v.* Fowler, 2 Ark. 133.

Illinois. — Crozier *v.* Cooper, 14 Ill. 139.

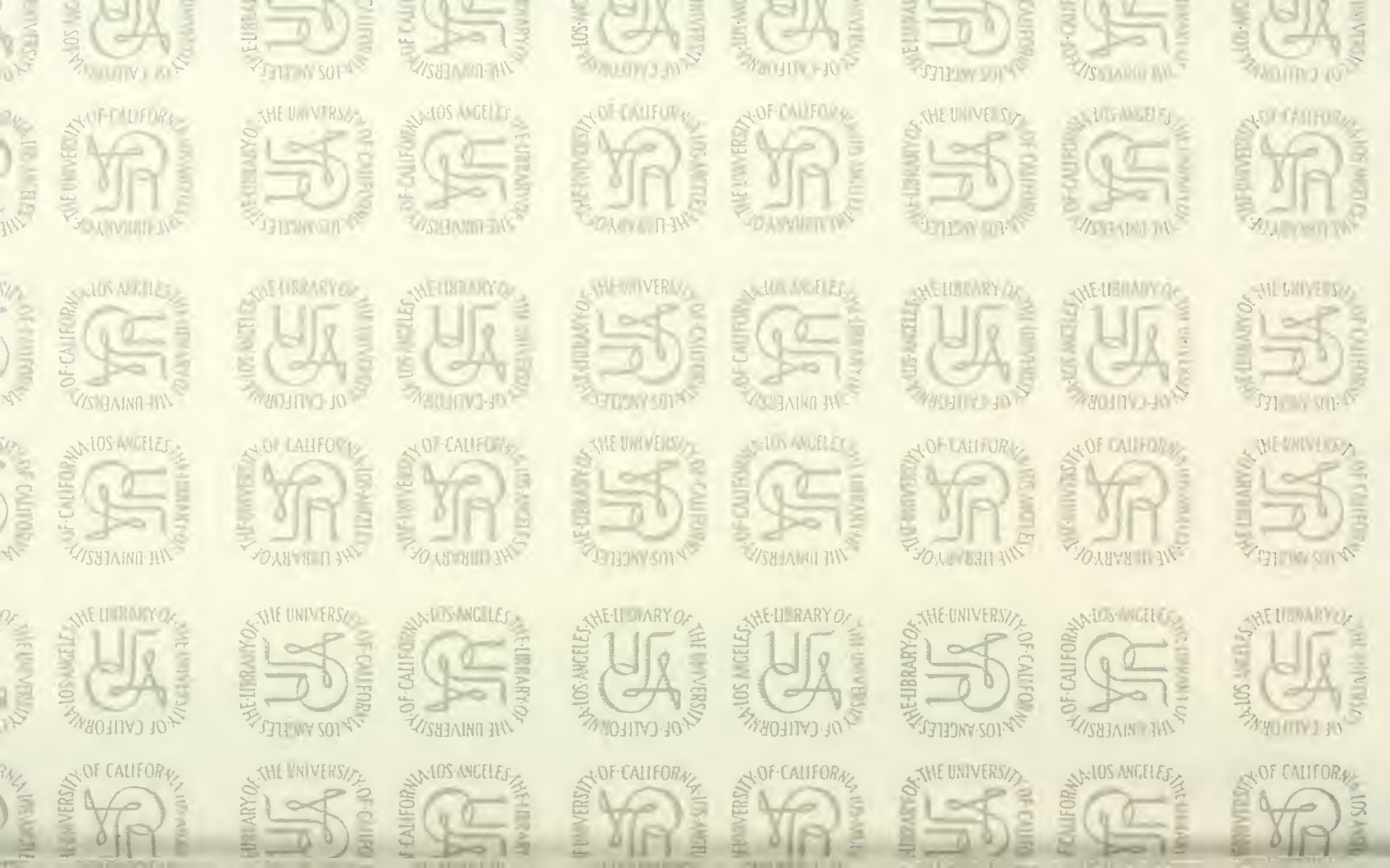
Missouri. — State *v.* Ray, 53 Mo. 345; State *v.* Miller, 144 Mo. 26, 45 S. W. 1104.

New York. — Shumway *v.* Fowler, 4 Johns. 425; Margolius *v.* Muldberg, 88 N. Y. Supp. 1048.

Oklahoma. — Huster *v.* Wynn, 8 Okla. 569, 58 Pac. 736.

Texas. — Templeton *v.* State, 5 Tex. App. 398; Rodgers *v.* State, 20 S. W. 709.

See also Chicago & E. I. R. Co. *v.* Stewart, 203 Ill. 223, 67 N. E. 830, *affirming* 104 Ill. App. 37.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